

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of April 6, 2017

Nashville, Tennessee

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Thomas L. Ambro
District Judge Pamela Pepper
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman
David Hubbert, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Thomas Moers Mayer, Esquire
Jill Michaux, Esquire
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice
and Procedure (the Standing Committee)
Professor Daniel R. Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee
Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for
U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office

Discussion Agenda

1. Greetings and introductions

Judge Ikuta welcomed the members and guests to the meeting and introduced the U.S. Marshals. Members and guests introduced themselves to the group.

2. Approval of minutes of Washington D.C. meeting on November 14, 2016

The draft minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

- (A) June 3, 2017 meeting of the Committee on Rules of Practice and Procedure

Professor Harner reported on the January 2017 meeting of the Standing Committee. The bankruptcy rules action items were approved. The Standing Committee discussed the five-year report regarding the work of the rules committees and determined to submit one report on behalf of all of the rules committees. The Standing Committee voiced its support for the need to continue coordinating the work of the rules committees.

- (B) Meeting of the Advisory Committee on Civil Rules

No report. Next meeting scheduled for April 25-26, 2017.

- (C) Meeting of the Advisory Committee on Appellate Rules

No report. Next meeting scheduled for May 2, 2017.

- (D) January 2017 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Bernstein reported on the January 2017 meeting. Several proposals were of interest to the Committee, including a potential venue provision change. The proposal is under study, and a further report will be provided at the next meeting of the Bankruptcy Committee. Another proposal related to acceptance of findings of facts of a bankruptcy judge, but this proposal was rescinded given recent Supreme Court decisions. Finally, Judge Bernstein reported on the suggestion from this Committee regarding the change of address form, and it is still under consideration.

Another issue discussed by the Bankruptcy Committee was judgeships, and a recommendation was made regarding the number of judgeships and changing duty stations for bankruptcy judges.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues

(A) Recommendation concerning Proposed Amendments to Rule 5005(a)(2)

Professor Harner provided the report. Several comments were received on the published rule, including one regarding electronic filing by *pro se* parties. The commenter suggested that *pro se* parties be given the option to file electronically or in paper form unless the court for good cause requires electronic filing. Information was received from other rules committees regarding comparable rule proposals. The subcommittee's working group focused on proposing language regarding electronic signatures to allow for potential changes to electronic filing based on future technological developments. The working group considered how to strike a balance for *pro se* parties and electronic filing, recognizing that while some *pro se* parties are sophisticated users with the resources to file electronically, others do not have access to those capabilities. For this and other reasons discussed during its conference call, the subcommittee did not recommend any changes to the proposed language in the rule regarding electronic filing by *pro se* parties.

The group discussed the use of the term "authorized" and the determination to approach the rule more generally. The subcommittee wanted to ensure the rule was flexible enough to permit various approaches by courts to electronic filing. Professor Harner explained that some of the changes to the proposed rule were made to conform to the proposed language of the other rules committees. The proposed rule amendment was approved by motion and vote.

(B) Recommendation concerning Proposed Amendments to Rule 3002.1(b) and (e)

Professor Gibson reported that amendments were proposed to Rule 3002.1 to address home equity lines of credit and objections to notices of payment changes. Several comments were received, including one from the National Conference of Bankruptcy Judges (NCBJ). A number of the NCBJ's suggestions were accepted, and a revised version of the proposed rule was included in the materials. Conforming changes were made to the Committee Note to reflect the proposed changes, and the revised Committee Note was included with the materials.

The group discussed a few stylistic issues, and a minor edit was made to add "if no motion was filed by the day before" in place of the proposed language in the version of the rule

in the materials. Language will be added to the Committee Note to clarify the new language. The revised proposed rule amendment and Committee Note were approved by motion and vote.

- (C) Recommendation regarding Suggestion 16-BK-D for possible amendment to Rule 4001(c) that would simplify notice requirements for obtaining credit in Chapter 13 cases

Judge Goldgar reported on this issue, explaining the origin of the suggestion, mainly that there are many procedural hoops for debtors in chapter 13 cases to obtain post-petition credit. The original suggestion was to amend the rule to make it less stringent for chapter 13 debtors, as the current rule contains many requirements. Professor Harner completed some research on the issue and determined that courts handle post-petition chapter 13 credit in a variety of ways. The different approaches adopted by courts may relate to the structure of the Bankruptcy Code (sections 364 and 1304), rather than the rules, and whether chapter 13 debtors not engaged in business can obtain credit under section 364. Some courts have concluded that section 364 (and Rule 4001(c)) apply only to chapter 13 debtors engaged in business. The subcommittee determined that the best resolution was to add a new subdivision (4) to Rule 4001(c) to exclude chapter 13 cases from the application that subdivision.

The Committee discussed the proposed amendment, noting its practicality. One member asked about the potential risks for post-petition lenders if chapter 13 cases are excluded from the subdivision. Others suggested leaving such matters to local practice. A suggestion was made to amend the Committee Note to explain the effect of the rule change. The proposed amendment was approved for publication by motion and vote, along with the amendment to the Committee Note.

- (D) Recommendations regarding Suggestion 12-BK-B proposing amendment to Rule 2002(f)(7) to require notice of an order confirming a chapter 13 plan, and Suggestion 12-BK-M proposing amendments to Bankruptcy Rule 2002(h) to include Chapter 13

Professor Harner addressed this issue. She reviewed the suggestions, explaining that the first suggestion related to Rule 2002(f)(7) and the absence of the order confirming a chapter 13 plan from the subdivision. The second proposed amendment concerned Rule 2002(h) and the absence of chapter 13 creditors from the rule, which limits notice in certain circumstances. She explained that after completing some research into past deliberations of the Committee, she

discovered that there was no clear reason for excluding chapter 13 from these two subdivisions of Rule 2002.

After discussion, the subcommittee determined to add language referencing chapter 13 to Rules 2002(f)(7). With regard to Rule 2002(h), the subcommittee agreed that given the amount of notice received in chapter 13 cases, adding chapter 13 cases to the subdivision (h) limitation made sense. In completing its review, the subcommittee noted that there are pending amendments to Rule 2002. For this reason, the subcommittee recommended that the amendments to Rule 2002(f) and (h) be approved, but held until after the 2017 amendments to Rule 2002 become effective to avoid confusion.

A Committee member asked why chapter 12 was excluded from subdivision (h), noting that the lack of a clear reason for its exclusion could lead to the same confusion that exists regarding chapter 13 if a similar suggestion is made in the future. Professor Harner advised that the subcommittee could consider this suggestion. Another member suggested that current practices lead to wasted noticing in bankruptcy cases, suggesting that the creditor matrix maintained by the court should be updated to remove non-claimants once the amendments to Rule 2002 go into effect. Judge Ikuta advised that this suggestion could be relayed to the appropriate group at the Administrative Office, and Ken Gardner supported the suggestion.

Professor Harner reviewed the recommendation: the subcommittee recommended that the proposed amendments to Rule 2002(f)(7) and (h) be approved, but held (and not provided to the Standing Committee for publication) until the current proposed amendments to Rule 2002 take effect to avoid any potential confusion. She noted that this would permit the subcommittee to consider the suggestion to include chapter 12 cases in subdivision (h). Judge Ikuta supported the suggestion to hold the proposed amendments until after the effective date of the current Rule 2002 amendments, noting that these proposed amendments to Rule 2002 are subject to possible further amendment.

The proposed amendments were approved for publication by motion and vote, with the provision that any proposed amendments be held until after the effective date of the current pending amendments to Rule 2002.

5. Report by the Subcommittee on Business Issues.

(A) Recommendations concerning Electronic Notice and Service

Professor Harner reported on the issues to be considered by the Committee at the meeting. She advised that the subcommittee will consider several additional issues related to noticing in bankruptcy cases at a later date.

Professor Harner explained the subcommittee's proposed approach for implementing a move towards enhanced electronic notice and service in bankruptcy cases. First, a proposed amendment to the proof of claim form (Official Form 410) would add a checkbox regarding consent to electronic noticing and service via email for non-registered users. A draft of the amended form was included in the agenda materials. Second, a corresponding amendment to Rule 2002(g) would permit creditors to expand their choices for receiving notice by email. Third, a proposed amendment to Rule 9036 would broaden the rule to include any party serving a paper under the rule to permit the party to serve electronically on registered users and parties who consent to service electronically, including those who consent via the proof of claim form. Some analysis was done on the term "in writing" and whether a check box on the proof of claim form would constitute "in writing," and the consensus was that it would meet the requirements.

In response to a question regarding why the subcommittee focused on amending the proof of claim form, Professor Harner explained that the proof of claim form appeared to be the best method for addressing the concerns of commenters regarding large filers and broader use of electronic notice and service. A member raised an issue regarding notice to security holders rather than claim holders. Judge Ikuta advised that the concern regarding security holders should be submitted as a suggestion for consideration.

Ken Gardner explained the mechanics of the proposed change to the proof of claim form, and how the information would be included in the court's database as part of the creditor matrix. An issue was raised regarding debtors' access to the court's database for noticing purposes to avoid sending paper notices to parties who have consented to electronic notices and service. The group discussed whether the proposed change lessens the burdens of noticing. One member noted that any email address submitted in connection with a proof of claim should supplement rather than replace any contact information submitted under Bankruptcy Code section 342 (and maintained by the Bankruptcy Noticing Center). In response, one member referenced the 2001 Committee Note to Rule 2002(g), which indicates that information on a later-filed proof of claim

replaces an earlier designation of a mailing address in a particular case. Further discussion was had regarding the implications of section 342 and the requirements for notice and those receiving notice. Members stated that the amendment to the proof of claim form is intended as an “opt-in” and not a requirement, and that language could be added to the Committee Note to address any issues with section 342. Judge Ikuta suggested follow up with the Bankruptcy Noticing Center regarding some of these issues, including whether debtors could get access to email addresses of creditors who opt in to electronic noticing and service for noticing purposes. Another member suggested that a solution may be to review the make-up of the creditor matrix if this proposed amendment were to go forward to attempt to eliminate duplicative noticing addresses.

Professor Harner suggested that the Committee Note could be amended to address the issues raised at the meeting. Judge Ikuta added that the Committee could complete additional research on the practical application of the proposed amendment, but that the proposed amendment could go forward. Professors Gibson and Coquillette noted their concern with publishing something that may not receive final approval in the published form. Professor Harner added that publication may signal that the Committee is behind a broader use of electronic notice and service, and that one method of obtaining feedback regarding that approach is to publish proposed amendments. The proposed amendment was approved for publication by motion and vote.

(B) Report on Suggestion 16-BK-C regarding Rule 6007 and notice of abandonment of estate property

Professor Harner explained that the suggestion is to amend Rule 6007 to eliminate the ambiguity between sections (a) and (b) of the rule regarding service of notice. The subcommittee considered the various approaches used by courts to implement Rule 6007(b). The proposed amendment to Rule 6007(b) clarifies the parties to be served with the motion and notice of the motion, eliminates the distinction between notice and service in the rule, and provides that if the court grants the motion, no further notice is required unless otherwise ordered.

A member asked whether the proposed amendment would mean that nothing additional would be required to effectuate abandonment. The group discussed possible language. Additional language was added to the proposed amendment to clarify that “the order effects the abandonment” without further notice or action by the court. Another question was raised regarding notice versus service, and a member explained that the point was to recognize that there are a variety of court practices with regard to motions to compel abandonment and to

eliminate the distinction between the terms “notice” and “service.” The group agreed to new language including the term “required notice.” The revised proposed amendment was approved for publication by motion and vote.

Following approval, Judge Campbell raised the issue of whether the term “required” should be explained more fully in the Committee Note. The group agreed to revise the language of the rule to remove the term “required,” changing it to “the motion and any notice of the motion” to permit for the possibility that notice may not be required in some jurisdictions. The group voted to approve the new language for the proposed amendment for publication.

(C) Report and Recommendation Concerning Proposed Amendments to Official Forms 309F, 425A, 425B, 425C, and 426

Professor Harner advised that the revised forms (Official Forms 425A, B, and C, and 426) all relate to business cases and were carved out from the Forms Modernization Project for consideration by the subcommittee. The revisions adopted the format of the newly styled forms of the Forms Modernization Project and made the forms easier to understand. The forms were published for comment, and several comments were submitted on Forms 425A and B. One comment questioned the removal of the notice of hearing and certain deadlines from the disclosure statement form. The subcommittee discussed this issue, but determined to not make the change to avoid any conflicts between the form and official court orders. Another comment supported the forms, and suggested that the disclosure statement and plan be combined into one form.

Professor Harner referred to her memo in the agenda materials for detailed analysis of all of the comments, explaining that five changes were recommended by the subcommittee in response to the comments. She reminded the group that these forms are suggested forms and are not required. The five changes are as follows: (1) removal of the insider column from the claims chart in the disclosure statement; (2) a better explanation of the exceptions to voting rules in the disclosure statement; (3) a change to Article VII of the plan regarding any claims reserve; (4) a placeholder for the court’s retention of jurisdiction following confirmation in the plan; and (5) a change to the signature block to match the caption for the form to permit multiple debtors. The forms were approved by motion and vote.

Professor Gibson presented the amendment to Official Form 309F explaining that the proposed amendment was to the language regarding an exception to discharge instructions on the form. There was some ambiguity regarding the availability of an exception to discharge in

certain circumstances, and the Committee wanted to avoid taking a position on whether an exception to discharge was required. Two comments were received, and one pointed out that a similar amendment may be required to Part 11 of the form. The subcommittee recommended a similar amendment to Part 11 of the form to conform with the proposed changes to Part 8. The revised form was included in the agenda materials. The form was approved by motion and vote.

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

(A) Review comments in Rules 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8022, 8023 and new Rule 8018.1

Professor Gibson explained that there a number of Part VIII rule amendments were published in August 2016, the majority of which were to conform to amendments to the Federal Rules of Appellate Procedure. New Rule 8018.1 and amended Rules 8011 and 8023 were also published in August. Several comments were filed, and were generally supportive, although two comments were filed in opposition to the amendments to Rule 8017. The proposed amendment to Rule 8017 conforms to a proposed amendment to corresponding Appellate Rule 29, and would permit district courts and bankruptcy appellate panels to strike or prohibit the filing of an amicus brief that the parties had consented to if it would result in a judge's disqualification. Professor Gibson stated that it may make sense to wait to see any action taken by the Appellate Rules Committee with regard to its proposed amendment to Appellate Rule 29 as the proposed amendment to Rule 8017 was merely to confirm to the Appellate Rule 29 amendment. The Appellate Rules Committee is meeting in early May, and it received similar comments regarding its proposed amendments to Appellate Rule 29. The subcommittee recommended approving the amended Part VIII rules, with the exception of the proposed amendments to Rule 8017, which will be subject to the actions of the Appellate Rules Committee regarding Appellate Rule 29, and Rule 8011, which was considered separately at the meeting.

An issue was raised regarding proposed Rule 8023 that adds a cross reference to Rule 9019, and a suggestion that language be added to the Committee Note to clarify the impact of adding the reference to Rule 9019. The group discussed the issue and whether or not it adds ambiguity into the rule. One member suggested removing the reference to Rule 9019 from Rule 8023. Professor Gibson explained that the amendment was made to alert parties to the potential need for approval of a dismissal resulting from a settlement and has no impact on the law, but it may impact procedure. Judge Campbell asked whether there have been problems with Rule 8023 since its enactment several years ago. Professor Gibson stated that the language was added to avoid the erroneous interpretation that Rule 8023 overrides the requirements of Rule 9019.

Possible language could be added to filings to clarify that Rule 9019 does not apply. Others stated that it may put a burden on clerks to seek a judicial determination for each of these filings. A suggestion was made to add language to the Committee Note. Given the varying views expressed in the discussion, Judge Ikuta recommended that the proposed amendment to Rule 8023 be reconsidered by the subcommittee, and the Committee agreed.

The Committee voted on a motion for final approval of the Part VIII Rules, with the exception of Rules 8011 and 8023, and in consideration of any further action by the Appellate Rules Committee with regard to Rule 8017, and the motion was approved.

(B) Consider possible amendments to rules 7062, 8007, 8010, 8021, and 9025 to address published amendments to Civil Rule 62 and 65.1, and FRAP 8(a)(1)(B), (b); 11(g); and 39(e) regarding the term “supersedeas bonds” and the period during which a judgment is automatically stayed after entry

Professor Gibson detailed the proposed amendments which are all conforming amendments to other proposed rule amendments regarding the use of the term “supersedeas” in the federal rules. Generally, the term was replaced with “bond or other security” throughout the federal rules. The one exception to conforming is Rule 7062, which incorporates Civil Rule 62. The subcommittee recommended retaining the current 14-day time period for the automatic stay of a judgment in Rule 7062, rather than adopting the amended time period in the Civil Rules.

Since the subcommittee meeting, the Civil Rules Committee advised that it will consider a change to the “other undertaking” language in Civil Rule 62, as well as other similar language changes. If this occurs, the proposed amendment to Bankruptcy Rule 9025 would be changed to match the Civil Rules Committee’s amended language, if the proposed language is approved by the Civil Rules Committee. In addition, Professor Gibson advised that it is possible that the Appellate Rules Committee will make changes to its proposed rule amendments to conform to the Civil Rules changes, and that committee meets in early May. If the Appellate Rules Committee makes changes to the language in its proposed rules, the proposed language in the Bankruptcy Rules will need to be changed.

The subcommittee recommended that the amendments be adopted without publication as they are merely conforming changes. Any approval by the Committee would be subject to potential changes to the proposed language based on the actions by the Civil and Appellate Rules Committees. One member asked about the provision of security by stipulation, and the Committee agreed that it is appropriate for the language to be removed from Rule 9025. A

motion to approve the proposed amendments without publication was approved, subject to any language changes from the other rules committees.

- (C) Recommendation to revise Rule 8011 to incorporate pending changes regarding electronic filing and notice across the rules committees

Professor Gibson explained that there are two sets of amendments to Rule 8011. The first relate to filings by inmates, and the second relate to electronic filing. The rules committees are working together to develop similar language regarding electronic filing. Professor Gibson explained that this Committee has the earliest meeting, so it does not have the benefit of feedback from the other rules committees. The subcommittee recommended approval of the proposed electronic-filing amendments to Rule 8011 without publication, given that they are merely conforming amendments. Professor Gibson advised that there was a suggestion to add language to the Committee Note indicating that the clerk is not responsible for monitoring if electronic service was received. The subcommittee generally approved adding language to this effect to the Committee Note, adding language that if a sender receives notice that the paper did not reach the person to be served, that person is then responsible for making effective service. This language is consistent with the rule itself. Members raised concerns with the use of the term “receives notice” and also whether there needs to be a distinction made between service by commercial carrier and service electronically. After discussion, the Committee determined to retain the term “receives notice” and include further explanation in the Committee Note.

The Committee discussed the proposed rule and Committee Note and raised some practical concerns with regard to the impact of the changes. Specifically, the group discussed the term “user name and password” and revised language was proposed. Professor Gibson advised that since the rules committees are attempting to maintain similar wording, the other committees will be notified of the proposed language changes.

A motion to approve the amendments to Rule 8011, with revised language regarding user name and passwords and an additional paragraph to the Committee Note regarding effective service, was passed unanimously.

(C) Oral Report on feedback to the Appellate Rules Committee in response to a request for comment on a proposed amendment to Appellate Rule 26.1 (*Corporate Disclosure Statement*) that address recusal matters in bankruptcy appeals

Professor Gibson explained that the subcommittee participated in a conference call with the chair and reporter for the Appellate Rules Committee. The Appellate Rules Committee is considering an amendment to Appellate Rule 26.1 based, in part, on an advisory ethics opinion issued several years ago regarding additional required disclosures in contested matters and adversary proceedings in connection with bankruptcy appeals. The subcommittee provided feedback regarding the proposed changes to Appellate Rule 26.1, and the Appellate Rules Committee reporter revised the proposed amended rule in response to the subcommittee's suggestions. Professor Gibson suggested that the Committee retain the suggestions for amendments related to the advisory ethics opinion for future consideration. Judge Ikuta asked whether others have encountered issues with regard to disclosure and bankruptcy appeals. Several members reported on local rules in place in their districts regarding disclosure, but no specific problems were noted. The subcommittee recommended waiting to make any proposed amendments to the bankruptcy rules pending a decision from the Appellate Rules Committee regarding Appellate Rule 26.1.

Information Items

Tom Mayer updated the Committee on the suggestion for a proposed rule for the filing of proceedings pursuant to Chapter VI of the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA). He advised that the rule at issue is not for national use, but instead is a local rule applicable only in the District of Puerto Rico. It provides a procedural method for starting a Title VI proceeding. Mr. Mayer hopes the rule will be in place on or before May 1, 2017. Judge Ikuta thanked those involved for their efforts in working with the court to provide it with a potential local rule.

Judge Ikuta advised that the Judicial Conference's five-year review was discussed at the Standing Committee meeting, and that the Committee's suggestions were well accepted. She noted the rules committees' work on the electronic filing rules is an example of a successful coordination effort.

Scott Myers updated the group about the coordination effort among the rules committees, advising that a full report was provided at the Standing Committee meeting. He stated that there

is a lot of support for the effort from the other rules committees and members of the Standing Committee.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Committee's meeting. There were no objections, and all recommendations were approved by motion at the meeting.

1. Subcommittee on Consumer Issues.

Revisions to Spring 2016 Recommendation for amendment to Rule 9037(h) (*Privacy Protection for Filings Made with the Court*), in response to Suggestion 14-BK-B.

2. Subcommittee on Business Issues.

Recommendation of no action on possible amendments to bankruptcy corporate ownership rules to parallel pending amendments to Criminal Rule 12.4.

3. Subcommittee on Privacy, Public Access, and Appeals.

Recommendation of no action regarding possible rule amendments to address situation of remand of a bankruptcy appeal from a court of appeals to the district court, and time frame for district court to determine whether the district or bankruptcy court is responsible for the case.

Judge Ikuta advised that the fall 2017 meeting will be in Washington D.C., on September 26-27. The meeting was adjourned at 3:20 p.m.