ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

San Diego, CA
April 3, 2018

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of April 3, 2018
San Diego, CA

Discussion Agenda

1. Greetings and introductions (Judge Ikuta)

2. Approval of minutes of Washington, DC September 26, 2017 meeting (Judge Ikuta)

   Tab 2: Draft minutes.

3. Oral reports on meetings of other committees:

   (A) January 4, 2018 Standing Committee meeting (Judge Ikuta, Professor Gibson)

   Tab 3A: Draft minutes of Standing Committee meeting.

   (B) November 7, 2017 Meeting of the Advisory Committee on Civil Rules. (Judge Goldgar)

   (C) November 9, 2017 Meeting of the Advisory Committee on Appellate Rules. (Judge Pepper)

   (D) December 7, 2017 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Bernstein, Judge Gorman)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues (Judge Goldgar)

   (A) Consider comments and make recommendation concerning the published amendment to Rule 4001(c) removing chapter 13 post petition credit matters from the scope of the rule (Judge Goldgar and Bartell)

   Tab 4A: Memo of March 2, 2018, by Professor Bartell

   (B) Consider comments and make recommendations concerning the published amendments to Rule 6007(b) regarding service of a party in interest's motion to

compel abandonment (Judge Goldgar and Professor Bartell)

Tab 4B: Memo of March 9, 2018, by Professor Bartell

(C) Consider comments and make recommendation concerning the proposed amendment to Rule 9037(h) regarding redaction procedures for documents that were not redacted of protected privacy information before being filed in a case (Judge Goldgar and Professor Gibson)

Tab 4C: Memo of March 11, 2018, by Professor Gibson
Rule 9037 – as published for comment 8/15/2017

5. Report by the Subcommittee on Business Issues (Judge Bernstein)

(A) Consider comments and make recommendations concerning published amendments to Rules 2002(g), and 9036, and Official Form 410A, to expand the use of electronic noticing (Judge Bernstein and Professor Gibson)

Tab 5A: Memo of March 11, 2018, by Professor Gibson

(B) Recommendation concerning suggestion 17-BK-B from the ABA Business Law Section to incorporate "proportionality" language similar to the recent amendment to Civ. R. 26(b)(1) into document requests made under Bankruptcy Rule 2004 (Judge Bernstein and Professor Gibson)

Tab 5B: Memo of March 12, 2018, by Professor Gibson

(C) Recommendation concerning suggestion 17-BK-D from the ABI Mediation Committee for an amendment to Rule 9019 that would require bankruptcy courts to establish local rules for mediation (Judge Bernstein and Professor Bartell)

Tab 5C: Memo of March 9, 2018, by Professor Bartell

(D) Recommendation concerning suggestion 17-BK-A from Kevin Dempsey, Clerk (IL-S) to revise and modernize the record keeping requirements of Rule 2013 (Judge Bernstein, Professor Gibson, Molly Johnson)

Tab 5D: Memo of September 1, 2017 by Professor Gibson
Memo by Molly Johnson summarizing survey of bankruptcy courts

6. Report by the Restyling Subcommittee (Judge Dow)

Consider process for soliciting feedback on possible restyling of the Federal Rules of Bankruptcy Procedure (Judge Dow and Professor Bartell)

Tab 6: Memo of March 9, 2018, by Professor Bartell
Proposed Survey Questions
Example of restyled rule - Rule 4001

Information Items

7. Items Awaiting Transmission to the Standing Rules Committee

(A) Recommendations for proposed amendments to Rule 2002(f)(7) and (h) for publication. The proposed amendment to subsection (f)(7) was made by the Advisory Committee at its spring 2017 meeting and is in consideration of suggestion 12-BK-B to require notice of a chapter 13 plan confirmation order. The proposed amendment to (h) was made by the Advisory Committee at its spring and fall 2017 meetings. The proposed amendments are incorporated into the version of Rule 2002 at Consent Agenda Item 1, which recommends a technical amendment to Rule 2002(k) and publication of the rule in August 2018.

(B) Recommendation approved by the Advisory Committee at its fall 2017 meeting to publish an amendment to Rule 8012 that would conform to a proposed FRAP 26.1 (Corporate Disclosure Statement) amendment that was published August 2017. Because the final version of FRAP 26.1 will not be available for review until after the Appellate Rules Committee meets this spring, after this meeting, the Advisory Committee will vote by email on the version of Rule 8012 to be recommend for publication to the Standing Committee this summer.

8. Report concerning Advisory Committee on Civil Rules consideration of an amendment to Rule 30(b)(6) and implications for bankruptcy.

Tab 8: Memo of March 9, by Professor Bartell

9. Items Retained for Further Consideration.

The matters listed below are part of the noticing project and will be considered at a later date in light of final approval of electronic noticing rules already under consideration

(A) Suggestion 14-BK-E (Richard Levin – Chair, NBC -- Proposing an amendment to Bankruptcy Rule 3001 to require a corporate creditor to specify address and authorized recipient information and the promulgation of a new rule to create a database for preferred creditor addresses under section 347. In addition, the Suggestion discusses the value to requiring electronic noticing and service on large creditors in bankruptcy cases for all purposes (other than process under Bankruptcy Rule 7004)).

(B) Comment 12-BK-040 (BCAG -- This Suggestion was submitted as a comment in response to proposed revisions to Rule 9027. It suggested that the reference to "mail" in Rule 9027(e)(3) be changed to "transmit." Because the comment did not implicate the part of Rule 9027 being amended, the comment was retained as suggestion for further consideration at a later time).

(C) Comments 12-BK-005, 12-BK-008, 12-BK-026, 12-BK-040 submitted separately by Judge Robert J. Kressel, the National Conference of Bankruptcy Judges, Judge S. Martin Teel, Jr., and the Bankruptcy Clerks Advisory Group. The comments were made response to pending amendments to Rule 8003(c)(1), and have been retained as suggestions for further consideration. They recommend that the obligation to serve a notice of appeal rest with the appellant or be permitted by electronic means.

(D) Suggestion/Comment BK-2014-0001-0062 (Chief Judge Robert E. Nugent, U.S. Bankruptcy Court for the District of Kansas, on behalf of the NCBJ -- Proposing amendments regarding service of entities under Bankruptcy Rule 7004(b) and, in turn, Bankruptcy Rules 4003(d) and 9014(b)).

(E) Informal Suggestion (David Lander, former committee member) -- Proposing rule in context of electronic noticing that would require particular notice to, or service on, a party when a motion or pleading is adverse to that party, as opposed to that

party just receiving the general e-notice of a filing in the case.

10. Coordination Items.

Tab 10: Memo of March 1, 2018, by Mr. Myers.

11. Future meetings:

The fall 2018 meeting will be in Washington, DC, on September 17, 2018.

Suggestions for the spring 2019 meeting.

12. New business.

13. Adjourn.

Proposed Consent Agenda

The Chair and Reporters have proposed the following items for study and consideration prior to the Advisory Committee's meeting**. Absent any objection, all recommendations will be approved by acclamation at the meeting.** Any of these matters may be moved to the Discussion Agenda if a member or liaison feels that discussion or debate is required prior to Committee action. Requests to move an item to the Discussion Agenda must be brought to attention of the Chair by noon, Eastern Time, on **Monday, March 26, 2018.**

1. Subcommittee on Consumer Issues.

Recommendation for technical amendment to Rule 2002(k) regarding chapter 13 noticing of plan objections to include transmittal of the notice to the United States Trustee (Judge Goldgar and Professor Gibson)

Tab Consent 1: Memo of March 12, 2018, by Professor Gibson

2. Subcommittee on Business Issues.

Recommendation of no change regarding suggestion 17-BK-D from A. Lysa Simon to add credit unions to the types of "insured depository institutions" described in 7004(h) as entitled to service of process in a contested matter or adversary proceeding by certified mail.

Tab Consent 2: Memo of March 12, 2018, by Professor Gibson

3. Subcommittee on Forms Issues.

Recommendation for technical amendments to the general and special power of attorney forms (Forms 4011A and 4011B), changing them to Official Bankruptcy Forms 411A and 411B to conform to the requirements of Rule 9010(c).

Tab Consent 3: Memo of March 12, 2018, by Professor Gibson
Official Form 411A, *General Power of Attorney*, and 411B, *Special Power of Attorney*.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Sandra Segal Ikuta** United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621
Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** Burton Craige Professor of Law University of North Carolina at Chapel Hill 5073 Van Hecke-Wettach Hall C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	**Professor Laura Bartell** Wayne State University Law School 471 W. Palmer Detroit, MI 48202
Members, Advisory Committee on Bankruptcy Rules	**Honorable Thomas L. Ambro** United States Court of Appeals J. Caleb Boggs Federal Building 844 North King Street, Unit 32 Wilmington, DE 19801-3519 **Honorable Stuart M. Bernstein** United States Bankruptcy Court Alexander Hamilton Custom House One Bowling Green, Room 729 New York, NY 10004-1408 **Honorable Dennis R. Dow** United States Bankruptcy Court Charles Evans Whittaker United States Courthouse 400 East Ninth Street, Room 6562 Kansas City, MO 64106 **Honorable A. Benjamin Goldgar** United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 638 Chicago, IL 60604

Members, Advisory Committee on Bankruptcy Rules *(cont'd)*	**Jeffery J. Hartley, Esq.** Helmsing Leach Post Office Box 2767 Mobile, AL 36652 **Honorable Melvin S. Hoffman** Chief Judge United States Bankruptcy Court John W. McCormack Post Office and Court House 5 Post Office Square, Room 1150 Boston, MA 02109-3945 **Honorable David A. Hubbert** Acting Assistant Attorney General, Tax Division (ex officio) United States Department of Justice 950 Pennsylvania Avenue N.W. Room 4141 Washington, D.C. 20530 **Honorable Marcia S. Krieger** Chief Judge United States District Court Alfred A. Arraj United States Courthouse 901 19th Street, Room A941 Denver, CO 80294 **Thomas Moers Mayer, Esq.** Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036 **Jill A. Michaux, Esq.** Neis & Michaux, P.A. 534 S. Kansas Avenue, Suite 825 Topeka, KS 66603-3446 **Debra L. Miller, Esq.** Chapter 13 Bankruptcy Trustee P. O. Box 11550 South Bend, IN 46634 **Honorable Pamela Pepper** United States District Court United States Courthouse and Federal Building 517 East Wisconsin Avenue, Room 271 Milwaukee, WI 53202

Members, Advisory Committee on Bankruptcy Rules (*cont'd)*	**Professor David Arthur Skeel** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104 **Honorable Amul R. Thapar** United States Court of Appeals United States Courthouse 35 West Fifth Street, Room 473 Covington, KY 41011
Clerk of Court Representative, Advisory Committee on Bankruptcy Rules	**Kenneth S. Gardner** Clerk, United States Bankruptcy Court United States Custom House 721 19th Street, Room 116 Denver, CO 80202-2508
Consultants, Advisory Committee on Bankruptcy Rules	**Patricia S. Ketchum, Esq.** 113 Richdale Avenue #35 Cambridge, MA 02140 **James H. Wannamaker, Esq.** 330 St. Dunstans Road Baltimore, MD 21212
Liaison Member, Advisory Committee on Bankruptcy Rules	**Honorable Susan P. Graber** *(Standing)* United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204
Liaison Member, U. S. Department of Justice, Executive Office for U. S. Trustees	**Ramona D. Elliott, Esq.** Deputy Director/General Counsel Executive Office for U.S. Trustees 20 Massachusetts Avenue, N.W. - Suite 8100 Washington, DC 20530
Liaison Member, Committee on the Administration of the Bankruptcy System	**Honorable Mary Patricia Gorman** Chief Judge United States Bankruptcy Court Paul Findley Federal Building and United States Courthouse 600 East Monroe Street, Room 235 Springfield, IL 62701
Secretary, Standing Committee and Rules Committee Chief Counsel	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820; Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

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Advisory Committee on Bankruptcy Rules

Members	Position	District/Circuit	Start Date	End Date
Sandra S. Ikuta Chair	C	Ninth Circuit	Member: 2010 Chair: 2014	---- 2018
Thomas L. Ambro	C	Third Circuit	2016	2019
Stuart M. Bernstein	B	New York (Southern)	2014	2020
Dennis R. Dow	B	Missouri (Western)	2014	2020
A. Benjamin Goldgar	B	Illinois (Northern)	2014	2020
Jeffery J. Hartley	ESQ	Alabama	2014	2020
Melvin S. Hoffman	B	Massachusetts	2016	2019
David A. Hubbert*	DOJ	Washington, DC	----	Open
Marcia S. Krieger	D	Colorado	2017	2020
Thomas M. Mayer	ESQ	New York	2014	2020
Jill A. Michaux	ESQ	Kansas	2012	2018
Debra Miller	ESQ	Indiana	2017	2020
Pamela Pepper	D	Wisconsin (Eastern)	2016	2019
David Arthur Skeel	ACAD	Pennsylvania	2016	2019
Amul R. Thapar	C	Sixth Circuit	2013	2019
S. Elizabeth Gibson Reporter	ACAD	North Carolina	2008	Open
Laura B. Bartell Associate Reporter	ACAD	Michigan	2017	2022

Principal Staff: Rebecca Womeldorf 202-502-1820

Scott Myers 202-502-1913

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* Ex-officio - Acting Assistant Attorney General, Tax Division

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COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Honorable David G. Campbell** United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
Reporter, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459
Associate Reporter, Committee on Rules of Practice and Procedure	**Professor Catherine T. Struve** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104

Chair, Advisory Committee on Appellate Rules	**Honorable Michael A. Chagares** United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
Reporter, Advisory Committee on Appellate Rules	

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Sandra Segal Ikuta** United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621
Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	**Professor Laura Bartell** Wayne State University Law School 471 W. Palmer Detroit, MI 48202

Chair, Advisory Committee on Civil Rules	**Honorable John D. Bates** United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
Reporter, Advisory Committee on Civil Rules	**Professor Edward H. Cooper** University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Associate Reporter, Advisory Committee on Civil Rules	**Professor Richard L. Marcus** University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	**Honorable Donald W. Molloy** United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
Reporter, Advisory Committee on Criminal Rules	**Professor Sara Sun Beale** Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
Associate Reporter, Advisory Committee on Criminal Rules	**Professor Nancy J. King** Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	**Honorable Debra Ann Livingston** United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 150 West 62nd Street New York, NY 10023

Secretary, Standing Committee and Rules Committee Chief Counsel	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

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TAB 2

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26, 2017
Washington, DC

Discussion Agenda

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Thomas L. Ambro
Circuit Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman
Jeffrey Hartley, Esquire
David Hubbert, 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 Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
District Judge Susan Graber
Bankruptcy Judge Mary Gorman
Professor Daniel R. Coquillette, reporter to the Standing Committee
Professor Cathie Struve, associate reporter to the Standing Committee (by telephone)
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
Patrick Tighe, Administrative Office
Debra Miller, Chapter 13 Trustee
Dermott Gorman, U.S. Trustee Program

1. Greetings and Introductions

Judge Sandra Ikuta welcomed everyone to the meeting, and introduced Professor Laura Bartell, the Committee's new associate reporter. She is a professor at Wayne State University

Law School in Detroit, Michigan. In addition, Judge Ikuta introduced Judge Mary Gorman, the new liaison from the Committee on Bankruptcy Administration, and Professor Cathie Struve, the new associate reporter to the Standing Committee. Professor Struve previously served as the reporter to the Advisory Committee on Rules of Appellate Procedure.

Judge Ikuta advised the group that this is the final meeting for Judge Jean Hamilton and Richardo Kilpatrick. She thanked them for their service to the Committee, noting their assistance with the new chapter 13 plan form and related rules. Debra Miller, the Standing Chapter 13 Trustee for the District of Northern Indiana, and Judge Marcia Krieger of the District of Colorado, will join the Committee as of October 1, 2017.

2. Approval of minutes of the spring meeting held April 6, 2017

With two minor amendments, the minutes were approved upon motion and vote.

3. Oral reports on meetings of other committees:

(A) June 13, 2017 meeting of the Committee on Rules of Practice and Procedure

Professor Elizabeth Gibson provided the report. The Standing Committee gave final approval to the amended rules and forms, and one new rule. It also approved conforming amendments to amended rules that were not published, but were amended to conform to amendments to the civil and appellate rules. The rules were approved by the Judicial Conference in September, and will have an effective date of December 2018, if approved by the Supreme Court and Congress. Professor Gibson advised that Appellate Rule 26.1 was approved for publication by the Standing Committee, and if the amendment goes forward, it may require a conforming amendment to Rule 8012.

(B) April 25-26, 2017 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report, noting that there were several issues discussed that may require monitoring by this Committee. First is a piece of legislation being considered by Congress that may impact the federal rules, specifically Civil Rule 11, entitled the Lawsuit Abuse Reduction Act. Second, a subcommittee of the Civil Rules Committee is considering potential changes to Civil Rule 30(b)(6). Third, the Civil Rules Committee is considering possible changes to Civil Rule 45, and any changes may impact Bankruptcy Rule 2004. Finally, a possible change to Civil Rule 68 is under consideration. Judge David Campbell explained the proposed legislation in greater detail, advising that the rules committees have communicated with Congress regarding the potential rules involvement and its concerns regarding a possible change to the rules.

(C) May 2, 2017 Meeting of the Advisory Committee on Appellate Rules

Professor Gibson provided the report because Judge Pamela Pepper was unable to attend the meeting. The Appellate Rules Committee will not meet until November, and there are no issues on the meeting agenda that would impact bankruptcy, but the Committee will continue to monitor any comments on the published amendment to Rule 26.1 regarding corporate disclosure.

(D) June 8-9, 2017 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report. She advised that the Bankruptcy Committee agreed that no action should be taken regarding the creation of a specific form for creditor address changes. The Bankruptcy Committee remains concerned about unclaimed funds remaining with courts, and will continue to investigate the issue to attempt to develop solutions. Also, the Bankruptcy Committee determined that no action should be taken regarding a suggestion to permit bankruptcy judges to consider venue *sua sponte*, and that the Judicial Conference agreed with this decision.

Judge Gorman stated that the Federal Judicial Center (FJC) developed a manual for chapter 9 cases for courts and practitioners. She advised that judges and practitioners have voiced concerns about gaps in the law regarding Chapter 9. In addition, the FJC created a manual for guidance in the use of telephonic and video conferences. The manual contains tips and practical advice for judges.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues

(A) Further consideration of a proposed amendment to Rule 2002(h) (Suggestion 12-BK-M from Chief Judge Scott Dales, BK WD-MI). See Memo of September 1, 2017, by Professor Gibson, included in the agenda materials located at the following link: Advisory Committee on Rules of Bankruptcy Procedure - September 2017 .

Judge Goldgar explained that following discussion at the spring 2017 meeting, the subcommittee was asked to consider the inclusion of chapter 12 in proposed amended Rule 2002(h). Following discussion, the subcommittee determined to add chapter 12 to the proposed amendment, and the Committee Note was updated as well.

The subcommittee considered a suggestion regarding the creditor matrix namely, that it be truncated after the claims bar date has passed, to comport with the proposed amendment to Rule 2002(h), but the subcommittee concluded that the issue could not be resolved by rulemaking. Ken Gardner added that he will look into a technological solution to the creditor matrix issue.

A motion was made to approve the proposed amendment to Rule 2002(h) for publication, and the motion was approved. Professor Gibson stated that because there are several proposed amendments to Rule 2002 pending, this amendment will not be presented to the Standing Committee for approval until its June 2018 meeting.

5. Report by the Subcommittee on Forms

(A) Consider National Instructions for Official Forms 103A, 103B, 309A-I, 312, 313, 314, 315, 318, and 420A. See Memo of September 1, 2017, by Professor Gibson.

Judge Dennis Dow explained that several forms may need to be modified, but that the amended language of Rule 9009 that will be effective in December generally prohibits modification of Official Forms. Professor Gibson added that amended Rule 9009 permits a form to be modified if the national instructions permit such modification, therefore, the national instructions should be modified given that courts and practitioners have raised concerns about the need to modify specific forms. She advised that the amendments to the national instructions are approved by the Committee alone; no approval is needed from the Standing Committee.

Scott Myers provided a list of the specific forms that need to be included in the list of modifiable forms, and the language that will be added to the national instructions. He detailed the reasons for the need for modification for each form or group of forms. A proposed table was included in the agenda materials. It lists the forms that may be modified, and separates Official Forms from Director's Forms. Director's Forms are not Official Forms, and may be modified despite amended Rule 9009.

Mr. Myers noted that it is possible that additional forms will need to be added to the national instructions to permit modifications. Generally, the practice will be to present any needed changes at Committee meetings.

A motion to approve the changes to the national instructions and the table was approved.

6. Report by the Subcommittee on Business Issues

(A) Recommendation concerning suggestion 17-BK-A from Kevin Dempsey, Clerk (IL-S) to revise and modernize the recordkeeping requirements of Rule 2013. See Memo of September 1, 2017, by Professor Gibson.

Professor Gibson stated that the suggestion is to amend Rule 2013. In the suggestion, Kevin Dempsey opines that the rule is rarely used or enforced. The subcommittee asked Molly Johnson of the FJC to research the use of the rule and whether it is being enforced, and she will report about her findings at the Committee's spring 2018 meeting.

(B) Recommendation concerning suggestion 17-BK-B from the ABA Business Law Section to incorporate "proportionality" language in Bankruptcy Rule 2004. See Memo of September 5, 2017, by Professor Gibson.

Professor Gibson stated that the subcommittee discussed the suggestion. It agreed that discovery should not be excessive and that the production and preservation of electronically stored information can be expensive and time consuming. The subcommittee discussed potential language for Rule 2004, and thought it needed to be more specific than the language included in the suggestion. It determined that it would be helpful to include proportionality factors rather than merely a cross-reference to Civil Rule 26. The proposed amended language included in the agenda materials introduces the term "electronically stored information," and language regarding proportionality. The proposed Committee Note explains that the amendments conform to the Civil Rule amendments, and the reasoning behind the clause in the second paragraph of the proposed rule that permits the court to consider the purpose for which the request is being made under Rule 2004. Professor Gibson detailed the proposed language, referring to the proposed amended rule included in the agenda materials, stating that the subcommittee recommended adoption of the proposed amended rule.

Several members voiced concerns about substantive changes to the purpose of Rule 2004, noting that the purpose of the rule is a "fishing expedition," which is different than Civil Rule 26. This makes it difficult to fit proportionality within the rule, and it may be inconsistent. Rule 2004 serves a purpose within a bankruptcy case, and if the rule is amended as suggested, it may lead to increased litigation regarding Rule 2004 motions. Others responded that disputes do arise regarding the scope of Rule 2004, and courts need a frame of reference for resolving these disputes; the proposed amendments reflect the reality of what occurs in bankruptcy courts. A suggestion was made to change the amended language to include a reference to electronically stored information only, and to remove the language regarding proportionality.

Professor Bartell summarized that it appeared that the first amended paragraph was not objectionable to the Committee, i.e., the inclusion of the term "electronically stored information" to modernize the rule. She suggested that there may be different language that could be added to the second paragraph to achieve the goal of preventing improper use of the rule in bankruptcy cases. The Committee agreed to ask the subcommittee to reconsider the proposed amendment.

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

(A) Recommendation regarding proposed amendments to Rule 8023, published for comment in 2016, withheld from final approval at spring 2017 meeting to consider concerns raised by Department of Justice. See Memo of September 5, 2017, by Professor Gibson.

Judge Thomas Ambro advised that the proposed rule amendment was reconsidered by the subcommittee following a concern raised by the Department of Justice (DOJ) at the spring meeting. Professor Gibson explained that the DOJ was concerned that the proposed amendments

would require a judicial decision for every voluntary dismissal or would unnecessarily burden clerks. The subcommittee discussed several options including revising the amendments or abandoning the amendment. The DOJ provided substitute language (the suggested language was included in the memo referenced above), and while the subcommittee preferred the substitute language, it recommended abandoning the proposed amendment. It did not appear that the current rule is causing difficulties, and any proposed amendment may lead to potential problems. The subcommittee also discussed the issue of costs in the rule, and determined not to pursue any amendments to this language. The Committee approved a motion to withdraw the proposed amendment. The action will be reported to the Standing Committee.

(B) Consider possible conforming amendments to Rule 8012 in light of proposed amendment to FRAP 26.1 (Corporate Disclosure Statement). See Memo of September 5, 2017, by Professor Gibson.

Professor Gibson stated that the Appellate Rules Committee published several amendments to Appellate Rule 26.1. These changes may require amendments to Rule 8012, and Professor Gibson detailed some of the potential changes, noting that the version of the rule approved by the Appellate Rules Committee had a narrow focus regarding disclosures in bankruptcy. The subcommittee agreed that Rule 8012 should conform to the proposed amendments to Appellate Rule 26.1. She has communicated with the Appellate Rules Committee regarding a potential gap in Rule 8012(c) if the rule is conformed to amended Appellate Rule 26.1.

Professor Gibson and will monitor the final version of the proposed amended Appellate Rule, particularly after the Appellate Rules Committee considers any comments at its spring 2018 meeting. Judge Campbell made a suggestion to change the title of subsection (d) to better reflect the purpose of Rule 8012, noting that it differs in application from Appellate Rule 26.1. The group discussed limiting the wording to "Disclosures as to Debtor" or similar language.

The group discussed several minor language revisions to the proposed amendments to Rule 8012, including the language regarding corporate ownership for clarity, the percentage ownership requirement, and changing the word "intervenors" to the singular, "intervenor." A motion to approve the revised language for publication was approved.

Judge Ikuta advised that the revised amendments should be communicated to the Appellate Rules Committee. Professor Gibson stated that the proposed amendment will not be presented to the Standing Committee until June 2018 to provide an opportunity to coordinate with the Appellate Rules Committee regarding the proposed amendments.

Information Items

8. Item Awaiting Transmission to the Standing Rules Committee

(A) Recommendation in consideration of suggestion 12-BK-B to amend Rule 2002(f)(7) to require notice of a chapter 13 plan confirmation order.

Professor Gibson explained that at the spring 2017 meeting, the Committee recommended publishing the proposed amendment to Rule 2002(f)(7) after the pending change to Rule 3002 goes into effect on December 1, 2017. The intended publication date would be August 2018. She noted that there may be a new amendment to Rule 2002(k), pending the outcome of the discussion regarding the suggestion at the spring 2018 meeting.

9. Items Retained for Further Consideration.

The matters listed below are part of the noticing project and will be considered at a later date in light of final approval of electronic noticing rules already under consideration

(A) Suggestion 15-BK-H, proposing an amendment to Bankruptcy Rule 9036 that would mandate electronic noticing in certain circumstances.

(B) Suggestion 14-BK-E, proposing an amendment to Bankruptcy Rule 3001 to require a corporate creditor to specify address and authorized recipient information and the promulgation of a new rule to create a database for preferred creditor addresses under section 347. In addition, the Suggestion discusses the value to requiring electronic noticing and service on large creditors in bankruptcy cases for all purposes (other than process under Bankruptcy Rule 7004).

(C) Comment 12-BK-040, submitted as a comment in response to proposed revisions to Rule 9027. It suggested that the reference to "mail" in Rule 9027(e)(3) be changed to "transmit." Because the comment did not implicate the part of Rule 9027 being amended, the comment was retained as suggestion for further consideration at a later time.

(D) Comments 12-BK-005, 12-BK-008, 12-BK-026, 12-BK-040, submitted separately. The comments were made response to pending amendments to Rule 8003(c)(1), and have been retained as suggestions for further consideration. They recommend that the obligation to serve a notice of appeal rest with the appellant or be permitted by electronic means.

(E) Suggestion/Comment BK-2014-0001-0062, proposing amendments regarding service of entities under Bankruptcy Rule 7004(b) and, in turn, Bankruptcy Rules 4003(d) and 9014(b).

(F) Informal Suggestion from David Lander, former committee member, proposing rule in context of electronic noticing that would require particular notice to, or service on, a party when a motion or pleading is adverse to that party, as opposed to that party just receiving the general e-notice of a filing in the case.

8. Coordination Items. See Memo of September 6, 2017, by Mr. Myers.

Mr. Myers advised that there are no new issues to consider for coordination items.

9. Future meetings:

The spring 2018 meeting will be in San Diego, CA, on April 3, 2018.

The fall 2018 meeting will be in Washington, DC, on September 17, 2018.

10. New business

Judge Ikuta proposed that the Committee consider restyling the Bankruptcy Rules, noting that it will be a big undertaking for the Committee. Professor Gibson advised that she consulted with the reporters of the other rules committees regarding the process, and cited an article published by Dan Capra, reporter to the Evidence Rules Committee, regarding the process. Generally, the first step would be to provide the rules to the style consultants for their suggestions and proposed changes. Following this, the Committee would review the suggested changes to evaluate whether they would result in any substantive changes. The Committee could object to a suggested change if merely style-based, although the style consultants have the final say on mere style (not substantive) language changes.

The goals of restyling are to make the rules clearer, better presented, and to eliminate unnecessary and ambiguous words. Good examples are the elimination of the word "shall" and the use of the active versus passive voice in the restyling of the Evidence Rules. Professor Gibson spoke with Professor Ed Cooper, reporter to the Civil Rules Committee, regarding his experience with the restyling process. The Civil Rules Committee created multiple subcommittees to review the proposed style changes, and then met as a full committee over multiple days to complete a full review and approve or reject the style suggestions.

Professor Gibson stated that it will be a multi-year process that will require a lot of time and effort, and the challenge is the line between style and substance. In the past the bankruptcy rules have been exempt from restyling because of their close relationship to the language in the Bankruptcy Code. Professor Coquillette advised that when restyling was initially started with the rules committees, Chief Justice Rehnquist voiced concern regarding restyling the Bankruptcy Rules because of their relationship with the Code. Also, substantive problems with rules restyling inevitably arise, although some are not apparent until the amendments are effective and the rules are in general use.

Judge Ikuta suggested an incremental approach. First, a restyling subcommittee should be created. That subcommittee will seek input from the other rules committees on restyling, determine whether the Committee has Standing Committee support, and whether restyling would be welcomed by the bankruptcy community. The subcommittee will then make a

recommendation whether to go forward with the project. The Committee discussed the idea of restyling, and agreed that an incremental approach makes sense.

In addition, Professor Gibson advised that a suggestion regarding mediation was filed. It will be assigned to the Business Subcommittee.

Also, there is an inconsistency between the Rule 9010 and two power of attorney forms that are currently Director's Forms. The rules may require that they be converted into Official Forms. This issue will be assigned to the Forms Subcommittee.

Finally, a suggestion from the reporter to amend Rule 2002(k) regarding chapter 13 noticing of objections to plans should be assigned to the Consumer Subcommittee.

Consent Agenda

The Chair and Reporter proposed the following item for study and consideration prior to the Committee's meeting**.** There being no objection to placing the item on the consent agenda, the recommendation was approved.

1. Subcommittee on Forms Issues.

   (A) Recommendation of no action regarding suggestion 17-BK-C from Judge Pamela S. Hollis for a revision to Official Form 423 to require most individual chapter 11 debtors to take the personal financial management course described by 11 USC § 111(d) as a condition of obtaining a discharge. See Memo of September 1, 2017, by Professor Gibson, included in the agenda materials.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 4, 2018 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting at the JW Marriott Camelback Inn in Scottsdale, Arizona, on January 4, 2017. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Daniel C. Girard, Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Judge Jack Zouhary

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

* Elizabeth J. Shapiro, Deputy Director of the Department of Justice's Civil Division, represented the Department on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve (by telephone)	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Julie Wilson (by telephone)	Attorney Advisor, RCS
Scott Myers (by telephone)	Attorney Advisor, RCS
Bridget Healy (by telephone)	Attorney Advisor, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He introduced the Committee's new members, Judge Srinivasan of the U.S. Court of Appeals for the District of Columbia, Judge Kuhl of the Los Angeles Superior Court, and attorney Bob Giuffra of Sullivan & Cromwell's New York Office, as well as other first-time attendees supporting the meeting.

He announced that Chief Justice Roberts appointed Cathie Struve Associate Reporter to the Standing Committee and that Dan Coquillette will retire as Reporter to the Standing Committee at the end of 2018. Dan Coquillette will continue to serve as a consultant to the Standing Committee. Judge Campbell thanked Professor Coquillette for his tremendous support and guidance throughout the years.

Judge Campbell also welcomed Judge Livingston as the new Chair of the Advisory Committee on Evidence Rules. He also informed the Standing Committee that Professor Greg Maggs was nominated to the U.S. Court of Appeals for the Armed Forces, and once confirmed, Professor Maggs will be ineligible to continue as Reporter to the Advisory Committee on Appellate Rules. He thanked Professor Maggs for his service.

For the new members, Judge Campbell explained the division of agenda items at the Standing Committee's January and June meetings. The January meeting tends to be an informational meeting with few action items, which is true for today's meeting. The January meeting typically serves to get the Standing Committee up to speed on what is happening in the advisory committees so that the Standing Committee is better prepared to make decisions at its June meeting, where proposals are approved for publication or transmission to the Supreme Court. The Committee's January meeting also serves to provide feedback to the advisory committees on pending proposals. Judge Campbell encouraged all Committee members to speak up on issues and topics raised by the advisory committees.

Rebecca Womeldorf directed the Committee to the chart, included in the Agenda Book, that summarizes the status of current rules amendments in a three-year cycle. This chart shows

the breadth of work underway in the rules process, whether technical or substantive rules changes. The chart also details proposed rules pending before the U.S. Supreme Court that, if approved, would become effective December 1, 2018. Between now and May 1, 2018, the Committee will receive word if the Supreme Court has approved the rules. If so, the Court and the Committee will prepare a package of materials for Congress. Around the end of April, there will be an order on the U.S. Supreme Court's website noting that the proposed rules have been transmitted to Congress. If Congress takes no action, this set of rules becomes effective December 1, 2018.

The chart also notes which proposed rules are published for comment and public hearings, whether in D.C. or elsewhere in the country. If there is insufficient interest, the public hearings are cancelled. So far, we have not had requests to testify about these published rules, but have received some written comments. These rules will most likely come before the Committee for final approval in June 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 12-13, 2017 meeting.**

TASK FORCE ON PROTECTING COOPERATORS

Judge Campbell and Judge St. Eve updated the Committee on the Task Force on Protecting Cooperators. Judge Campbell began by reviewing the origins of the Cooperators Task Force, from a letter by the Committee on Court Administration and Case Management ("CACM") detailing various recommendations to address harm to cooperators to Judge Sutton's referral of CACM's recommendation for various rules-related amendments to the Criminal Rules Committee. Director Duff also formed a Task Force on Protecting Cooperators to address various practices within the judiciary, the Bureau of Prisons ("BOP"), and the Department of Justice ("DOJ") that might address the problem in a comprehensive way.

Judge St. Eve provided an overview of the Task Force, noting that Judge Kaplan serves as Chair. She explained that the Task Force has explored what is driving harm to cooperators and what the Task Force can do to address the problem. There are four separate working groups within the Task Force – namely, a BOP Working Group, a CM/ECF Working Group, a DOJ Working Group, and a State Practices Working Group. Judge St. Eve reviewed the work completed or underway by each working group. The State Practices Working Group explored and did not identify any state practices that could be adopted by the federal courts to address harm to cooperators.

One challenge the Task Force faces is the variety of policies and procedures used by federal district courts across the country to reduce harm to cooperators, from the District of Maryland to the Southern District of New York. The DOJ Working Group is trying to synthesize and identify commonalities among disparate local policies and procedures.

The BOP Working Group found consistent themes and issues, and Judge St. Eve noted that BOP has been incredibly cooperative throughout this process. The BOP does not collect statistics documenting the extent of the harm to cooperators. Harm is occurring, primarily at high and medium security prisons, not low security facilities. Within these high and medium security prisons, prisoners are often forced by other inmates to "show their papers," such as sentencing transcripts and plea agreements, to demonstrate that they are not cooperators. These papers can be electronically accessed through PACER and CM/ECF.

As a result of these findings, the BOP Working Group will recommend that the BOP make these sentencing-related documents contraband within the prisons. Because some prisoners need access to these documents, BOP will work with wardens to establish facilities within the prisons where prisoners can securely access these documents. The Group is also recommending that BOP punish individuals for pressuring and threatening cooperators. Some recommended changes will require approval from BOP's union prior to implementation.

Another major issue is developing other types of limitations to place on PACER and CM/ECF to reduce the identification of cooperators, consistent with First Amendment and other concerns. On January 17, the CM/ECF Working Group will meet in Washington D.C. to hear from federal public defenders on this issue. The full Task Force meets on January 18.

Judge Campbell noted that the Committee does not have jurisdiction over BOP Policy or CM/ECF remote access. However, the question for the Committee is whether and what rules-based changes can be made to further help address this problem.

Judge Bates asked whether the Task Force has received any feedback from the defense bar about limiting incarcerated individuals' access. Judge St. Eve noted that a federal defender is on the Task Force and that federal defenders support limiting access within BOP so long as prisoners can still access their documents when necessary for appeals and other court proceedings.

Professor Coquillette asked why the BOP cannot collect empirical data, and Judge St. Eve responded that the Task Force considered proposing such a recommendation. The Task Force decided against this recommendation after the BOP voiced concerns that collecting the data will create more harm than good. Judge Campbell noted the FJC survey, which provides anecdotal evidence in which judges reported over 500 instances of harm to cooperators, including 31 murders, and that much of this harm stemmed from the ability to identify cooperators from court documents. This FJC survey was a major impetus for the CACM letter. One committee member noted that he believes that the problem of harm to cooperators is better addressed by the BOP, instead of through rules changes. Judge St. Eve emphasized that BOP officials – especially BOP staff working at high and medium security facilities – know that harm to cooperators is a problem and are committed to better addressing it.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy provided the report of the Advisory Committee on Criminal Rules, focusing largely on the Advisory Committee's decision to oppose adopting CACM-recommended rules to reduce harm to cooperators. As noted earlier, CACM recommended that the Standing Committee amend various criminal rules to reduce harm to cooperators. The Committee referred the CACM recommendation to the Criminal Rules Committee, which created the Cooperator Subcommittee, also chaired by Judge Kaplan.

At the Advisory Committee meeting in October 2017, the Cooperator Subcommittee presented its research and recommendations about CACM-based rules amendments. In drafting rule amendments consistent with CACM's proposal, the Subcommittee balanced competing interests – namely, transparency and First Amendment concerns with harm reduction concerns. After many meetings, the Subcommittee concluded that amendments to Criminal Rules 11, 32, 35, 47, and 49 would be required to implement CACM's recommendations, and the Subcommittee drafted these amendments for further discussion.

The Subcommittee's draft amendments engendered a lively discussion at the Advisory Committee meeting. Judge Kaplan and the DOJ abstained from voting. The Advisory Committee as a whole voted on two questions. First, the Advisory Committee unanimously agreed that the draft rules amendments would implement CACM's proposals. Second, the Advisory Committee agreed, albeit with two dissenting votes, not to recommend these amendments.

With this overview, Judge Molloy sought discussion about whether the Committee agreed with Advisory Committee's decision. To assist the Committee, Professors Beale and King provided an overview of the various proposed amendments to Criminal Rules 11, 32, 35, 47, and 49, that had been considered.

One Committee member questioned how defense bar advocacy is impaired when plea agreements are sealed on a case-by-case basis because defense attorneys are not losing any information that they otherwise would have. Professor King noted that sealing practices vary district-by-district, and so, a rule about sealing on a case-by-case basis would not reduce access to that information in districts that rarely or never seal. Professor King also noted that the defense bar indicated that the terms of plea agreements are important, that they need this information in order to assess their client's proposed plea agreement, and that sealing plea agreements in every case would impair their ability to do this. Another member asked about whether sealing the plea agreements in every case would prevent others from identifying cooperators. Professor Beale responded that it would prevent others from identifying cooperators through plea agreements, but that there are other ways to learn about cooperators – through lighter sentences, Brady disclosures, etc. She articulated that the Advisory Committee did not think that Rule 11 was an effective response to the problem, especially given that this rule change would be a transition to secrecy.

One member asked whether constitutional challenges have been raised in districts that have implemented aggressive sealing tactics in order to protect cooperators. Judge St. Eve noted that she is not aware of any constitutional challenges. This may reflect that these districts have received

buy-in as to sealing practices from prosecutors, defenders, and judges prior to implementation. Professor Beale noted that some instances of constitutional challenges by an individual do exist.

Judge Campbell interjected to respond to a few comments raised by committee members. First, he stated that there is no way to absolutely prevent cooperator identity from becoming known but that this does not mean steps cannot be taken that will reduce the dissemination of such information. Moreover, there seem to be ways to reduce the identification of cooperators without increased sealing, whether by changing the appearance of the docket on CM/ECF or adopting the "master sealed event" approach implemented in the District of Arizona. Judge Campbell emphasized that the Advisory Committee should not give up on amendments that would not result in more secrecy.

More generally, many Committee members asked questions about the overall implications of CACM-based rules changes. One member inquired whether these rules changes would (negatively) affect non-cooperators who would no longer be able to demonstrate their non-cooperation status. Professor King noted that this is a tricky issue and that the effect of rule-based changes on non-cooperators is one reason why the defense bar has no unanimous position on this topic. Another member asked whether the CACM-based rules changes would encourage more cooperation. From the Task Force perspective, Judge St. Eve said it is not part of the Task Force's mission to consider whether rules or policy changes would encourage more cooperation. The Task Force's charter focuses on ways to reduce harm to cooperators. One member voiced support for more judicial education on how to reduce harm to cooperators.

Another member noted that harm to cooperators has been occurring long before CM/ECF and that cooperator information can be learned from many sources other than CM/ECF. This member asked whether the Task Force believed that there would be some benefit from a national policy instead of the disparate local policy approach. Judge St. Eve stated that the Task Force thinks a national policy is the best option, and the DOJ is considering a national approach as well. However, due to local variation, the Task Force is facing the challenging question of what that national policy should be. Professor Capra noted that in 2011 a Joint CACM/Rules Committee considered this issue and determined that a national policy or approach is not feasible. Judge St. Eve stated that the Task Force is aware of this 2011 conclusion. Professor Beale noted one advantage to a rules-based change is that proposed rules would be published for public comment. In addition, rules promulgated through the Rules Enabling Act process would also obviously have national enforcement effect.

In light of this discussion, Judge Campbell asked whether the Committee agreed with the Advisory Committee's decision not to adopt the CACM rules-based changes. Before soliciting feedback, Judge Campbell noted that the DOJ did not take a position on these CACM rules-based amendments because DOJ wants to wait until the Task Force concludes its work. He also stated that some Advisory Committee members questioned whether the Advisory Committee could revisit rules changes depending on the outcome of the Task Force's work. Unless the Committee disagrees with the decision not to adopt the CACM rules-based changes at this time, the Advisory Committee opted, if necessary, to revisit these rules after the Task Force concludes its work.

Many members voiced agreement with the Advisory Committee's decision to reject the CACM rules-based amendments. One member supported the District of Arizona's approach, and another noted that, without empirical data about the causes of the problem, the Advisory Committee's position seemed wise. This member also stated that CM/ECF seems to be a problem and that CM/ECF should be changed. Another member thought consideration of any rules changes should wait until the CM/ECF Working Group makes its recommendations. One member suggested that achieving a national policy is difficult and the source of the problem stems from the BOP. This member believed that the harms from rules-based changes exceed the benefits.

Judge Molloy concluded his report by providing updates about the Advisory Committee's other work. After the mini-conference on complex criminal litigation, the Advisory Committee recommended that the FJC prepare a Manual on Complex Criminal Litigation, which would parallel the Manual on Complex Civil Litigation. The Advisory Committee is also considering a few new rules amendments. First, the Cooperator Subcommittee is considering amending Rule 32(e)(2) to remove the requirement to give the PSR to the defendant. This change could help address one aspect of the cooperator identification problem. Second, the Advisory Committee rejected a proposal to amend Rule 43 to permit sentencing by videoconference. Third, the Advisory Committee is considering re-examining potential changes to Rule 16 regarding expert disclosure in light of an article by Judge Paul Grimm. Lastly, the Advisory Committee is considering changes to Rule 49.2, which would limit remote access in criminal cases akin to the remote access limitations imposed by Civil Rule 5.2. However, the Advisory Committee is holding in abeyance its final recommendation on this rule change until after the Task Force concludes its work.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates presented the report of the Advisory Committee on Civil Rules, which included only informational items and no action items.

Rule 30(b)(6): The Subcommittee on Rule 30(b)(6) began with a broad focus, but it has narrowed the issues under consideration, primarily through examination and input from the bar. There is little case law on this topic in part because these problems are often resolved before judicial involvement or with little judicial involvement. The Subcommittee received more than 100 written comments on its proposed amendment ideas, and the feedback revealed strong competing views, often dependent upon whether the commenter typically represents plaintiffs or defendants.

Based on this input, the Subcommittee on Rule 30(b)(6) is focusing on amending Rule 30(b)(6) to require that the parties confer about the number and description of matters for examination. The Subcommittee is, however, still tinkering with the language. The Subcommittee is also receiving additional input on some select topics, including whether to add language to Rule 26(f) listing Rule 30(b)(6) depositions as a topic of consideration.

In terms of timeline, the Subcommittee will make a recommendation to the Advisory Committee at its April 2018 meeting. Its recommendation, if any, will be presented to the Standing Committee in June 2018.

One member asked why the judicial admissions issue was eliminated as an issue to be addressed. The Subcommittee concluded that there is little utility to a rules-based approach to this problem. Although tension in the case law exists, the cases are typically sanction-based cases related to bad behavior. The Subcommittee is concerned that a rule change directed to the judicial admissions issue could create more problems than it would solve.

Some members voiced support for adding a "meet and confer" element to Rule 30(b)(6), noting that it would help encourage parties to agree on the topics of depositions before the deposition and thereby reduce litigation costs. Others were skeptical that the parties would actually meet and confer to flesh out topics for the depositions. One member suggested that the benefit of this rule change would not exceed the work necessary to change the rule. Judge Campbell noted that this is a unique problem for a frequently used discovery tool. The Advisory Committee investigated this problem ten years ago and concluded that it was too difficult to devise a rule change to reduce the problem. Based on the comments raised, Judge Campbell wondered whether education of the bar, through a best practices or guidance document for Rule 30(b)(6), may be a better solution than a rule change.

Social Security Disability Review: The Administrative Conference of the United States ("ACUS") proposed creating uniform procedural rules governing judicial review of social security disability benefit determinations by the Social Security Administration. The Social Security Administration supports ACUS's proposal. The Advisory Committee is in the early stages of considering this proposal, and in November 2017, it met with representatives from ACUS, the Social Security Administration, the DOJ, and claimants' representatives. At this meeting, it became clear that a rules-based approach would not address the major issues with respect to social security review, including the high remand rate, lengthy administrative delays, and variations within the substantive case law governing social security appeals.

The Advisory Committee created a Social Security Subcommittee to consider the ACUS proposal. The Subcommittee will focus on potential rules governing the initiation of the case (e.g., filing of a complaint and an answer) and electronic service options. The Subcommittee will not consider discovery-based rules because this does not appear to be a major issue.

Some broad issues remain for the Subcommittee's determination, including the kind of rules it would devise, the placement of the rules (e.g., within the Civil Rules), concerns relating to substance-specific rulemaking, and whether to devise procedural rules for all administrative law cases. The Subcommittee thus far is not inclined to draft procedural rules for all types of administrative law cases, which can vary greatly. Although the Social Security Administration would like rules regarding page limits and filing deadlines, the Civil Rules do not typically include such specifications. The Subcommittee will provide an update to the Advisory Committee at its April meeting and to the Standing Committee in June.

One member asked about trans-substantivity, noting that the admiralty rules do not fit well within the Civil Rules and that rules governing judicial review of one administrative agency seem to raise even greater trans-substantivity concerns because such rules would be less general. This member asked whether the Subcommittee has considered that procedural rules for all administrative law cases would seem to raise fewer trans-substantive concerns than social security rules alone. Judge Bates said that the Subcommittee has not considered this issue yet but will be considering trans-substantivity concerns. Professor Cooper raised an empirical question about the extent to which all administrative law review cases focus primarily or solely on the administrative record.

One member encouraged the Subcommittee to consider Appellate Rules 15 and 20 when devising particular rules governing review of social security benefits decisions. Professor Struve seconded this suggestion. Another member asked about how the specialized rules for habeas corpus and admiralty came about under the Rules Enabling Act. Professors Cooper and Marcus provided an overview of the formation of these rules and noted that the habeas corpus rules are a good analogy for creating specialized rules for social security decisions.

Another member asked whether the Subcommittee is considering the patchwork of local district court rules governing social security review. The Subcommittee is looking at the panoply of local rules and how these rules impact the time for review at the district court level. Professor Cooper noted that there is not a wide divergence in the amount of time it takes courts to review social security decisions. Judge Campbell noted that 52 out of 94 district courts have their own procedural rules and that, according to the Social Security Administration's estimates, uniform rules would save the agency around 2-3 hours per case. Because the Social Security Administration handles around 18,000 cases per year, uniform rules would result in significant cost savings for the agency.

Multidistrict Litigation ("MDL") Proceedings: The Advisory Committee has received some proposals to draft specialized rules governing MDL proceedings, some of which parallel legislation pending in Congress such as HR 985. The business and defense interests have submitted these proposals, and none is from the plaintiff side. Judge Bates provided an overview of these various proposals, noting the focus on mass tort litigation.

The Advisory Committee has created a MDL Subcommittee, headed by Judge Bob Dow (who also headed the Class Action Subcommittee). The Subcommittee has a significant amount to learn. The Subcommittee has received written comments from the defense bar but it has yet to hear from the plaintiffs' bar, the Judicial Panel on Multidistrict Litigation, judges who have handled significant numbers of MDLs, and the academic community. The Subcommittee is currently creating a reading list as well as identifying research projects. The Subcommittee also has to explore how it wants to proceed, and given these factors adoption of rules, if any, will be a long and careful process. The Subcommittee will take six to twelve months of information gathering. Judge Campbell clarified that the Rules Enabling Act process guarantees that it would take at least three years before any rules are adopted (assuming any are proposed), but that these proposals are receiving careful attention.

Some members noted that this an important and valuable area to investigate given that MDLs comprise a significant portion of the federal docket. Because these cases often require considerable flexibility, innovation, and discretion, others expressed skepticism about the necessity or ability to devise a specialized set of rules for MDL proceedings. Another member noted that devising such rules may be difficult given that mass tort MDLs raise different issues and problems than antitrust MDLs, for example.

One member suggested that the Subcommittee consider the process for appointing lead counsel in light of Civil Rule 23(g)'s objective standard and how lead counsels are appointed under the Private Securities Litigation Reform Act. Another member recommended speaking with experienced MDL litigators. Other members recommended attending a variety of MDL conferences occurring around the country in 2018 as well as considering the best practices materials complied by the MDL Panel.

Third-Party Litigation Finance: The Advisory Committee has received a proposal which would require automatic disclosure of third-party litigation financing agreements under Rule 26(a)(1)(A)(v). Although this proposal does not pertain only to MDLs, the MDL Subcommittee is charged with exploring it. The Advisory Committee considered similar proposals in 2014 and 2016 but did not recommend any changes to the Civil Rules. Like the previous proposals, this proposal presents a definitional problem regarding what constitutes third-party litigation financing. It is also controversial, with a clear division between the plaintiff and defense bars, and it presents significant ethical questions. It is not clear that the Advisory Committee would have reconsidered this proposal again so soon, but because third-party litigation financing issues were raised within the MDL proposals, the Advisory Committee decided to examine the issue further as part of the rulemaking proposals for MDLs.

Other Proposals: The Advisory Committee received a proposal to amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The Advisory Committee will further explore this proposal, and the Department of Justice has indicated that it does not have a problem with eliminating the preference. The Advisory Committee wants to further explore the implications of eliminating the preference.

Another proposal received by the Advisory Committee was to amend Rule 16 so that a judge assigned to manage and adjudicate a case could not also serve as a "settlement neutral." The Advisory Committee removed this matter from its agenda because it is not clear that there is a problem that a rule amendment could or should solve.

The Advisory Committee was also asked to explore the initial discovery protocols for the Fair Labor Standards Act – a request which parallels earlier efforts regarding initial discovery protocols for employment cases alleging adverse action. The Advisory Committee hopes judges consider these protocols favorably, but it did not think the Advisory Committee should endorse these protocols. The Advisory Committee concerns itself with rules adopted through the Rules Enabling Act process and does not endorse work developed by other entities outside the rulemaking process.

Pilot Project Updates: Two courts, the District of Arizona and the Northern District of Illinois, have enlisted in the Mandatory Initial Discovery project. It is too early to report feedback on its results. Judge Campbell noted that the project has been going well in the District of Arizona, stating that initial feedback has been positive and that the district has experienced fewer issues than expected. He suspects, however, that problems may arise during summary judgment and trial phases for cases filed after May 1 when parties request that district judges exclude evidence not disclosed during the mandatory initial discovery periods. The district judges in Arizona are anticipating this and are prepared to handle the problems as they arise. Judge Campbell also applauded the FJC's efforts with developing and implementing this project. Judge St. Eve reported that the Mandatory Initial Discovery project rolled out very smoothly in the Northern District of Illinois and that the district has received positive feedback thus far.

The Expedited Procedures project has been stalled for want of participating district courts. The Advisory Committee has enlisted Judge Jack Zouhary to spearhead its efforts to drum up participation. The Advisory Committee has found courts often indicate initial support for the pilot, but ultimately decline to participate. Their support typically wanes due to vacancies, caseloads, or lack of unanimous participation by judges within a district. The project's requirements have been modified to permit more flexibility and to allow for less than unanimous participation by district judges within a given district.

Judge Zouhary noted his district agreed to participate in the Expedited Procedures project because his district already had similar rules in place, albeit using different terminology. A letter of endorsement for the project has been drafted, and some organizations, including the American College of Trial Lawyers, the Federal Bar Association, the FJC, the NYU Civil Jury Project, and the American Board of Trial Advocates, have expressed excitement for the project and are considering joining the letter.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta gave the report of the Advisory Committee on Bankruptcy Rules. At its September 2017 meeting, the Advisory Committee recommended publishing changes to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because the proposed amendments relate to a bankruptcy rule and an appellate rule that were published in August 2017, however, the Advisory Committee is waiting to review any comments before finalizing proposed language. The Advisory Committee plans to present the proposed changes at the Committee's June meeting.

Judge Ikuta discussed four additional information items: (1) withdrawal of a prior proposal to amend Rule 8023 (Voluntary Dismissals), (2) updates to national instructions for bankruptcy forms, (3) a suggestion to eliminate Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals), and (4) preliminary consideration of a proposal to restyle the bankruptcy rules.

The Advisory Committee decided to withdraw its prior recommendation to amend Rule 8023. Judge Ikuta said the proposed amendment was intended to be a reminder that a bankruptcy trustee who is party to an appeal may need bankruptcy court approval before seeking to dismiss the appeal. The Advisory Committee's Department of Justice representative raised a concern, however, that the change would be difficult for appellate clerks to administer. The Advisory Committee agreed that the proposed amendment could cause confusion, which outweighed the benefit of the proposed change. It therefore voted to withdraw the proposal from consideration.

The Advisory Committee updated national instructions for certain forms. Judge Ikuta explained that the December 1, 2017 amendments to Rule 9009 (Form) restricted the ability of bankruptcy courts to modify official forms, with certain exceptions. One exception allows for modifications that are authorized by national instructions. After learning the courts routinely modify certain notice-related forms to provide additional local court information, and that model court orders included as part of some official forms are often modified by courts to provide relevant details, the Advisory Committee approved national instructions that would permit these practices to continue.

The Advisory Committee is also looking into a suggestion from a bankruptcy clerk that it should eliminate or amend Rule 2013. The intent of the rule is to avoid cronyism between the bankruptcy bar and the courts. It requires the bankruptcy clerk to maintain a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and to provide an annual report of such fees to the United States trustee. The suggestion stated that compliance with this rule is spotty, and because a report regarding fees can be generated and provided on request, there is no need to keep systematic records. Judge Ikuta said that the Advisory Committee, with help from the FJC, will gather more information about current compliance with the rule before taking any steps. It expects to consider the issue at its spring 2018 meeting.

Finally, the Advisory Committee is considering whether it should commence the process of restyling the Bankruptcy Rules. The Advisory Committee is taking a phased approach before making this big decision. First, it is studying whether any restyling is warranted, given the close connection of the Bankruptcy Rules to the Bankruptcy Code and the use of many statutory terms throughout the rules. The Advisory Committee will also consider the views of its stakeholders, and it has asked the FJC to help it obtain input from users of the Bankruptcy Rules regarding the pros and cons of restyling. Because any input would be more meaningful and valuable if bankruptcy judges and practitioners could consider some exemplars of restyled rules, the Advisory Committee has asked the Committee's style consultants to assist in developing such exemplars from the eight rules in Part IV of the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston provided the report for the Advisory Committee on Evidence Rules. The Advisory Committee met on October 26 and 27, 2017, at the Boston College Law School, where the law school and Dean Vincent Rougeau were gracious hosts. She advised that she had no action items to report, but that there were several information items.

The Advisory Committee held a symposium in connection with its meeting. The symposium focused on forensic expert testimony, Rule 702, and Daubert. The topics discussed included the 2016 President's Council of Advisors on Science and Technology's ("PCAST") report on forensic science in criminal courts and a potential "best practices" manual. The conference participants shared an interest in ensuring that expert testimony comported with Rule 702, but the focus was not on potential amendments to Rule 702, but instead, the applications of the rule. Some conference attendees suggested that a best practice manual might be more helpful than potential rule amendments. Judge Livingston stated that the Advisory Committee will discuss the findings from the conference at its spring 2018 meeting.

Judge Campbell noted that a panel of judges and lawyers at the Boston College event also raised concerns about possible abuses of Daubert motions in civil cases, and he suggested that the Civil Rules Advisory Committee be apprised of these concerns. Dan Capra noted a potential circuit split related to the admissibility of forensic evidence.

Next, Judge Livingston advised that the Advisory Committee published a proposed amendment to Rule 807, and that the public comment period is open until mid-February. The Advisory Committee will discuss all comments at its meeting in the spring.

The Advisory Committee is also considering a possible amendment to Rule 801(d)(1)(A). It sought informal input on a possible amendment in the fall of 2017, and it also obtained results from a survey conducted by the FJC. The Advisory Committee will consider the input at its spring meeting. A committee member noted that one possible area of consideration for the Advisory Committee is jury instructions regarding prior consistent statements.

The Advisory Committee is considering a possible amendment to Rule 404(b); however, disagreement exists within the Advisory Committee regarding a circuit split between the Third and Seventh Circuits. There is further disagreement about how the rule is being employed, and the Advisory Committee has discussed the three principal purposes of the rule, including the chain of reasoning, the balancing test, and additions to the notice provision. Judge Campbell noted the similarities to the discussion surrounding Rule 30(b)(6), where there is a disagreement regarding whether an amendment is needed. Another member added that while much of the discussion is about criminal cases, any changes would impact civil cases as well.

Other items that will be considered by the Advisory Committee at its spring meeting include possible amendments to Rule 606(b) (in light of the Supreme Court's decision in *Pena-Rodriguez v. Colorado*) and to Rules 106 and 609(a)(1).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares provided the report for the Advisory Committee on Appellate Rules, which included several informational items and one discussion item. First, as to the discussion item, Judge Chagares reviewed the proposed amended rules pending before the Supreme Court for consideration, including the proposed amendments to Rule 25(d). The proposed amendment to Rule 25(d) would eliminate the requirement of proof of service when a document is filed through a court's electronic-filing system, replacing "proof of service" with "filed and served." Given the

pending amendment to Rule 25(d), the Advisory Committee decided that references to "proof of service" in Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) should be removed. Judge Chagares explained that these proposed amendments are technical and that the Advisory Committee did not believe publication of the technical changes was necessary.

During this discussion, several committee members raised concerns about the use of "filed and served" in Rule 25(d), suggesting elimination of the term "and served." Judge Campbell noted that while a document filed electronically is served automatically, those not filed electronically need the instruction in the rule. Committee members made suggestions for various stylistic edits to the proposed rule amendments, and the Committee's style consultants offered their views on the proposed language and edits, including present versus past tense. One committee member raised concerns about eliminating the proof of service language in Rule 39, given the subject-matter of the rule. Judge Campbell suggested adding to the committee notes an instruction regarding service and a reference to Rule 25. The group discussed possible language for the committee notes, and Judge Campbell recommended that the Advisory Committee consider these comments and present the revised package of rules and committee notes to the Committee in June, after consideration of the discussion at the meeting.

Following this meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d) from the Supreme Court's consideration. The Advisory Committee will consider the comments made at the Standing Committee meeting regarding Rule 25(d), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and it will present an amended set of proposed rule amendments for the Committee's consideration at its June 2018 meeting.

Judge Chagares reviewed several information items. The Advisory Committee considered at its November 2017 meeting a suggestion to amend Rule 29 to permit cities and Indian tribes to file amicus briefs without leave of court. The Advisory Committee considered but deferred action on the proposal five years ago, and after discussion at its November 2017 meeting, the Advisory Committee decided to take no further action. It is a problem that rarely, if ever, arises in litigation. Judge Campbell noted that most Indian tribes appear before federal court via private firms, not through government lawyers, and this could cause more recusal issues.

Judge Chagares advised that the Advisory Committee considered several other issues at its November 2017 meeting. These included a proposal to amend Rule 3(c)(1)(B), which as currently drafted may present a potential trap for the unwary. After discussion, a subcommittee was formed to study the issue. The Advisory Committee also considered a suggestion to amend Rules 10, 11, and 12 in light of advances made with electronic filing and the impact on the record on appeal. After discussion, the Advisory Committee determined that most clerks' offices have procedures to manage these issues, and that with upcoming upgrades to CM/ECF, some issues raised may be resolved. The Advisory Committee thus determined to remove the suggestion from its agenda. The Advisory Committee discussed a potential issue related to Rule 7 and whether attorney fees are "costs on appeal" under the rule. The Advisory Committee determined to refer the issue to the Civil Rules Committee and to form a subcommittee to monitor any developments.

Finally, Judge Chagares noted several items that the Advisory Committee may consider at upcoming meetings, including concerns about judges deciding issues outside of those addressed in briefing, the use of appendices, and the dismissal of appeals after settlement agreements. A Committee member raised a concern that the dismissal issue could be substantive rather than procedural, and Judge Chagares stated that this concern would be considered by the Advisory Committee when the issue is discussed.

REPORT OF THE ADMINISTRATIVE OFFICE

Rebecca Womeldorf provided the report from the Rules Committee Staff ("RCS"). The Standing Committee reviewed Scott Myers' report regarding instances where committees need to coordinate regarding proposed rule changes which implicate other rules. Ms. Womeldorf added that treatment of bonds for costs on appeal under Appellate Rule 7 and treatment of the proof of service references across the Appellate and Civil Rules will continue to require coordination between these various committees.

Julie Wilson provided an overview of congressional activity implicating the Federal Rules. In general, Ms. Wilson noted that, although the RCS is monitoring many pending bills, not much movement has occurred in the past few months. Ms. Wilson first briefly reviewed pending congressional legislation which would directly amend the Federal Rules. The Senate Judiciary Committee held in November 2017 a hearing on "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators," which focused on a variety of bills which would directly amend the Federal Rules, including the Lawsuit Abuse Reduction Act ("LARA"). No action, however, has occurred regarding these pieces of legislation, including LARA, since that hearing. The RCS continues to monitor these bills for further development.

The RCS has also offered mostly informal feedback and comments to Congress on other bills which would not directly amend but rather require review of the Federal Rules by the Standing Committee. This includes the Safeguarding Addresses from Emerging (SAFE) at Home Act, which was introduced in September 2017 by Senator Roy Blunt and would require federal courts and several agencies to comply with state address confidentiality programs. This proposed legislation raises concerns about service under the Federal Rules, and RCS communicated this feedback to Senator Blunt's staffer but has not heard anything in response. Representative Bob Goodlatte also introduced in October 2017 the Article I Amicus and Intervention Act, which would limit federal courts' authority to deny Congress's ability to appear as an amicus curiae. The RCS communicated its concern to congressional staffers that this legislation would lengthen the time of appeals.

A few developments occurred in the past month as well. On November 30, 2017, the House Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on "The Role and Impact of Nationwide Injunctions by District Courts." Although the hearing did not concern a specific piece of legislation, Rep. Goodlatte reiterated his interest in this issue, and Professor Samuel Bray, who submitted a proposal to the Civil Rules Committee earlier this year regarding nationwide injunctions, spoke at this hearing. The RCS will continue to monitor for the introduction of any specific pieces of legislation regarding nationwide injunctions.

The Committee lastly considered what advice it could provide to the Executive Committee regarding which goals and strategies outlined in the *Strategic Plan for the Federal Judiciary* should receive priority attention over the next two years. After discussion, the Committee authorized Judge Campbell to report the sense of the Committee on these issues to the Judiciary's Planning Coordinator.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the Committee members and other attendees for their participation. The Committee will next meet on June 12, 2018, in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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TAB 4A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: 16-BK-D PROPOSED AMENDMENT TO RULE 4001

DATE: MARCH 2, 2018

The proposed amendment to Rule 4001 to make Rule 4001(c) inapplicable in chapter 13 cases elicited no comments. Therefore, the Consumer Subcommittee recommends that the Advisory Committee approve the amendment. The text of the amendment follows:

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

(c) OBTAINING CREDIT.

* * * * *

(4) This subdivision (c) does not apply in chapter 13 cases.

* * * * *

Committee Note

Subdivision (c) of the rule is amended to exclude chapter 13 cases from that subdivision. This amendment does not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: 16-BK-C PROPOSED AMENDMENTS TO RULE 6007(b)

DATE: MAR. 9, 2018

In 2017, the Judicial Conference Committee on Rules of Practice and Procedure approved publication of proposed amendments to Fed. R. Bankr. P. 6007(b). The purpose of the amendments was to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession). The current text of Rule 6007 follows:

Rule 6007. Abandonment or Disposition of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to §705 or appointed pursuant to §1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

The proposed amendments would modify Rule 6007(b) to read as follows:

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion

on the trustee or debtor in possession, the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of service, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. If the court grants the motion, the order effects the abandonment without further notice, unless otherwise directed by the court.

Committee Note

Subdivision (b) of the rule is amended to specify the parties to be served with the motion and any notice of the motion. The rule also establishes an objection deadline. Both of these changes align subdivision (b) more closely with the procedures set forth in subdivision (a). In addition, the rule clarifies that no further action is necessary to notice or effect the abandonment of property ordered by the court in connection with a motion filed under subdivision (b), unless the court directs otherwise.

Five comments were submitted on the amendments.

A. Completing Abandonment Process After Motion.

COMMENT USC-RULES-BK-2017-0003-0004. This comment was submitted by Judge Robert Kressel of the U.S. Bankruptcy Court for the District of Minnesota, suggesting that the last sentence of the proposed amendment is inconsistent with the provisions of § 554(b) of the Code. He wrote:

> "Bankruptcy Code section 554 provides for abandon[ment] of property BY THE TRUSTEE. This amendment deals with the situation addressed by section 554(b) which allows a party in interest to move the court to order THE TRUSTEE to abandon property. Nowhere does the statute say the court can abandon property, but that is what the last sentence of the proposed rule essentially provides. Although the comment says the sentence is a 'clarification,' I think the proposed rule is inconsistent with the statute and violates the rules enabling act.

> I would simply delete the last sentence. Or if you prefer, you could delete the last sentence and add something like 'If the courts grant the motion, the trustee shall promptly file an abandonment of the property.'"

COMMENT USC-RULES-BK-2017-0003-0009. Chief Judge Kathy Surratt-States, writing on behalf of the judges of the Eastern District of Missouri bankruptcy court and the clerk of that court, echoed the concern of Judge Kressel in her comment:

> "[A]s our esteemed colleague, the Hon. Robert Kressel, has highlighted in his comment, the Bankruptcy Code does not allow the court to abandon property – only the trustee. The sentence should be deleted and allow local court procedure to make sure that the trustee has abandoned the property related to the motion by a party in interest.

RESPONSE TO COMMENTS. The Subcommittee considered three different options in response to these comments. First, to delete the last sentence as suggested by the comments. Second, to rewrite the last sentence to provide that:

"A grant of the motion will constitute an order to the trustee to abandon the property without further notice, unless otherwise directed by the court."

Third, to make no change to the published version of the amendment.

The first alternative was rejected because the Subcommittee believed that its absence would create the possibility that, after the motion is granted, the trustee would have to file a motion to abandon or some other document, and the Subcommittee wanted to make clear that no further action need be taken. The second alternative was rejected because the Subcommittee did not see abandonment as requiring action by the trustee (as opposed to inaction with respect to the abandoned property), and therefore it was inappropriate to order the trustee to "abandon" the property. Therefore, the Subcommittee recommends no change to the language of the amendment in response to these comments.

B. Service and Notice Requirements.

Two more comments criticized the language of the second sentence in the proposed amendments that require both service and notice of the motion on all creditors.

COMMENT USC-RULES-BK-2017-0003-000. Kelly Black, a bankruptcy attorney from Mesa, Arizona, expressed concerned about the merger of the service and notice

requirements in the proposed amendments, because she believes it substantially increases the burden on parties seeking to compel abandonment of property.

She said that when the trustee or debtor in possession provides notice under Rule 6007(a), the recipients of that notice are those on the case's mailing list. The requirement that a movant under Rule 6007(b) serve and provide notice to all creditors requires that the movant research service addresses under Rule 7004, which can be a substantial burden. She suggested that service of the motion be limited to the trustee or debtor in possession and "parties who have liens or other interests in the property" to be abandoned (incorporating language similar to that used in Rule 6004(c) for selling property free and clear of liens). The other parties listed in the amended rule would receive notice but not service of the motion. Her proposed revision of the second sentence of Rule 6007(b) would read as follows:

> (b) MOTION BY PARTY IN INTEREST. *** Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion on the trustee or debtor in possession and on the parties who have liens or other interests in the property to be abandoned and shall give notice of the motion to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. ***

RESPONSE TO COMMENT.

The Subcommittee noted that there are varying approaches to service and notice in different districts, and the current language of the amendment was included to ensure that all parties (not merely those who have liens on the property to be abandoned) get notice of the contents of the proposed motion, as opposed to notice that a motion has been filed. Moreover, requiring service is also consistent with Rule 9013 which requires "service" of motions generally. Therefore, the Subcommittee decided that requiring service on all parties, although occasionally more burdensome, is the only way to ensure all parties get the appropriate notice. No change to the amendment is recommended.

COMMENT USC-RULES-BK-2017-0003-0006. Ryan W. Johnson, Clerk of the Bankruptcy Court for the Northern District of West Virginia, made three points. First, he also critiqued the service requirement, predicting that a party seeking to compel abandonment would be forced to seek relief from the service and notice obligations (presumably because they are so burdensome), and that "may create unnecessary work for the party, clerk's office, and the court by unnecessarily multiplying proceedings." He is also concerned that a party seeking to limit the notice requirements "may be making a choice based on economic efficiency rather than one based on merit as both alternatives (expanded service or a request to limit service) may create unnecessary work." He suggested that service should be limited to the trustee or debtor in possession, and that other parties in interest should receive notice.

He next expressed concern that the rule "removes the clerk's office as the entity responsible for issuing the notice – even when the moving party is pro se." He believes the amended rule should incorporated the language used in Rule 2002 that "the clerk, or some other person as the court may direct, shall give" the notice.

He also suggested that, if notice and service of the motion are separated, "Official Form B420A is insufficient to effect proper notice of a motion to compel abandonment and a new Official Form may be required that, at a minimum, specifically identifies the property requested to be abandoned."

RESPONSE TO COMMENTS. With respect to his first point, the Subcommittee concluded that obtaining relief from the court from the service requirements under this Rule, assuming relief is ever appropriate, would not impose an undue burden on the party, the clerk or the court.

As to the Rule 2002 issue, Rule 2002 provides a detailed list of the matters with respect to which notice under the rule is given, and abandonment of property under Rule 6007 is not one of those matters. The proposed amendments therefore do not "remove[ ]" the clerk's office as the entity responsible for the notice; the clerk's office never had that responsibility. If a movant would be burdened by the notice and service obligations, the rule allows the movant to seek a court order modifying those obligations. The Subcommittee recommends no change in response to this comment.

In response to the comment suggesting modification of Form B420A, Form B420A is just a notice of motion, not specifically tailored to any particular relief. It (or its predecessor) has always been used for motions under Rule 6007(b). The actual motion would specifically identify the property requested to be abandoned. No change to the official forms is necessary. The Subcommittee recommends no change in response to this comment.

C. Computation of Time and Related Matters

COMMENT USC-RULES-BK-2017-0003-0013. Aderant CompuLaw made two comments relating to the 14-day period for objecting to the motion to compel abandonment.

Their first concern is based on the fact that, although Rule 6007(a) gives any party in interest 14 days after mailing of the notice of proposed abandonment by the trustee to object, Rule 6007(b) gives a party in interest 14 days after service of the motion to compel abandonment to object. They note that, under Rule 9006(f),

> "When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5(b)(2)(D), (E), or (F), F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a)."

The thrust of their comment seems to be that it is unfair to get three extra days to object under Rule 6007(b) after service of a motion to compel abandonment, when a recipient of a notice of proposed abandonment under Rule 6007(a), which may also be by mail, is not entitled to those three extra days under Rule 9006(f). Therefore, they suggest that either Rule 6007(a) be amended to replace the word "mailing" with "service," or Rule 6007(b) be amended to replace the word "service" with "mailing."

Their final comment is that the language of both Rule 6007(a) and 6007(b) should be amended to replace "within 14 days of" with "within 14 days after." They suggest that "within 14 days of" could include the 14-day period before the notice is mailed, or service of the motion is made, and "14 days after" is more precise.

RESPONSE TO COMMENT. Because a notice of proposed abandonment by the trustee is not "served" on anyone, the first proposal makes no sense. And because a motion must be "served" and not merely "mailed," the second proposal makes no sense. Unfair or not, Rule 9006(f) provides the extra time only after "service," not after "notice." Their discomfort is not really with Rule 6007(b), but with Rule 9006(f). No amendment has been proposed to Rule 9006(f). The Subcommittee recommends no change in response to this comment.

As to the use of "within 14 days after" instead of "within 14 days of" in Rules 6007(a) and (b), while the former is indeed more precise, the goal of the proposed amendment was to make the language of the newly revised Rule 6007(b) track the language of existing Rule 6007(a), and Rule 6007(a) uses the phrase "14 days of." Moreover, parties in interest are not likely to object to a proposed abandonment by the trustee or a motion to compel such abandonment before those parties in interest receive notice or service with respect to that action. The Subcommittee recommends no change in response to this comment.

D. Conclusion

The Subcommittee recommends that the Advisory Committee approve the proposed amendments to Rule 6007(b).

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: COMMENTS ON PROPOSED AMENDMENT TO RULE 9037 (PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT)

DATE: MARCH 11, 2018

Among the proposed rule amendments published for public comment last August was a proposed amendment to Rule 9037. It would add a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The texts of the published amendment and Committee Note follow in the agenda materials.

Three comments were submitted regarding this amendment. Because they raise three distinct issues, they are discussed separately below, along with the Subcommittee's recommendations.

Comment of Charles Ivey IV (BK-2017-0003-0005)

Mr. Ivey states that, while the proposed amendment to Rule 9037 would be a positive change, it should be expanded further to allow parties to submit a redacted document as an alternative to an existing sealed document that is subject to Rule 8009(f). Rule 8009(f) governs the handling on appeal of documents placed under seal by the bankruptcy court.[1] Without elaborating, Mr. Ivey says that Rule 8009(f) creates many unwanted consequences that significantly prolong and complicate bankruptcy appeals. As an alternative to the designation of

[1] Rule 8009(f) provides that a sealed document may be designated as part of the record on appeal, but that the clerk should not send it to the appellate court until that court grants a party's motion to accept the document under seal.

sealed documents to be included in the record on appeal, he suggests that proposed Rule 9037(h) also permit a party to request that a redacted version of the sealed document be submitted. If the bankruptcy court grants this motion to substitute the redacted document, he says, then the bankruptcy clerk's office would transmit the redacted document as part of the final record on appeal.

Mr. Ivey's suggestion would expand the amendment to address a situation that the Advisory Committee has not considered and that it was not attempting to deal with when it proposed the amendment. Documents can be placed under seal for reasons other than to protect against the disclosure of personal identifiers, which was the purpose behind the proposed addition of Rule 9037(h). To the extent that filed documents have been redacted according to Rule 9037(h), a later appeal should not present a problem. The redacted version could be designated as part of the record on appeal, and Rule 8009(f) would not need to be invoked.

The Subcommittee recommends that no changes be made to the published amendment in response to this comment.

Comment of Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2017-0003-0006)

Mr. Johnson says that a party who did not file the previous (unredacted) document but is requesting that a document be restricted from viewing due to the improper disclosure of personal identifying information should be specifically exempted from paying the redaction fee. Furthermore, he says, debtors or any entity whose personal information is wrongfully disclosed should not be required by Rule 9037(h) to file a redacted document, such as a proof of claim and its attachments, on behalf of the party originally filing the document.

He explains that currently many courts addressing this situation restrict viewing of the offending document at the request of the non-filing party and then enter an order directing the

original party to file a motion to redact, pay the fee, and attach the redacted version of the offending document. Mr. Johnson is concerned that these procedures might be contrary to proposed Rule 9037(h). He notes that the language regarding a court's ability to "order otherwise" is ambiguous because the language appears in subsection (h)(1) and then is repeated in subparagraph (h)(1)(C). He expresses concern that once a motion to redact is filed, it is unclear whether a court can alter the requirements of subparagraphs (h)(1)(A) and (B).

Judicial Conference policy addresses the issue Mr. Johnson raises concerning the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides as follows:

> Redaction Fee
>
> (a) Effective December 1, 2014, Item 21 of the Bankruptcy Court Miscellaneous Fee Schedule includes a fee for filing a motion to redact a record. The fee is $25 per affected case and is applicable to both open and closed cases. For example, if a creditor files an omnibus motion requesting to redact records in fifty cases, the total fee would be $1,250.
>
> (b) Item 21 specifies that the court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor.

Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Subcommittee concluded that there is no need for Rule 9037(h) to address the issue. Nor, given the discretionary policy, would it be appropriate for the rule to mandate an exemption.

The Subcommittee thought that Mr. Johnson had raised a valid point about the ambiguity of when the proposed rule allows a bankruptcy court to depart from its requirements. Subdivision (h)(1) begins with the language "Unless the court orders otherwise." That language

could be read to apply to all of (h)(1) were it not for the inclusion of the same language in subdivision (h)(1)(C), thereby possibly suggesting that similar authority is not granted under (h)(1)(A) and (B). The Subcommittee thought that there was no need to repeat the language in subparagraph (C). Eliminating it would avoid a possible ambiguity and would more clearly give a court flexibility to permit someone other than the filer of the unredacted document to file a motion to redact without attaching documents that the person may not have access to. But the Subcommittee thought the phrase would be better located at the beginning of the second sentence of subdivision (h)(1). **The Subcommittee therefore recommends that the first two sentences of subdivision (h)(1) be revised to read: "If an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must file a motion to redact. Unless the court orders otherwise, the movant must . . . ." It also recommends that "unless the court orders otherwise," be deleted from subdivision (h)(1)(C).**[2]

Comment of Chief Judge Robert E. Grant (Bankr. N.D. Ind.) (BK-2017-0003-0012)

Judge Grant suggests that there is a gap in proposed Rule 9037(h). He says that there is nothing in the rule that actually requires the filing of a redacted version of the original document as a condition to the restrictions upon public access. Under the rule as written, he says, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view. Accordingly, he contends that it is at least theoretically possible that a motion to redact could be submitted and granted but the redacted filing never made, with the result being that the original filing, as well as the motion to redact it, would be restricted from public view unless the court took further action.

[2] See the Reporter's Addendum at the end of this memorandum, which offers an alternative revision of Rule 9037(h) in response to this comment.

Judge Grant suggests that the rule be revised so that the restrictions upon public access do not occur until the motion is granted and a redacted or amended version of the original document is actually filed with the court. He explains that most courts readily respond to motions to redact, and the difference in timing between the immediate technological restrictions on public access, contemplated by the proposed rule, and the entry of an order granting or denying the motion to redact should be relatively slight. He further notes that the order granting the motion could state that restrictions upon public access would be put in place upon the filing of a redacted version of the original document which, if submitted along with the motion to redact, could occur immediately.

When the Advisory Committee initially considered how best to provide for the redaction of already filed documents, it was aware that bankruptcy courts were using a variety of procedures for handling these requests. Of special importance to the Advisory Committee was devising a procedure that would provide maximum protection from public view of unredacted documents. To avoid the possibility of a publicly available motion to redact highlighting the existence in court files of an unredacted document, the proposed rule requires immediate restriction on public access of the motion itself and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although the rule does not expressly say so, the underlying intent, and arguably the implication, of the rule is that the redacted document, which was filed with the motion, will then be placed on the record as a substitute for the original document that remains protected from public view. The first sentence of the penultimate paragraph of the Committee Note explains: "If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted."

To eliminate any uncertainty, the Subcommittee decided that the best way to respond to the issue Judge Grant raises is to **revise the second sentence of subdivision (h)(2) to read, "If the court grants it, the redacted document must be filed, and the restrictions on public access to the motion and unredacted document remain in effect until a further court order." The Subcommittee does not recommend, however, accepting the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.**

The Committee Note would also be revised to reflect the changes being made to the rule. Those revisions are indicated below.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion must identify by location on the case docket or claims register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

Unless the court orders otherwise, ~~T~~the moving party must attach to the motion a copy of the original document showing the proposed redactions. The attached document must otherwise be identical to the one previously filed. The court, however, may relieve the movant of this requirement in appropriate circumstances, for example when the movant was not the filer of the unredacted document and does not have access to it. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted

document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the redacted document must be filed ~~should be placed on the docket~~, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

Reporter's Addendum

In the course of preparing this memorandum, I was reminded of the reason that the clause, "Unless the court orders otherwise," was placed at the beginning of the first sentence of Rule 9037(h). As the Committee Note explains, the intent was to give courts the flexibility to alter the procedure used for post-filing redactions in special situations, such as when a movant seeks to redact a large number of documents. Moving that clause to the beginning of the next sentence would arguably eliminate that flexibility. Rather than begin two sentences in a row with the same clause, I suggest that Rule 9037(h)(1) be reorganized to read as follows:

Rule 9037. Privacy Protection for Filings Made with the Court

* * * * *

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion; Service.* Unless the court orders otherwise, if an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must:

(A) file a motion to redact;

(B) attach to the motion a copy of the previously filed, unredacted document, showing the proposed redactions;

(C) include in the body of the motion the docket or proof-of-claim number of the previously filed document; and

(D) serve the motion and attachment on the debtor, debtor's attorney, trustee if any, United States trustee, filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

(2) *Restricting Public Access to the Unredacted Document.* The court must promptly restrict public access to the motion and the unredacted document pending its ruling on the motion. If the court grants it, the redacted document must be filed, and the restrictions on public access to the motion and unredacted document remain in effect until a further

court order. If the court denies it, the restrictions must be lifted, unless the court orders otherwise.

Although Judge Ikuta and Judge Goldgar have reviewed and approved this revision of Rule 9037(h)(1), the full Subcommittee did not have an opportunity to review it.

Rule 9037. Privacy Protection for Filings Made with the Court

* * * * *

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion; Service.* Unless the court orders otherwise, if an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must file a motion to redact. The movant must:

(A) attach a copy of the previously filed, unredacted document, showing the proposed redactions;

(B) include the docket or proof-of-claim number of the previously filed document; and

(C) unless the court orders otherwise, serve the debtor, debtor's attorney, trustee if any, United States trustee, filer of the unredacted

document, and any individual whose personal identifying information is to be redacted.

(2) *Restricting Public Access to the Unredacted Document.* The court must promptly restrict public access to the motion and the unredacted document pending its ruling on the motion. If the court grants it, these restrictions on public access remain in effect until a further court order. If the court denies it, the restrictions must be lifted, unless the court orders otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion

must identify by location on the case docket or claims register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

The moving party must attach to the motion a copy of the original document showing the proposed redactions. The attached document must otherwise be identical to the one previously filed. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: COMMENTS ON PROPOSED AMENDMENTS TO RULES 2002(g) AND 9036, AND OFFICIAL FORM 410

DATE: MARCH 11, 2018

On the Advisory Committee's recommendation, the Standing Committee in August published for public comment proposed amendments to two rules and to one Official Form that are intended to expand the use of electronic noticing and service in the bankruptcy courts. The proposed amendments to Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The Committee Note explains that a "creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

As published, Rule 9036 (Notice or Service Generally) would be amended to allow not only clerks but also parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system. It would also allow service or noticing on any person by any electronic means consented to in writing by that person. Under the proposed amendment, electronic service would be complete upon filing or sending, but it would not be effective if the filer or sender receives notice that the electronic service was not received by the person to be served.

Finally, Official Form 410 (Proof of Claim) would be amended to include a check box for opting into email service and noticing. It would instruct the creditor to check the box "if you would like to receive all notices and papers by email rather than regular mail."

Four sets of comments were submitted that address these proposed amendments. They were submitted by Ryan Johnson (Clerk, Bankr. N.D.W. Va.); Chief Judge Kathy Surratt-States (Bankr. E.D. Mo.); Eva Roeber (Chief Deputy Clerk, Bankr. D. Neb.) (on behalf on the Bankruptcy Noticing Working Group); and jointly by the Bankruptcy Judges Advisory Group and the Bankruptcy Clerks Advisory Group ("BJAG/BCAG"). Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised several substantial issues about the published amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions. Summaries of each of the comments are attached to this memorandum.

Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, **the Subcommittee recommends that the amendments to Rule 2002(g) and Official Form 410 be held in abeyance, but that the Advisory Committee give its final approval to the amendments to Rule 9036, with some minor revisions suggested by the Subcommittee and the reporters**.

This memorandum proceeds with a discussion of the comments on the three identified topics and then explains the rationale for the Subcommittee's recommendation.

Technological Feasibility

All four sets of comments state that it is not currently feasible to implement the proposed email opt-in system. They state that without time-consuming software programming and testing,

the Bankruptcy Noticing Center ("BNC"), which is responsible for sending court notices by means other than CM/ECF, would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to BNC by clerk's office personnel, and, as Judge Surratt-States says, "With no work measurement credit to accompany this workload increase, it is unrealistic to assume that courts will take on these duties without considerable difficulty."

Writing on behalf of the Bankruptcy Noticing Working Group, Ms. Roeber explains the technology problem as follows:

> To effectuate the Committee's proposed amendments, the judiciary will have to undertake a great deal of programming and reconfiguration of the Case Management/Electronic Case Files (CM/ECF) and the Bankruptcy Noticing Center (BNC) systems, especially for the amendments to Rule 2002(g)(1) and the Proof of Claim form. For instance, the BNC and CM/ECF systems must be altered to receive and process email addresses submitted on the proof of claim/interest under Rule 2002(g)(1), handle a greater volume of bounced back emails, and to ensure correct email addresses on case mailing lists, among other changes.

Similarly, the BJAG/BCAG comment says that "[w]hile we are pleased with the Committee's direction in promoting electronic noticing rules enhancements, there is currently no technically feasible way in either the judiciary's Case Management/Electronic Case Filing (CM/ECF) system or the Bankruptcy Noticing Center (BNC) contract to manage creditor email opt-in."

Both Ms. Roeber and BJAG/BCAG state that the programming and testing that would be required to implement the proposed opt-in rule most likely could not be undertaken for some time. They explain that resources are currently being devoted to implementing the NextGen system for the bankruptcy courts, and in addition the contract with BNC will expire this fiscal year and will be "recompeted." In light of these complications, these commenters ask that the effective date of the proposed amendments to Rule 2002(g) and Official Form 410 be delayed for two years from final approval, that is, until December 1, 2021. Judge Surratt-States also

expresses the need for delay in the effective date of those amendments. Ms. Roeber adds that the amendments to Rule 9036 could go into effect within the normal timeframe.

In order to gain a better understanding of the challenges of implementing the proposed email opt-in provision, on February 20 Judge Bernstein, Ken Gardner, Scott Myers, Bridget Healy, and the reporter spoke with Gary Streeting and Dustin Rowe of the Administrative Office of the Courts ("AO"). They work with BNC and the Bankruptcy Noticing Working Group and agreed that a delay in implementation is needed. In follow-up correspondence, Mr. Streeting explained why the current technology would have to be changed:

> The technological issue arises because the process is automated. CM/ECF is currently programmed to capture a physical address that is entered at the time of filing the proof of claim form and add it to a case mailing list stored in the system. When a document is entered on the docket, one of the options that the clerk's office has is BNC service. If this is selected, the notice is, through an automated process, zipped into a file along with the address list and other information about the notice. The file is then automatically retrieved by the BNC, whose system then (through another automated process) reads the addresses in the file and determines whether to send it to the physical address, send it to an electronic address on file with the BNC, or send it to a preferred physical address.
>
> The CM/ECF system is not currently programmed to pull an email address from a proof of claim for noticing. It would need to be programmed to do this. It would also need to be programmed to include an electronic address in the zipped file sent with the notice to the BNC. It would also possibly need to be programmed to suppress or flag the email address from the proof of claim if it conflicts with an email address on file for a registered user in the CM/ECF system. After this, the BNC system would need to be programmed to recognize the email address in the file received from CM/ECF, and it would have to be programmed to route the notice either to that email address or to ignore that email address if there is an address on file with the BNC. This is all assuming that the BNC will be the most efficient vehicle to send the notice rather than the CM/ECF system (more discussion would need to be had with the people involved in programming the changes to determine this, but it appears so given the sorting that would need to take place using the BNC system's information).

Priorities

Three of the submitted comments expressed concerns about the possibility that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions that allow a creditor to designate an address for notice and service. Section 342(f) of the Bankruptcy Code allows a creditor to designate an address to be used in all bankruptcy courts or in specified ones and requires any notice from the court to be sent to that address unless the creditor has provided a different address for that particular chapter 7 or 13 case, as § 342(e) allows. Rule 2002(g)(1)(A) allows a creditor to designate on a proof of claim a mailing address to which all notices in a case shall be sent. Under the published amendments, this provision would be expanded to include email addresses by deleting references to "mail" and "mailing." And Rule 2002(g)(4) provides that, notwithstanding Rule 2002(g)(1)-(3), an entity may specify the manner and address to which notices should be sent by a notice provider, and "[t]hat address is conclusively presumed to be the proper address for the notice[s]" sent by that notice provider. Finally, Rule 9036 currently allows an entity to request in writing that notices that are sent by the clerk or some other person designated by the court be sent by electronic transmission instead of mail. The published amendments would make this rule applicable to notice and service by the clerk or any other party and would authorize notice and service on a registered user by means of CM/ECF. It would also allow notice and service by any other electronic means that the person to be served consents to in writing.

BNC currently implements these provisions as follows. Consistent with Code § 342(f) and Rule 2002(g)(4), a creditor can fill out a form designating a preferred mailing address for

cases in all bankruptcy courts or in courts that the creditor specifies. If the name on the form matches a name on the court-provided mailing list in a case (usually derived from the debtor's schedules), BNC will substitute the preferred address and send a notice there instead. The form alerts the creditor to the fact that "[n]otices generated by trustees, attorneys, debtors and other entities may continue to be mailed to the address of record filed by the debtor."

Under the authority granted in Rule 9036, BNC also has created the Electronic Bankruptcy Noticing program ("EBN"). To participate, an entity fills out a form requesting notices sent by BNC to be sent by email to a designated email address. The same matching process described above is used to substitute the email address for the mailing address provided by the court. As with the preferred address, EBN just applies to notices sent by BNC. Clerk's offices use email addresses for registered users of the CM/ECF system based on the system's user agreement, which specifies that registering for CM/ECF constitutes consent to receive court notices through the system.

The concern that the comments raise is that it is not clear how an email address on a proof of claim and the checked opt-in box affect the existing priorities and thus it is not clear which email address prevails if there are conflicting ones. Ms. Roeber suggests the following order of priorities:

1. CM/ECF email address for registered users;
2. BNC email address; and
3. Proof-of-claim opt-in email address.

To establish this hierarchy, Ms. Roeber suggests changing the first sentence of the proposed amendment to Rule 9036 to read, "Whenever these rules require or permit sending a notice or serving a paper, <u>whether</u> by mail <u>or any other means</u>, the clerk or other party may send

the notice to – or serve the paper on – a registered user by filing it with the court's electronic filing system." She then suggests changing the first sentence of Rule 2002(g)(1) to read, "Subject to Rule 9036, ~~N~~notices required to be mailed or otherwise delivered under Rule 2002 . . . ." Those provisions would give preference to the CM/ECF address. Then to subordinate the proof-of-claim email address to an EBN email address, she suggests stating in the Committee Note to Rule 2002(g) that providing an email address on a proof of claim or other filed request pursuant to Rule 2002(g) does not constitute consent to electronic notice or service under Rule 9036. This statement would be contrary to the proposed Committee Note accompanying the amendments to Rule 2002(g), which states, "A creditor's election on the proof of claim, or an equity securityholder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

Wording Suggestions

In their comments Ms. Roeber and BJAG/BCAG suggest a change in the wording of the opt-in instruction on the proof-of-claim form in order to clarify the scope of the consent being given. Ms. Roeber says that the form should "clarify that an electronic noticing election and email address provided on the form are applicable only in the case in which that form was submitted. It should also be clarified that not all papers in the case will be sent to the claimant by email." She endorses proposed language submitted by BJAG/BCAG. They suggest that the language accompanying the opt-in box be modified as follows:

> Check this box if you would like to receive all notices and papers that you are entitled to receive in this case by email instead of regular mail. Such notices and papers do not include any complaint or motion required to be served in accordance with Rule 7004.

Mr. Johnson comments that Rule 9036 should make clear that the clerk's office is not responsible for notifying parties that their attempted service by CM/ECF failed.

The Subcommittee's Discussion and Basis for its Recommendation

The Subcommittee discussed the comments during its conference call on March 8. Members of the Subcommittee accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. Some members were concerned, however, about approving the rule and form amendments now but delaying their effective date until 2021. During that more-than-three-year interim, technological advances might result in better means of employing electronic service and noticing than what is currently proposed.

While the commenters sought a delay in implementation, not a rejection of the proposed amendments, several Subcommittee members thought that the comments about determining priorities among conflicting creditor addresses complicated the issue. Parties do not have access to BNC's database of email addresses, so the proof-of-claim opt-in was proposed in order to facilitate email service by parties on creditors who are not registered users of CM/ECF. Thus, assuming that the email address on the proof of claim would be accessible to parties, unlike the EBN email address, the Advisory Committee's intent in proposing the amendments would be not served by having an EBN address prevail over a conflicting proof-of-claim address. Likewise, the decision to opt in to email noticing and service needs to be treated as consent in order to be consistent with § 342(e) and (f) and Rule 9036. Thus, the Subcommittee did not favor Ms. Roeber's proposed revision of the Committee Note to Rule 2002(g) to state that that providing an

email address on a proof of claim or other filed request pursuant to Rule 2002(g) does not constitute consent to electronic notice or service under Rule 9036.

The discussion of possibly conflicting email addresses pointed out to the Subcommittee that this bankruptcy rules issue needs to be considered in coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Ideally there would be one method for a creditor to designate an email address, with access to the information given to all persons who will be sending notices or serving papers. The Committee on Court Administration and Case Management ("CACM") has a subcommittee that is looking at BNC issues, and Judge Bernstein is a liaison from the Advisory Committee to that group. Whether working through the CACM subcommittee or through consultation with the relevant groups, the Subcommittee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be held up for now so that a broader perspective could be gained on how best to facilitate electronic service by parties on other parties that are not registered users of CM/ECF.

The Subcommittee decided that the reasons for holding in abeyance the amendments to Rule 2002(g) and Official Form 410 do not apply to the proposed amendments to Rule 9036. The latter amendments would (1) allow both clerks and parties to serve and give notice by CM/ECF to registered users; (2) allow other means of electronic service and noticing to be used for parties that give their written consent to such service and noticing; and (3) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with the amendments to Rule 7005's incorporation of amendments to Civil Rule 5 (Serving and Filing Pleadings and Other Papers) and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus there does not seem to be any reason to hold them up,

and the Subcommittee recommends that the Advisory Committee approve the amendments to Rule 9036, with the following revisions:

- Change the last sentence of the rule to refer to "any pleading or other paper [rather than complaint or motion] to be served in accordance with Rule 7004" because some objections, pleadings other than complaints (for insured depository institutions), and chapter 13 plans must be served in that manner.
- Add the following sentences to the Committee Note in response to Mr. Johnson's comment: "The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service." Identical language appears in the Committee Note to Rule 8011.
- Add "or notice" after "service" in the third sentence of the rule to be consistent with the wording of the remainder of the rule.[1]

With those changes, Rule 9036 as amended would read as follows:

Rule 9036. Notice or Service Generally ~~by Electronic Transmission~~

Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk or other party may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that

[1] This wording change is proposed by the reporters and was not reviewed by the full Subcommittee.

the person consented to in writing. In either of these events, service or notice is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.~~the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.~~

Committee Note

The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery has increased since the rule was first adopted. The amendments recognize the increased utility of electronic delivery, with appropriate safeguards for parties not filing an appearance in the case through the court's electronic-filing system.

The amended rule permits electronic notice or service on a registered user who has appeared in the case by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. The rule does not make the court responsible for notifying a person who filed a paper with the

court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Attachment

Comments on Proposed Amendments to Rules 2002(g), 9036, and Official Form 410

1. **Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2017-0003-0006)** – Rule 9036 should clarify that the clerk's office is not responsible for notifying parties that their attempted service on particular entities by means of the court's electronic-filing system failed. The proposed provision, as well as the proposed amendment to Civil Rule 5, may require a technological change that would generate an automated certificate of service that details the NEFs that were "bounced-back" to the court's email account. Those bounce-back NEFs need to be associated with the case participant's user account.

It is not clear that systems or programs are in place that could implement the proposed changes to Rule 9036 and Official Form 410. Furthermore, I do not recommend making a proof-of-claim holder a case participant by including an email address on a proof of claim because: (a) inadvertently including such an email address may have unintended consequences, and (b) programs and services already exist for providing non-attorney case participants with NEFs, which, after the anticipated effective date of Rule 5 and 9036, will also constitute a method of service between private parties. Regarding court orders and notices, creditors are already encouraged to register for the BNC's EBN program. It is not apparent whether the insertion of an email address on a proof of claim form is redundant of the EBN program, or alternatively, would register the email address with the BNC to make the creditor an EBN recipient. EBN registration should be the responsibility of the BNC, not the local court. Also, it is unclear how the insertion of an email address for notice on a proof of claim is to interact with the mailing list, if at all. It is not apparent whether an email address is treated as (1) an additional address on the mailing list, (2) a change of address that makes the physical address obsolete, or (3) is to have no effect.

2. **Chief Judge Kathy Surratt-States (Bankr. E.D. Mo.) (BK-2017-0003-0009)** – The proposed changes to Rule 2002(g) and Official Form 410, although well intentioned, would be unworkable and impracticable. There are no fields in the CM/ECF database that currently exist that would allow a deputy clerk to enter data that identifies an opt-into option for electronic notice and service and an e-mail address. Moreover, an interface would need to be built between CM/ECF and the Bankruptcy Noticing Center (BNC) so that BNC can receive and store that data. Both of those activities are time and labor intensive and will require extensive coordination. It is entirely unrealistic that this could happen by December 1, 2018. It is also unclear what the relationship would be between the email address listed on the proof of claim and the preferred creditor address maintained by the BNC. If there's a conflict, which governs? Furthermore, bounce backs are likely to be a problem. The person who files a proof of claim for a creditor may give her own email address, which will no longer be valid if the filer leaves that job. Finally, the proposed amendments will impose additional duties on the clerk's office: checking the proof of claim for an email address and opt-in checkmark and manually entering the email address in the CM/ECF system. With no work measurement credit to accompany this workload increase, it is unrealistic to assume that courts will take on these duties without considerable difficulty.

3. **Eva Roeber (Chief Deputy Clerk, Bankr. D. Neb.) (BK-2017-0003-0011) (on behalf on the Bankruptcy Noticing Working Group)** – The proposed changes to Rule 2002(g) and Official Form 410 should be delayed two years to allow sufficient time for the courts to implement it. The judiciary will have to undertake a great deal of programming and reconfiguration of the CM/ECF and the BNC systems in order to receive and process email addresses submitted on proofs of claim under Rule 2002(g)(1), handle a greater volume of bounced back emails, and ensure correct email addresses on case mailing lists, among other changes. Further confusion could be caused if the BNC vendor changes, as the current contract is being rebid. The amendments to Rule 9036 could go into effect within the normal timeframe.

The amendments to the proof-of-claim form should be modified to indicate that the opt-in for service and noticing through CM/ECF only applies to the case in which the claim is filed. It should also be stated that the claimant will not receive all papers in the case by email, but only those that creditors currently receive in paper form.

The proposed amendments could lead to conflicts between requests for electronic noticing submitted by a given creditor in different manners at different times under different rules. The CM/ECF email address submitted pursuant to Rule 9036 should take precedence over electronic addresses submitted in the other manners so that redundant notices can be eliminated and notices can be sent in the least expensive way. This would prevent confusion and save money. Therefore, amended Rule 9036 should be revised to read, "Whenever these rules require or permit sending a notice or serving a paper, whether by mail or any other means, the clerk or other party may send the notice to – or serve the paper on – a registered user by filing it with the court's electronic filing system." Amended Rule 2002(g)(1) should be revised to read, "Subject to Rule 9036, ~~N~~notices required to be mailed or otherwise delivered under Rule 2002 …."

An electronic address submitted to the BNC for Electronic Bankruptcy Noticing should come next in priority. Notice recipients spend a great deal of time and money configuring their systems and working with the BNC to make sure that notices are re-directed to them in the manner and at the electronic address they want. The instruction to the proof-of-claim form should be revised to state, "If you have already registered for Electronic Bankruptcy Noticing with the Bankruptcy Noticing Center or are a registered CM/ECF user with full filing privileges, notices from the court will continue to be sent to your electronic address already on file and not to the email address on this form. If an email bounce-back occurs for a notice that the court sends to an email address provided on a proof of claim, the email address will no longer be used by the court or made available by the court to other parties."

The proof-of-claim email address would come third in the order of priorities. This could be made clear by stating in the Committee Note to Rule 2002 that providing an email address on a proof of claim or other filed request pursuant to Rule 2002(g) does not constitute consent to electronic notice or service under Rule 9036.

4. **Bankruptcy Judges Advisory Group and Bankruptcy Clerks Advisory Group (BK-2017-0003-0010)** – The effective date of amended Form 410 should be delayed until December 1, 2021. There is currently no technically feasible way in either the judiciary's CM/ECF system or the BNC contract to manage creditor email opt-in. To complicate the issue further, CM/ECF

programming resources are almost entirely devoted to advancing the Next Generation CM/ECF initiative and the current BNC contract will expire at the end of this fiscal year and is currently being recompeted.

To clarify the scope and effect of the opt-in on the proof-of-claim form, the proposed language should be modified as follows:

> Check this box if you would like to receive all notices and papers that you are entitled to receive in this case by email instead of regular mail. Such notices and papers do not include any complaint or motion required to be served in accordance with Rule 7004.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: FURTHER CONSIDERATION OF PROPOSED AMENDMENT TO RULE 2004(c)

DATE: MARCH 12, 2018

At the fall 2017 Advisory Committee meeting, the Subcommittee recommended the publication of an amendment to Rule 2004(c) to impose a proportionality requirement on requests for the production of documents and electronically stored information ("ESI") in connection with Rule 2004 examinations. This recommendation was made in response to a suggestion submitted by the Business Law Section of the American Bar Association on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process ("ABA Committee").

As proposed, the amendment would have included the proportionality factors listed in Civil Rule 26(b)(1) and one additional factor, as well as additional amendments to conform the rule to the current version of the subpoena rules—Civil Rule 45 and Bankruptcy Rule 9016. The proposed amended provision considered by the Advisory Committee read as follows:

Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS AND ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as

provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court ~~for the district in which the examination is to be held~~ in which the case is pending if the attorney is admitted to practice in that court ~~or in the court in which the case is pending~~. A request for the production of documents or electronically stored information in connection with an examination under this rule shall be proportional to the needs of the case and of the party seeking production, in light of the following factors, to the extent relevant: the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving issues, whether the burden or expense of the proposed discovery outweighs its likely benefit, and the purpose for which the request is being made.

* * * * *

After a full discussion of the proposed amendment at the Advisory Committee meeting, the Subcommittee was asked to give it further consideration in light of the views expressed at the meeting. It now recommends that the Advisory Committee approve for publication a modified version of the prior proposal as set forth below.

Last Fall's Advisory Committee Discussion

Members of the Advisory Committee expressed differing views about whether consideration of proportionality is appropriate for Rule 2004 examinations and what factors a bankruptcy court should consider in assessing proportionality. Some members said that the current rule is working and that Rule 2004 examinations are supposed to be broad, so no additional limitation should be imposed. Another member suggested that proportionality should

be required for requests for ESI but not for paper documents. Others agreed with the Subcommittee that a proportionality requirement should be imposed both for requests for documents and for ESI. A judge member said that disputes arise concerning the scope of document and ESI requests in connection with Rule 2004 examinations and that it would be helpful to have a standard in the rule that imposes some limit. The Associate Reporter said that it seemed that the main concern expressed by those supportive of the proposed amendment was that documents and ESI are sometimes sought for an improper purpose, and she suggested that any amendment should focus on that concern.

In a straw poll, the Advisory Committee voted 6 to 5 in favor of the concept of adding a proportionality requirement, although specific language was not agreed upon. There seemed to be general support for the other proposed amendments to Rule 2004(c), which would add references to ESI and conform the rule to the amended subpoena rules.

The Subcommittee's Reconsideration and Recommendation

The Subcommittee reconsidered the proposed amendments to Rule 2004(c) during its February 7 conference call, and it continues to support the imposition of a proportionality limitation on Rule 2004(c) requests for documents and ESI. Although Rule 2004 examinations are permitted to be "fishing expeditions," there does not seem to be a reason why the rule should require the production of documents and ESI when the costs and efforts of doing so are disproportionate to the needs of the case.

Because the Subcommittee was asked to reconsider its proposed amendment, it discussed alternative approaches to the amendments previously presented to the Advisory Committee. These included refining the list of proportionality factors in Civil Rule 26(b)(1) to eliminate ones that would not be applicable frequently to Rule 2004 examinations; providing less specific

guidance about the factors to be considered in assessing proportionality; limiting a proportionality requirement to requests for ESI, rather than applying it to all document requests; and imposing a limitation other than proportionality, such as disallowing requests made for an improper purpose.

After a full discussion, the Subcommittee agreed that in order to be consistent with the notion that Rule 2004 examinations are supposed to be broad ranging and relatively unconfined, an amendment to Rule 2004(c) should be proposed that would incorporate the concept of proportionality but give bankruptcy judges flexibility in interpreting and imposing that requirement. That approach could be expressed by requiring that a request for the production of documents or electronically stored information in connection with a Rule 2004 examination be proportional to the needs of the case and of the party seeking production, but without specifying the factors that should be considered in making that determination. That formulation is similar to the ABA Committee's suggested wording—"Proportionality considerations apply to a request for the production of documents or electronically stored information in connection with a Rule 2004 examination."—without being as vague.

The Subcommittee therefore recommends that the Advisory Committee approve for publication the amendments to Rule 2004(c) and the Committee Note that follow on the next page.

Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS AND ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court ~~for the district in which the examination is to be held~~ in which the case is pending if the attorney is admitted to practice in that court ~~or in the court in which the case is pending~~. A request for the production of documents or electronically stored information in connection with an examination under this rule shall be proportional to the needs of the case and of the party seeking production.

* * * * *

Committee Note

Subdivision (c) is amended in three respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R. Civ. P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued

from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Third, subdivision (c) now requires parties requesting the production of documents and electronically stored information in connection with a Rule 2004 examination to limit the request to what is proportional to the needs of the case and the requesting party's needs. While the scope of an examination under this rule remains broad, as spelled out in subdivision (b), it is not unlimited. In order to prevent unnecessary or unduly burdensome Rule 2004 discovery, subdivision (c) now requires parties seeking the production of documents and electronically stored information under this rule to keep their requests within the bounds of proportionality as determined by the scope of Rule 2004 and the circumstances of the case. Proportionality considerations are already applicable to the scope of discovery in adversary proceedings and contested matters under Rules 7026 and 9014, which make F.R. Civ. P. 26 applicable. But because Rule 2004 examinations are permitted to be broader in scope than discovery in individual adversary proceedings and contested matters, subdivision (c) does not specify or limit the factors to be considered in determining proportionality.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: 17-BK-D PROPOSED AMENDMENT TO RULE 9019 ON MEDIATION

DATE: MAR. 9, 2018

The Mediation Committee of the American Bankruptcy Institute has proposed an amendment to Fed. R. Bankr. Pro. 9019 explicitly to empower bankruptcy courts to provide for mediation of any dispute arising in a bankruptcy case. A link to the letter from the co-chairs of the Mediation Committee is attached as Exhibit A. The Mediation Committee suggests the insertion of the following clause (d) in Rule 9019:

> (d) MEDIATION. The court may assign to mediation any dispute arising in a bankruptcy case, whether or not an adversary proceeding or contested matter is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter, or a dispute not yet pending before the court may also stipulate to mediation, subject to court approval. The mediation shall be subject to the limitations on admissibility contained in Fed. R. Evid. 408 and such additional confidentiality provisions as may be applicable under applicable law and governing local rules. Without limiting the foregoing, the mediator and the mediation participants in any mediation shall be prohibited from divulging, and may not be compelled to testify concerning, any oral or written information disclosed by the mediation participants or by witnesses in the courts of the mediation process, nor shall such information be admissible as evidence for any propose in any arbitral, judicial or other proceeding. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation. Each district shall adopt a local bankruptcy rule consistent with this provision implementing appropriate procedures for the use of mediation in all pending cases.

The Subcommittee examined the proposed amendment and concluded that, before proceeding further (if at all), it wished to hear the views of the entire Advisory Committee. Among the concerns expressed at the meeting of the Subcommittee were the following:

1. Is an amendment with respect to mediation necessary?

Bankruptcy courts have been ordering mediation in bankruptcy cases for many years. *See, e.g.*, *In re* Barney's Inc., 200 B.R. 527 (Bankr. S.D.N.Y. 1996); *In re* Raytech Corp., 190 B.R. 149 (Bankr. D. Conn. 1995); *In re* Kovalchik, 175 B.R. 863 (Bankr. E.D. Pa. 1994); *In re* Edgewater Sun Spot, Inc., 174 B.R. 626 (Bankr. N.D. Fla. 1994). It is generally accepted that "[a]mple inherent authority exists for bankruptcy courts to compel parties to participate in ADR" because they, like all other courts, have the power to manage and control their dockets. *See* Ralph R. Mabey, Charles J. Tabb, & Ira S. Dizengoff, Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and Other Forms of ADR, 46 S.C. L. Rev. 1259 (1995).

Many districts have already adopted local rules with respect to alternative dispute resolution, including mediation. A link to a compilation of such rules as of 2013 is attached as Exhibit B. Most of the districts that did not have a rule in 2013 have adopted one since. Those rules seem to be operating efficiently. There may be no need to layer a federal bankruptcy rule on top of those existing local rules and practices.

2. Should districts without local rules be forced to adopt one?

The Subcommittee expressed reluctance about mandating the adoption of a local rule regarding mediation in those districts where one does not exist, as provided in the last sentence of the proposed amendment, or requiring any district to conform its local rule to the mandates of a federal rule.

3. Should courts be allowed to mandate mediation without the parties' consent?

The first sentence of the proposed amendment says that the court "may assign" a dispute to mediation, which can be interpreted to allow mandatory mediation over the objection of one or more parties to the dispute. Many local rules provide for mediation only with consent, and there was some opposition to allowing mediation without consent.

4. Should mediation be permitted of disputes other than adversary proceedings?

Under the Alternative Dispute Resolution Act of 1998 (ADRA), 28 U.S.C. §§ 651 *et seq.*, Congress directed that:

> Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

Id. at § 651(b). The Act amended the Judicial Improvements and Access to Justice Act of 1988 (JIAJA), PL 100–702, which gave district courts statutory authorization to adopt local rules on the use of arbitration in any civil action, including adversary proceedings in bankruptcy.

The proposed amendment expands the scope of mediation beyond adversary proceedings to contested matters and "any dispute arising in a bankruptcy case." Even assuming that the statute does not preclude the adoption of a rule by the bankruptcy court as opposed to the district court (and the Subcommittee believes the ADRA does not bar bankruptcy court action), there was some concern about a court using mediation with respect to a dispute that was not yet properly before the court. Others thought that this was an appropriate context for mediation, because mediation might resolve the dispute without the need for litigation.

EXHIBIT A

http://www.uscourts.gov/sites/default/files/17-bk-cl-suggestion_american_bankruptcy_institute_0.pdf

EXHIBIT B

http://cbinsolvency.com/wp-content/uploads/2017/02/Compendium-of-Local-Rules-2013.pdf

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: SUGGESTION REGARDING RULE 2013

DATE: SEPTEMBER 1, 2017

The Advisory Committee has received a suggestion from Kevin P. Dempsey, Clerk of the Bankruptcy Court for the Southern District of Indiana. The Suggestion (17-BK-A) questions whether there is a need any longer for Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals). Mr. Dempsey proposes that the Committee consider substantially modifying the rule to eliminate its requirements that the clerk maintain a public record of awarded fees and make an annual summary available to the public and the United States trustee.

Part I of this memorandum discusses the Suggestion in greater detail, and Part II provides background information about the history and purpose of Rule 2013. Part III then discusses further research that the Subcommittee believes should be undertaken before deciding whether to propose an amendment to Rule 2013.

I. The Suggestion

Rule 2013(a) requires the clerk to maintain a public record of all fees awarded by the court to (1) trustees; (2) attorneys and other professionals employed by trustees; and (3) examiners.[1] The record must identify each case in which fees were awarded and indicate for each case who received the fees and in what amount. Subdivision (b) requires the clerk annually to prepare a summary of the record by individual or firm name, indicating the total fees each was

[1] Rule 2013(a) says that the requirements do not apply to debtors in possession, and the Committee Note says that the rule is inapplicable to standing trustees in chapter 13 cases.

awarded during the year. The summary must be made available without charge to the public, and a copy of it must be transmitted to the U.S. trustee.

Mr. Dempsey says, based on his experience and discussions with other clerks, that compliance with Rule 2013 "is spotty." He states that during his 17 years in the U.S. trustee's office, such a report was never submitted to the office, nor was it ever requested. And during his 10 years as clerk, he says, no one has ever requested to see the Rule 2013 record.

Mr. Dempsey suggests that CM/ECF has replaced the need for the type of record that the rule calls for. Information about fee awards is available electronically, and reports can be generated on demand. He says that his office would provide such a report without charge to anyone who asked. To ensure that all courts would follow a similar practice, he proposes that, rather than being abrogated, Rule 2013 be amended to require the clerk to make information about fees awarded to professionals available upon request, perhaps with a limit on the time period covered by the report. He suggests that the information might be expanded to include fees awarded all professionals, including those employed by chapter 11 debtors in possession.

II. The Background and Purpose of Rule 2013

The original Committee Note to Rule 2013 states that its purpose "is to prevent what Congress has defined as 'cronyism.'" The Committee Note goes on to explain as follows:

> Appointment or employment, whether in a chapter 7 or 11 case, should not center among a small select group of individuals unless the circumstances are such that it would be warranted. . . . This rule is in keeping with the findings of the Congressional subcommittees as set forth in the House Report of the Committee on the Judiciary, No. 95-595, 95th Cong., 1st Sess. 89-99 (1977). These findings included the observations that there were frequent appointments of the same person, contacts developed between the bankruptcy bar and the courts, and an unusually close relationship between the bar and the judges developed over the years. A major purpose of the new statute [the Bankruptcy Code] is to dilute these practices and instill greater public confidence in the system. Rule 2013 implements that laudatory purpose.

FED. R. BANKR. P. 2013 advisory committee's note (1983); *see also In re* Smith, 524 B.R. 689, 699 (Bankr. S.D. Tex. 2015) (noting Rule 2013's purpose of preventing cronyism). The Collier treatise adds that the reports under the rule "are intended for use by the United States trustee in ensuring against disproportionate employment or compensation of some professionals." 9 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 2013.03 (16th ed. 2017).

While there is very little case law concerning Rule 2013, in one recent opinion Judge Christopher Klein, writing for all of the bankruptcy judges in the Eastern District of California, includes information about fees awarded to chapter 7 trustees in the district during the year 2013. He says that the data is drawn from public records maintained by the clerk under Rule 2013. *In re* Scoggins, 517 B.R. 206, 209 (Bankr. E.D. Cal. 2014) (en banc); *see also In re* Hutter, 221 B.R. 632, 638-39 (Bankr. D. Conn. 1998) (noting the clerk's responsibility under Rule 2013 to keep records of trustee compensation).

III. The Subcommittee's Discussion

Members of the Subcommittee noted Rule 2013's goal of providing transparency regarding compensation in the bankruptcy courts and expressed reluctance to amend or abrogate the rule without having a record to support such a decision. Before deciding whether the Suggestion should be pursued, the Subcommittee wants to gather more information about current compliance with Rule 2013. Mr. Dempsey asserts that it is spotty, but a more systematic survey of districts might reveal otherwise. The Subcommittee has therefore asked Dr. Molly Johnson of the Federal Judicial Center to survey bankruptcy clerks regarding their compliance and experience with Rule 2013. She will also seek information from a group of bankruptcy scholars to determine the extent to which information reported under Rule 2013 is useful for research purposes. The Subcommittee will look further to information provided by Ramona Elliott

regarding U.S. trustees' need for and use of the summary report mandated by Rule 2013(b).

The Subcommittee anticipates obtaining this information and being in a position to make a recommendation to the Committee at the spring 2018 meeting.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: MOLLY JOHNSON, THE FEDERAL JUDICIAL CENTER

SUBJECT: RESULTS OF STUDY OF USE OF BANKRUPTCY RULE 2013

DATE: MARCH 14, 2018

The Advisory Committee received a suggestion (17-BK-A) from Kevin Dempsey, Clerk of the Bankruptcy Court for the Southern District of Indiana, asking the Committee to consider whether Bankruptcy Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals) should be substantially modified. The Rule requires the Clerk to keep a public record of all fees awarded by the court to 1) trustees; 2) attorneys and other professionals employed by trustees; and 3) examiners, and further requires that the Clerk prepare an annual summary of this record by individual or firm name, indicating the total fees awarded during the year. The summary is to be made available to the public without charge, and a copy of it must be transmitted to the United States Trustee. Rule 2013(a) says that these reporting requirements do not apply to debtors in possession, and the Committee Note to the Rule says that it is inapplicable to standing trustees in chapter 13 cases. The original Committee Note explains that the purpose of the rule is to "prevent what Congress has defined as 'cronyism'", and "instill greater public confidence in the system", by ensuring that courts do not disproportionately employ or compensate certain individuals.

Mr. Dempsey indicated that in his experience, both in the U.S. Trustee's office and as a Clerk of Court, compliance with Rule 2013 "is spotty." He further suggested that CM/ECF has replaced the need for the type of record called for by the rule, and proposed that Rule 2013 could

be amended to require the Clerk to make information about fees awarded to professionals available on request, rather than annually. Finally, he suggested that the information required to be reported under the rule be expanded to include fees awarded to all professionals, including debtors in possession.

Before making a decision about whether to recommend taking any action on Mr. Dempsey's suggestion, the Business Subcommittee determined that it wanted more empirical information about the current use of and compliance with Rule 2013. It asked the Federal Judicial Center (FJC) to gather relevant information from bankruptcy Clerks of Court, academics who might use the Rule 2013 reports in their scholarly research, and the Executive Office for United States Trustees. This memorandum discusses the results of an FJC survey of bankruptcy Clerks of Court, input solicited by the FJC from academic researchers, and the results of a survey of U.S. Trustees conducted by the Executive Office for United States Trustees (EOUST). Highlights of the findings are:

- Most bankruptcy Clerks of Court (84%) report that they maintain the public record required under Rule 2013, and about 2/3 of them (62.5%) prepare an annual summary. Most who do this (90%) use the "Professional Fees Awarded" report in CM/ECF to generate the summary.
- Most Clerks (63%) do not transmit their annual summary to the U.S. Trustee, most frequently because they believe the U.S. Trustee office can run the report itself or get it from the court's website, or because the UST has not requested it.
- About 2/3 (68%) of Clerks who generate the Rule 2013 reports believe their reports are generally accurate, while the remainder are uncertain or believe the reports are not entirely accurate.
- A quarter of bankruptcy Clerks (25%) responding to the survey said they believe Rule 2013 is no longer necessary and should be abrogated. Almost half (49%) said the rule should be amended to require the Clerk of Court to make information about fees awarded to professionals available on request, but not require that an annual report be prepared. Only 17% believe the rule should be retained in its current form, while 8% believe it should be amended in some other way.
- Based on a survey of U.S. Trustees conducted by Ramona Elliott of the Executive Office for United States Trustees, U.S. Trustee offices do have a need for the Rule 2013 reports, and use them primarily in the oversight of chapter 7 trustees. Some

offices that do not currently receive the reports expressed an interest in having them. The Executive Office for United States Trustees also believes that, from the public's perspective, the purpose of the rule in ensuring transparency supports retaining the report requirement.

- Academic researchers we contacted said they do not use the information generated under Rule 2013 in their scholarly research. One professor said he looked into using these records in professional fees research, but found them "virtually useless" for research, in part because fees awarded to professionals serving debtors in possession are not required to be reported and the information about them is "grossly incomplete."

SURVEY OF BANKRUPTCY CLERKS OF COURT

The FJC, in consultation with the Business Subcommittee, developed a questionnaire to bankruptcy Clerks of Court to learn more about the use of and compliance with Rule 2013. We sent a link to this online survey to all 92 bankruptcy Clerks of Court. Seventy-six responded (83%), with some Clerks delegating the survey completion to a member of their staff. Appendix A contains a copy of the survey questions, and Appendix B sets forth the text responses to questions that asked for explanation or comment.

Preparation and Dissemination of the Information Required Under Rule 2013

The first question asked Clerks whether their office maintains a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and examiners, as required by Rule 2013(a). Sixty-four (84%) indicated that their office does keep this record, while 12 said their office does not. For those who said they do not maintain the public record, the most frequent explanations were that such a report can be run any time it is needed; that the information is already available to anyone through CM/ECF; or that the court has never received a request for the information.

Rule 2013(b) requires that the Clerk annually prepare a summary of the record by individual or firm name, including the total fees each was awarded during the year. The

summary is to be made available to the public without charge, and a copy of it must be transmitted to the U.S. Trustee. Clerks who indicated that they keep the record were asked if they complied with these requirements. Of the 64 clerks who reported that they maintain a public record, just under 2/3 (63%) said they prepare an annual summary, while the remainder do not. The reason they most frequently gave (19 respondents) for not preparing the annual summary was that a report can be run at any time through CM/ECF if a request is received.

We asked the 40 respondents who said they prepare an annual summary whether they use the "Professional Fees Awarded" report in CM/ECF to generate this summary, since the Bankruptcy Clerks' Manual suggests this. The vast majority (36, or 90%) said they do use the Professional Fees Awarded report, with only 3 making local modifications to it. The four Clerks who do not use the Professional Fees Awarded report said they have a locally-developed spreadsheet or a program that extracts the relevant information from CM/ECF.

The survey also asked Clerks who prepare an annual summary whether they transmit the summary to the U.S. Trustee. Just over one-third (37%) said they do this, while the remainder do not. The most frequent reasons respondents gave for not transmitting the summary annually to the U.S. Trustee were that the U.S. Trustee hadn't requested it (11 respondents); that the U.S. Trustee office could run the report itself (10 respondents); that the court puts the report on its public website (6); or that the U.S. Trustee had told the Clerk's Office that it did not want the annual summary (4). A small number of Clerks said they had not realized the annual summary was required and that they would start preparing them moving forward.

Requests for Rule 2013 Information

The survey asked Clerks if they ever received requests to view the full record or the annual summary. The vast majority (82%) said they had not. Of the 11 Clerks who said they had, 10 said they received such requests less than once a year, and one reported getting requests 1-5 times per year. A follow-up question asked who had made the requests, and the most frequent responses were members of the public (4), trustees (3), a party or attorney (2), the media (2), and a bankruptcy judge (1).

Perceived Accuracy of Information in the Rule 2013 Reports

Following up on further concerns expressed by Mr. Dempsey about the accuracy of reports generated pursuant to Rule 2013, we asked respondents to indicate their opinion about the accuracy of the Rule 2013 reports generated in their respective courts. Table 1 below shows the response options and the number and percentage selecting each.

Table 1. Clerks' beliefs about the accuracy of the Rule 2013 reports from their courts

Response Option	**Number and Percentage Selecting This Option (N=63)**
I have not investigated the accuracy of the reports but I believe they are generally accurate.	22 (35%)
I have not investigated the accuracy of the reports, and I am not sure how accurate they are.	14 (22%)
I have investigated the accuracy of the reports, and they are generally accurate.	20 (32%)
I have investigated the accuracy of the reports, and they are not entirely accurate.	7 (11%)

Most respondents (67%) believe their Rule 2013 reports are generally accurate. About half of these Clerks base this belief on having investigated the reports' accuracy. The others gave various reasons for believing the reports are accurate,[1] including that the information comes from CM/ECF and that the court uses quality control measures to ensure accuracy. Clerks who were less sure about the accuracy of their reports primarily cited the potential for docketing errors with the underlying information.

Overall Views About Bankruptcy Rule 2013

Finally, the survey asked Clerks of Court about their overall views regarding Rule 2013, and specifically whether the rule should be retained in its current form; amended to require the Clerk of Court to prepare a report of the information upon request but not annually; amended in some other way; or abrogated. Table 2 displays the results from this question.

Table 2. Clerks' Overall Views About Rule 2013

Response Option	**Number and Percentage Selecting This Option (N=71)**
It should be retained in its current form.	12 (17%)
It should be amended to require the Clerk of Court to make information about fees awarded to professionals available on request, but not require that an annual summary be prepared.	35 (49%)
It should be amended in some other way.	6 (8%)
It is no longer necessary and should be abrogated.	18 (25%)

[1] See Appendix B for the full text of their responses.

Survey respondents had an opportunity to provide additional open-ended comments at the end of the questionnaire. The text of all of these comments can be found in Appendix B. Some of the respondents used the opportunity to reinforce earlier responses, most frequently noting that the report can be run on an as-needed basis or is already made publicly available on the court's website, so Clerks should not be required to prepare it annually. Other comments raising new points or suggestions include:

> "The preparation of the annual summary provides the Clerk's Office with a second chance to correct administrative or filer errors."
>
> "The 2013b report should be included in CM/ECF. In CM/ECF the professional fees awarded report does not have that specific information. That report includes all professionals."
>
> "…CM/ECF, NextGen, and PACER should be modified to allow the UST and public to run the report without requesting it from the Clerk's office."
>
> "I think Rule 2013 needs to be updated to define which trustees it covers. A Mini Code/Mini Rules book does not have committee notes like a "big" book. The committee notes in the big book state specifically that this does not apply to Chapter 13 Trustees."
>
> "The Advisory Committee Note of 1983 explains the basic purpose of the provision is to prevent cronyism, that employment of professionals should be fair and not limited to a select group of individuals. The 1991 committee note advises that the summary report will assist the UST in performing duties under 11 USC §586. However, there is sufficient scrutiny given the UST's review of employment applications, as well as fee applications."
>
> "If the Rules committee retains all or some of the requirements of Rule 2013, they should provide sufficient lead time to SDSO [Systems Deployment and Support Office] to create the appropriate reports on behalf of the BK court family. That will alleviate all 90 BK courts trying to do this themselves. Sufficient lead time extends beyond a six-month period."
>
> "If the intent (back in 1983) was to prevent cronyism, the data on fees would have occurred in the pre ECF era. Now that it's all public record via ECF, there may not be the need to jump through these hoops."

INPUT FROM EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

In his suggestion to the Committee, Mr. Dempsey indicated that in his experience, the U.S. Trustee generally did not request or make use of Rule 2013 reports. Several bankruptcy Clerks of Court responding to the survey made similar comments. To help inform the Committee on this issue, Ramona Elliott, Esq., of the Executive Office for United States Trustees, surveyed U.S. Trustees about whether their offices had a need for the information in the Rule 2013 annual reports. The overall conclusion was that there is such a need.[2] According to the survey results, the main benefits of the Rule 2013 report are:

- It assists in the oversight of chapter 7 trustees. In contrast to the Trustee Final Report (TFR) and Trustee Distribution Report (TDR) filed in chapter 7 cases, the information in the 2013 reports is aggregated by specific professionals, rather than categories of professionals;
- The Rule 2013 report includes information about chapter 11 trustees and examiners, for which no reports similar to the TFR and TDR in chapter 7 cases are available;
- Having clerks post the annual summaries will be helpful to judges in their review of professional fees; and
- The original purpose of the rule from the public's perspective, to ensure transparency by reporting fees for each specific professional, still supports retaining the rule, since the information is not available otherwise.

USE OF THE RULE 2013 DATA IN ACADEMIC RESEARCH

The Committee also expressed interest in knowing whether the information generated under Rule 2013 is relied upon by academics in conducting research on professional fees in bankruptcy cases. Through initial suggestions from Committee member Professor David Skeel, I contacted several professors who have done scholarly research in this general area, asking them

[2] Ms. Elliott's description of the results from her survey can be found in Appendix C.

about both whether they had used the Rule 2013 information in their own work, and for suggestions of others who might use this data. Altogether, I contacted six professors and received feedback from five of them. None of them indicated that they have used information generated under Rule 2013 in their research. The primary substantive response, reproduced in Appendix D, came from Professor Lynn LoPucki of UCLA Law School, who is a prominent researcher in the bankruptcy area, and maintains a database of data on large public company bankruptcies. He said that he is not aware of anyone who has used the public record required by Bankruptcy Rule 2013 in academic research, but that he had looked into using that information at one point. He found that:

> "[the records in the district I looked at] included fees awarded to professionals serving debtors in possession, but were grossly incomplete with respect to those fees. The incompleteness did not literally violate the rule, because Rule 2013 is limited to trustees' fees and does not require the inclusion of debtor in possession fees. It did, however, confuse the record and create the false impression that fees awarded to professionals serving debtors in possession were much lower than they actually are. It also rendered the Rule 2013 public record virtually useless for research."

Professor LoPucki went on to note that 28 U.S.C. §589b requires that the Attorney General promulgate forms for periodic reports in chapter 7 and chapter 11 that would include the fees of professionals employed by trustees and debtors in possession, but he said the Attorney General has failed to comply with this requirement and these reports are not filed in the bankruptcy courts. Another professor also said he believed this information is not collected and reported by the Attorney General. The result, according to Professor LoPucki, is that "fee researchers must extract data from base documents on PACER," which is a burdensome process, and therefore little or no fee research is currently being undertaken.

CONCLUSION

Most bankruptcy Clerks of Court report that they comply with Rule 2013 by keeping the required record and preparing an annual summary. Substantially fewer provide the information to the U.S. Trustee, primarily because they believe the U.S. Trustee has other ways of getting the information, such as from the court's website or by running their own report. Courts receive very few requests for the Rule 2013 information. It is also not widely used by academics, although that could have more to do with perceptions of the quality and completeness of the information compiled under the Rule, rather than there not being a need. While a handful of Clerks said that their U.S. Trustee had told them not to send the reports, the Executive Office for United States Trustees believes there is still a need for the Rule. U.S. Trustees overall reported using the information, particularly with respect to oversight of chapter 7 trustees.

More than half of the bankruptcy Clerks of Court responding to our survey think that Rule 2013 should be modified to require reports to be produced only upon request (rather than annually), or that it should be abrogated. One question raised by these results is whether on-demand reporting would serve the original purpose of the rule, or if this can only be done through required regular reporting and sharing of the information with the United States Trustees.

APPENDIX A

Survey of Bankruptcy Clerks of Court re:

Federal Rule of Bankruptcy Procedure 2013

Federal Rule of Bankruptcy Procedure 2013 requires Clerks of Court to maintain a public record of all fees awarded by the court to 1) trustees; 2) attorneys and other professionals employed by trustees; and 3) examiners, and to prepare an annual summary of the record that is made available to the public upon request, with a copy transmitted to the U.S. trustee. As explained in the original Committee Note to the rule, its purpose is to prevent "cronyism," or favoritism involving employment or compensation of some professionals. The Advisory Committee on Bankruptcy Rules is interested in learning about current practices relating to Rule 2013, and has asked the Federal Judicial Center to survey all Bankruptcy Clerks of Court about their experiences with the rule. We hope that you will take 10-15 minutes of your time to answer questions about your court's experiences with Rule 2013. Responses to this questionnaire will be reported to the Committee in the aggregate, and no individual respondent or court will be identified.

1) Does your office maintain a public record, as described in Rule 2013(a), of all fees awarded to trustees, attorneys and other professionals employed by trustees and examiners?

- No → Why not? [Skip to #5]
- Yes

2) Does your office prepare an annual summary of this record (the "Rule 2013 report") that lists each individual or firm and the total fees awarded to each during the year?

- No → Why not?
- Yes → The Bankruptcy Clerk's Manual suggests using the "Professional Fees Awarded" report in CM/ECF to generate the Rule 2013 report. Do you use this to prepare your 2013 report?
  - Yes → Do you make any local modifications to the CM/ECF report in doing this?
    - No
    - Yes → Please describe the modifications you make.
  - No → What do you use to generate the Rule 2013 report?

3) Which of the following statements best expresses your opinion about the *accuracy* of the Rule 2013 reports generated in your court?

- I have not investigated the accuracy of the reports but I believe they are generally accurate. → What is the basis of your belief that they are generally accurate?
- I have not investigated the accuracy of the reports, and I am not sure how accurate they are.
- I have investigated the accuracy of the reports, and they are generally accurate.
- I have investigated the accuracy of the reports, and they are not entirely accurate. –> In what way are the reports inaccurate?

4) Do you transmit a copy of your annual summary to the U.S. Trustee?

- No → Why not?
  - My district is not under the jurisdiction of the U.S. Trustee Program.
  - Other reason--> Please explain:
- Yes

5) Have you received any requests to view the full record or an annual summary of fees awarded to professionals?

- No → Skip to #7
- Yes → On average, about how frequently?
  - Less than once a year
  - 1-5 times per year
  - 5-10 times per year
  - More than 10 times a year → Please estimate the average number of times per year you receive these requests:

6) From whom have you received requests for this information? [check all that apply]

- Members of the public
- Bankruptcy judge(s)
- Academic researchers
- Other → Please specify:

7) What is your overall view regarding Rule 2013?

- It should be retained in its current form.
- It should be amended to require the Clerk of Court to make information about fees awarded to professionals available on request, but not require that an annual summary be prepared.
- It should be amended in some other way--> Please specify:
- It is no longer necessary and should be abrogated.

8) If you have any other comments about Rule 2013, please provide them here:

APPENDIX B

TEXT OF RESPONSES TO OPEN-ENDED SURVEY QUESTIONS

[For Clerks who indicated their office does not maintain a public record as described in Rule 2013]: Why not?

1. We have an electronic report that generates this information. However, we recently discovered that our Case Administrators were inconsistent about entering the information into CM/ECF. Consequently, we have clarified to staff that they need to enter this information.

2. Fees Reports are available on PACER and can be run whenever needed.

3. No historical record is available of reason for decision not to generate report before ECF. New Clerk arrived after ECF and inquired about compliance. Decided then - with input from UST - that since ECF is gathering data for the report it would be provided upon request rather than generated routinely. No requests for the report since new Clerk came on board eleven years ago.

4. Under our former Clerk it was decided to discontinue this practice around 2008 because: (1) the UST didn't know what to do with the report; and (2) the UST preferred to view this information in CM/ECF (Professional Fees Awarded - Summary Report). This report is also available to court staff to satisfy any public requests for the information. I just became Clerk last month and am reviewing this practice.

5. There is the ability to run the report within CM/ECF, but that ability has not been granted to outside users. We have always provided a report upon request.

6. Lack of knowledge of the rule's requirements, but the report can be run on request. We have never had a request.

7. We get virtually no requests and can easily provide a report from CM/ECF if a request is made.

8. The Report is available in CM/ECF. The report may be run by any CM/ECF user. We do not print and maintain a report since it changes on a daily basis. We let anyone know that they may obtain the report through CM/ECF if they need it.

9. Information is readily available to the public in PACER and a formal report would be provided on demand. No one, including the UST has ever asked for such information that I am aware of, at least since I became clerk 12 years ago.

10. I have no technological mechanism by which to gather this data to form a report. CM/ECF is not set up with the proper data fields so that the data can be captured and then placed in a report. There are data fields for trustees, and to an extent, I can capture their

professional fees. But those fees are also lumped into a standard report with individuals Rule 2013 doesn't cover, e.g,. debtors counsel. So for all practical purposes, I have no way to produce the report.

[For Clerks who indicated their office does not prepare an annual summary of the record]: Why not?

1. The Bankruptcy Administrator pulls the information. It is electronic in ECF. We keep it up to date.

2. No one had ever asked for it. The information is readily retrieved from CM/ECF

3. The report can be run at any time, upon demand

4. It was believed that the information was available to the UST and the public in CM/ECF and through PACER. The report of Professional Fees Awarded lists each individual or firm and the total fees. In addition the parameters (dates covered) of the reporting period could be changed to allow the report to cover whatever period is desired (annually, monthly, etc.). In the future the report will be printed as an Adobe document and then sent to the UST and made available to the public when requested.

5. We have not been asked to run a summary report. The UST's office can access the ECF report for Professional Fees Applied For/Awarded through PACER.

6. If requested, it is prepared. Sometimes a judge will request it for the fees they have ordered for the year.

7. Report can be run dynamically at any time when someone requests it for any time period.

8. We have the capacity in CM/ECF to run the report on demand. Our website provides information for anyone wanting the report and we would run it upon request.

9. The report is made available to the U.S. Trustee monthly. We have never received a request for an annual report. If a request were made, we would prepare the report for the time period requested.

10. We recently gave the US Trustee access to the report in CM/ECF. This way they can run the report when they want and for any time period they want. This access was discussed with the UST before we granted it.

11. This report is in CM/ECF and does not need to be "prepared".

12. It has never been requested.

13. The information is compiled in CM/ECF by specific judge for a given time period. Preparing an annual summary for each individual or firm would be very time-intensive for Court staff. However, a requestor with specific criteria in

mind merely has to compare reports and add individual and firm fee amounts from the separate judge reports to arrive at the total amount of fees awarded for the year.

14. The information is available to the public on a user report in CM/ECF called Professional Fees Awarded; therefore, there is no need for the court to prepare it.

15. We maintain the record in ECF.

16. There has never been a request for one.

17. We only run the CM/ECF Professional Fees Awarded report when requested by the public. It is available at any time.

18. In the past, only upon request. In reviewing FRBP 2013(b), such a summary will be prepared and maintained.

19. Our Court maintains all of the records and data required by FRBP 2013. The annual report required by FRPB may be generated at any time right from CM/ECF. The court has not provided the local UST office the summary report in a number of years. The best we can tell is that perhaps the UST had direct access to this report in CM/ECF at some point in the past and could generate the reports themselves as needed. However, we believe that due to CM/ECF security/password changes that were implemented a number of years ago (where UST office accounts were terminated in favor of filing agent accounts) that the UST lost access to this report. In response to this survey, we contacted our local UST office and they were unaware of the reporting requirements in FRBP 2013(b).

20. The report is available on demand in CMECF

21. The report is available in CM/ECF. In the last 15 years, we have never received a request for any such report.

22. We do not prepare it because this report can be run through CM/ECF at any time.

23. We have it available electronically and is provided upon request.

24. Because the information is readily available through standard report in CM/ECF at any time if requested.

25. The record is stored electronically and will be generated upon request.

[For Clerks who indicated their office does not use the Professional Fees Awarded report to generate the annual summary]: What do you use to generate the Rule 2013 report?

1. Wrote a Crystal Report to run, and generate the Report.

2. We use the data stored in CM/ECF and run it through a locally-developed program that generates the report. The program automatically posts every fee awarded throughout the year and a year-end total.

3. We have a District created automated system to automatically pull the data from ECF.

4. We use a spreadsheet.

[For Clerks who indicated their office makes local modifications to the Professional Fees Awarded report to generate the annual summary]: Please describe the modifications you make:

1. One of our judges prefers we docket the fees awarded in her session differently than the others. To capture the information we have made very slight modification to the report.

2. We utilize the ECF report to satisfy the 2013(a) requirement, but use crystal reports to extract information for the summary report under 2013(b). In addition to submitting the summary to the US Trustee, we also publish the 2013(b) report on our website.

3. We added a feature that allows us to run reports listing totals by professionals.

[For Clerks who indicated they have not investigated the accuracy of their reports under Rule 2013 but believe they are generally accurate]: What is the basis of your belief that they are generally accurate?

1. In office procedures are designed to insure accuracy.

2. The information is taken from what is input by the case managers when an order is entered. Any mistakes would come from human error input.

3. I scan view the reports and the reports contain information from court issued orders.

4. The numbers come from CM/ECF and are inputted into the system when an order is entered awarding professional fees and expenses.

5. The orders awarding fees are checked against the fees requested in the motion for accuracy at the time of entry.

6. Amounts awarded by order are entered as part of docketing process for orders and any errors would be caught by qc.

7. As stated on our website with the 2013(a) information, the information for the report comes from CM/ECF and is only as accurate as the information and data that is input. That said, I know our case administrators do a good job of quality control.

8. The information as to recipient, type of fee, case number, order date and dollar amount for fees and expenses is pulled from ECF. It is highly unlikely that a trustee, attorney, or other professional would be paid without a court order. Additionally, the U.S. Trustee reviews and approves all Trustee Final Reports before they are filed with the court, as well as all Chapter 11 Monthly Operating Statements.

9. We recently reviewed the process that our Case Administrators and other go through that gets this information in CM/ECF. We have refined our procedures in conjunction with the UST to make sure we are capturing the information required and needed.

10. Data compiled from CM/ECF.

11. We do not receive, in general, objections by the UST or other parties.

12. The numbers appear to match the fee awards given by the Court.

13. When events involving compensation are misdocketed, the CM/ECF Specialist corrects the fees in the fee tables. When a Case Administrator inquires about

compensation being docketed correctly, the CM/ECF Specialist checks the report and/or professional fees table. Accuracy is determined.

14. The report is in CM/ECF and pulls data from the events. These events are QC-ed during the court's normal processes so the data that is pulled into the report should be accurate.

15. They are based on orders allowing compensation.

16. Quality control procedures in place in operations to capture reliable information.

17. The orders awarding fees are docketed in CM/ECF as to who was paid and what amount.

18. We believe that the accuracy of our docketing is high.

19. Because the standard reports were designed to work in CM/ECF by programmers, and CM/ECF reports are very reliable.

20. As long as the Case Administrator is entering the dollar amounts correctly, it is being pulled onto the report correctly.

21. The financial manager is served with copies of the orders awarding the fees and then she updates the spreadsheet.

[For Clerks who indicated they have investigated the accuracy of their reports under Rule 2013 and they are not entirely accurate]: In what way are the reports inaccurate?

1. On a monthly basis, a staff member reviews all orders granting fees. There are times when the order or application for compensation are docketed incorrectly. If this is discovered, the IT department fixes the error to correct the report.

2. It depends on how the orders are docketed when granting the fees. For the most part the fees appear on the professional fees report; however, we have found on occasion where they were not reported.

3. Compensation is awarded many ways in bankruptcy cases. One example is a bundled motion where a Trustee may file a "hire, sell, pay" motion that hires a realtor to sell residential real property, notices the sale of the property, and obtains permission to pay the realtor and secured creditors from the sale proceeds at closing. This document is not generally followed up with an application for compensation for the realtor, and, therefore, the report of fees awarded in CM/ECF is not accurate.

4. Professional fee awards in CM/ECF are entered manually and are subject to human data entry error.

5. Although the reports we reviewed were fairly accurate, they did contain errors. The errors/discrepancies fell into two main categories: (1) Entry errors by case administrators (e.g., one order awarded a total of $10,717.96 in fees with $9,500 to be paid immediately. The CA entered that order as awarding a total of $9,500 in fees); and (2) Amended fee orders. Because of the way fee orders are docketed in our court, the CAs do not have an opportunity to correct the original fee amounts entered. To do this would require a number of manual steps and the CAs have not previously been instructed to complete the manual process to correct the original fee amount entered.

6. The problem we have encountered is that some of our trustees incorporate Applications for Compensation within their Motions to Sell Free and Clear of Lien without including that language in the docket entry text, so they can be missed by case admins during qc. The Orders Granting the Motions to Sell Free and Clear of Lien do not always reflect that a fee award was included in the motion (and granted). Our case admins have gotten a lot better ferreting these out, but it takes some effort. So I don't know that I would consider this a problem with CM/ECF Report, more so a problem with how the trustees are requesting the fee awards.

7. Because the docketing/processing function does not allow for editing on fees awarded.

[For Clerks who said their office does not transmit a copy of their annual summary to the U.S. Trustee even though their district is under the jurisdiction of a U.S. Trustee]: Why not?

1. I am a new clerk and submitting the report to the UST had never been a practice in this district.

2. The USTE said not to send it.

3. The report was added to the UST's ECF menu. They can run it themselves.

4. It's available on our web site for their view

5. Post the Report to the Court website, UST accesses the Report from the Court website.

6. Please refer to the answer to a previous question. It also has never been requested by the UST.

7. The UST's office has the ability to access the ECF report for Professional Fees Applied For/Awarded through PACER.

8. If requested by the UST, the summary would be provided.

9. They run themselves

10. US Trustee Program gets notification when posted to our website.

11. They are aware they can run it themselves any time.

12. They indicated they did not want it several years ago.

13. prepared monthly

14. In discussion with the UST we gave them access to this report to run when they want.

15. No request has been made.

16. The U.S. Trustee can presumably run its own report. I am verifying that it is on their CM/ECF menu.

17. They have not requested it. We meet with them at least annually to discuss any requests, challenges or concerns.

18. An inquiry about the report has never been made

19. I was under the impression the U.S. Trustee had access to the report in CM/ECF. However, I have since found out they do not. Therefore our court is in the process of adding access to the report for the U.S. Trustee. To my knowledge, they have not requested a copy of the report.

20. One has never been requested

21. The Report is posted on the Court's website and made available to the U.S. Trustee in this manner.

22. Has not been requested by the U.S. Trustee

23. In the past, this has been done upon request, which occurred one time.

24. It is on our external website

25. The report is available to the U.S. Trustee using the PACER system.

26. Our court maintains all of the records and data required by FRBP 2013. The annual report required by FRBP may be generated at any time right from CM/ECF. The court has not provided the local UST office the summary report in a number of years. The best we can tell is that perhaps the UST had direct access to this report in CM/ECF at some point in the past and could generate the reports themselves as needed. However, we believe that due to CM/ECF security/password changes that were implemented a number of years ago (where UST office accounts were terminated in favor of filing agent accounts) that the UST lost access to this report. In response to this survey, we contacted our local UST office and they were unaware of the reporting requirements in FRBP 2013(b).

27. They do not want to see the report

28. The report is available on demand in ECF

29. The US Trustee does not want the report.

30. This report can be run by the UST at any given time through CM/ECF

31. They can ask for a copy and we will furnish it.

32. It is available on our website.

33. Assumed that Trustee had access to the same reports in CM/ECF.

34. I am a fairly new clerk. I was informed that the previous clerk ceased transmittal of the report for reasons unknown. So we have not done so for the past few years, but we will reinstate this process.

35. We did not understand that it was a requirement to do so and they have never requested it.

[For Clerks who said Rule 2013 should be modified in some way other than allowing Clerk to make report available only on request] Please specify:

1. The technology and reporting capabilities have changed. The current rule is based on old technology. Allowing access to a dynamic report makes more sense and is more useful to someone who actually wants the information.

2. The courts do not need to print or send the report. The report should be available within CM/ECF for registered users or upon request.

3. We update the report weekly and publish it to our external website.

4. There should be no requirement to submit to the UST, as long as it is available on the court's website. Also, the UST extracts this data from our database.

Responses to Final Question: If you have any other comments about Rule 2013, please provide them here:

1. I have long been concerned about the inaccuracy of the Rule 2013 report in CM/ECF and the Clerk's responsibility for its accuracy. After speaking with the regional office of the United States Trustee about the report, however, that office indicated that it did not want the report and had no apparent use for it. At that time, the changing local practices to make the report accurate obtained a low priority. I have not personally grasped the importance of the report to prevent cronyism or why the burden of providing the report is on the Clerk's Office. I favor the abrogation of Rule 2013. If asked to produce a report of compensation awarded pursuant to an application for compensation, that information is readily available as a docket activity report in CM/ECF.

2. If someone wants a copy of the report, we can make it available. The UST has access to the report on their own menu. We do make every effort to enter the correct information and quality control the numbers. While most judges accept the UST Statement of Review, one of our judges does not. She has the Case Administrators check the math for every fee application. We do not find many errors but the UST does not have the staff they once did.

3. The preparation of the annual summary provides the Clerk's Office with a second chance to correct administrative or filer errors.

4. No additional comments other than a rule modification that makes the report available ONLY upon request.

5. The 2013b report should be included in CM/ECF. In CM/ECF the professional fees report awarded does not have that specific information. That report includes all professionals.

6. We do not believe that the information/report has ever been requested. Since the data is entered into CM/ECF when an order awarding fees is entered, CM/ECF, NextGen, and PACER should be modified to allow the UST and public to run the report without requesting it from the Clerk's office.

7. Rule 2013, like many other rules, have not kept pace with technology and the ability to run multiple reports in CM/ECF. I have not spoken with any court that is comfortable with the requirement of FRBP 5003(c), specifically the index of civil judgments to be kept with the district court, but apparently includes bankruptcy court judgments as well.

8. CM/ECF should provide a report for fees awarded in currency other than US Dollars. There is no way to query such items, and I must solely rely on case administrators remembering which orders awarding compensation are awarded in foreign currencies.

9. The entire report along with a summary is posted to our website and available for the public to view. There is no hardship in creating this report.

10. In my ten years as the Clerk of Court, neither I nor my staff have ever received an inquiry regarding this information, and it is not a high-traffic area on our website.

11. The monthly report is readily available through ECF.

12. We have recently seen more and more that auctioneers are getting all their fees from a buyer's premium instead of fees coming from the trustee. It would be great to have this addressed in rule or just a clarifying memo. For instance, if the auctioneer gets all his fees from buyers but charges expenses to the trustee/estate, we do not put this information in the system because there is no fee. Is that the correct way of handling it? It might also be nice to have the report have some sorting options or come out in an excel format that would allow you to group by trustee or professional. I assume that may be someone else's issue.
I [also] think Rule 2013 needs to be updated to define which trustees it covers. A Mini Code/Mini Rules book does not have committee notes like a “big” book. The committee notes in the big book state specifically that this does not apply to Chapter 13 Trustees.

13. We have made these reports available to all in CM/ECF.

14. The only request received by this office for information on fees in recent years has been from an attorney with regard to fees awarded in specific instances, but not a blanket request for all fees awarded during a particular year.

15. Our court relies on our ability to generate CM/ECF report in the unlikely event that anyone asks for a Rule 2013 report.

16. The Advisory Committee Note of 1983 explains the basic purpose of the provision is to prevent cronyism, that employment of professionals should be fair and not limited to a select group of individuals. The 1991 committee note advises that the summary report will assist the UST in performing duties under 11 USC ¬ß 586. However, there is sufficient scrutiny given the UST's review of employment applications as well as fee applications.

17. "Manually" preparing this report is not necessary. We have not had one request for this report in the last 5 years at least. All orders awarding fees are docketed in CM/ECF and the Professional Fees Awarded Report can be run at any time.

18. Since the information is available electronically and upon request, any other reporting source is not needed.

19. If the Rules committee retains all or some of the requirements of Rule 2013, they should provide sufficient lead time to SDSO to create the appropriate reports on behalf of the BK court family. That will alleviate all 90 BK courts trying to do this themselves. Sufficient lead time extends beyond a six-month period.

20. We have made the online report available through PACER so that the trustee or any other party can pull a report for any period that they desire.

21. If the intent (back in 1983) was to prevent cronyism, the data on fees would have occurred in the pre ECF era. Now that it's all public record via ECF, there may not be the need to jump through these hoops.

22. Hopefully my answers above are not misleading – the Clerk does not prepare and post on the website a specific document summarizing professional fees. Our website includes instruction and overview of the report and indicates it can be generated at any time in ECF or through PACER. The user can specify whatever dates they want, annually or otherwise. We believe that our procedure complies with the rule's intent and purpose.

APPENDIX C

Feedback from the Executive Office for United States Trustees (transmitted by Ramona Elliott, Esq.)

I surveyed our United States Trustees on whether our offices have a need for the information in the Rule 2013 annual report. The answer is yes.

I am still developing the information, but the report is used by our offices primarily in the oversight of chapter 7 trustees. In the Trustee Final Report (TFR) and Trustee Distribution Report (TDR) filed in chapter 7 cases, the trustees provide information on their fees as well as those of their professionals and, in converted cases, the debtor's professionals. Although these reports are data enabled, the information is provided in the aggregate by category of professional.

By comparison, the information in the Rule 2013 report is provided by professional, consistent with the Rule's objective. In addition, the report includes information as to chapter 11 trustees and examiners, for which no reports similar to the TFR and TDR in chapter 7 are available.

While the Rule 2013 report might not include the complete universe of professional fees in either the chapter 7 or the chapter 11 context, many of our offices that receive the report nevertheless find the report useful. And other offices that do not currently receive the report expressed an interest in having it. Interestingly, I believe that as a result of your survey one clerk has reached out about providing the report going forward.

In addition, having the clerk post this information will be helpful to judges in their review of professional fees. In Scoggins, Judge Klein asked our office to obtain the information from the clerk and file it with the court, but I question whether that is required if the information is posted on the court's website.

And from the public's perspective, we believe that the purpose of the rule in ensuring transparency supports retaining the report. The report aggregates the annual fees for each specific professional, which information is not available otherwise. And I think the concerns expressed in the Committee Note and addressed by the Rule remain.

APPENDIX D

TEXT OF PROFESSOR LOPUCKI'S EMAIL MESSAGE RE: USE OF RULE 2013 DATA IN ACADEMIC RESEARCH

I am not aware of anyone who has used the public record required by Bankruptcy Rule 2013 in academic research. Several years ago, I investigated the possibility of using those records in my professional fees research. In particular, I examined the records kept by [district name]. I found that they included fees awarded to professionals serving debtors in possession, but were grossly incomplete with respect to those fees. The incompleteness did not literally violate the rule, because Rule 2013 is limited to trustees' fees and does not require the inclusion of debtor in possession fees. It did, however, confuse the record and create the false impression that fees awarded to professionals serving debtors in possession were much lower than they actually are. It also rendered the Rule 2013 public record virtually useless for research.

28 USC 589b requires that the Attorney General promulgate forms for periodic reports in chapter 7 and chapter 11 that would include the fees of professionals employed by trustees and debtors in possession. The Attorney General failed to comply with that law, and to my knowledge the reports required by the statute are not filed in the bankruptcy courts. The result is that fee researchers must extract data from base documents on PACER. That is a burdensome process. As a result, little or no fee research is currently being done.

Because I did principally business bankruptcy empiricism, I may not be aware of people working on consumer bankruptcy fees. For that, you might contact [names of 2 professors].

TAB 6

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON RESTYLING

SUBJECT: RESTYLING OF FEDERAL RULES OF BANKRUPTCY PROCEDURE

DATE: MAR. 9, 2018

The Restyling Subcommittee of the Advisory Committee on the Federal Bankruptcy Rules is tasked with recommending to the Advisory Committee whether to embark upon a project to "restyle" the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

In order to make that recommendation, the Subcommittee decided that it would be necessary to obtain input from those who would be affected by such a restyling. Therefore, the Subcommittee undertook two tasks.

First, the Subcommittee asked the Style Consultants to prepare a restyled version of Part IV of the Federal Rules of Bankruptcy Procedure, so that those asked for their views on the restyling process would have a concrete example of restyled rules to look at. The Style Consultants produced a draft restyled Rule 4001 in January, the Reporters and Judge Dow provided comments on the draft, and the Style Consultants sent a revised version in which they accepted some, but not all, of the comments. The revised version is attached as Exhibit A.

Second, the Associate Reporter and Molly T. Johnson of the Federal Judicial Center prepared a cover memo and survey to obtain comments on the restyling project. A copy is attached as Exhibit B. As for the methodology of soliciting reactions, Scott Myers has suggested the following:

> I expect we would set up a link on the left-hand side of the "published for comments page" similar to this one for Rule 30(b)(6). http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-civil-rule-30b6
>
> In our case we might call the page Invitation for Comment on Bankruptcy Rules Restyling Project and then have a sentence or two explaining that we are seeking feedback to assist the Advisory Committee on Bankruptcy Rules in its

consideration of whether to restyle the Federal Rules of Bankruptcy Procedure. We would then provide a participation deadline and links for filling out the FJC survey.

The link to our new Invitation for Comment page would be included in any outreach email we send.

The Subcommittee plans to send a link to the questionnaire directly to bankruptcy judges and clerks of court. Other individuals (including Article III judges) and organizations could respond to the questionnaire link on the rules website. The Subcommittee also proposes to solicit reactions from interested organizations, such as the NCBJ, NACBA, CLLA, NABT, NACTT, ABI, ABA Business Law Section Bankruptcy Committee, American College of Bankruptcy, National Bankruptcy Conference and AALS Debtor-Creditor Committee. Those organizations would be invited to respond either on behalf of their organizations, or to solicit comments from their members.

The Subcommittee asks that the Advisory Committee approve the proposed process for obtaining input on the issue of whether to embark on the project of restyling the Federal Rules of Bankruptcy Procedure.

EXHIBIT A

Pilot for Bankruptcy Rules Restyling

Rule 4001

ORIGINAL	REVISION
Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements	**Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Using[1] Cash Collateral; Obtaining Credit; Agreements**

1 Although *use of property* may be the statutory terminology, we certainly hope not to be constrained to use the *of*-genitive in phrases like this one. —Style Consultants.

ORIGINAL	REVISION
(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY. (1) *Motion*. A motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property pursuant to §363(e) shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to §705 or appointed pursuant to §1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to §1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.	**(a) Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property.** **(1)** ***Motion.*** A motion for relief from an automatic stay under the Code or a motion to prohibit or condition the use, sale, or lease of property under § 363(e)[2] must comply with Rule 9014 and must be served on: (A) the following, as appropriate: (i) a committee elected under § 705 or appointed under § 1102; (ii) such a committee's authorized agent; or (iii) the creditors included on the list filed under Rule 1007(d) if (a) the case is a chapter 9 municipality case or a chapter 11 reorganization case, and (b) no committee of unsecured creditors has been appointed under § 1102; and (B) any other entity[3] that the court directs.[4]

[2] We're putting spaces after section signs—hard spaces—as in most legal documents and as prescribed in both *The Bluebook* R. 6.2(c), at 89 (20th ed. 2015) and *The Redbook: A Manual on Legal Style* § 6.2(a), at 121 (3d ed. 2013). —Style Consultants.

[3] How about *anyone else* instead of *any other entity*? At a minimum, *person or* might be thought desirable before *entity*, if we're looking for plain English. But we're informed that, oddly enough, *entity* is defined in the Bankruptcy Code to include *person*. —Style Consultants.

[4] Simplifying this further as a single-tier list joined with *and* would alter the original's logical structure, under which service goes to either a committee or its agent—except in a chapter 9 or 11 case with no committee, when service goes to the creditors—and to anyone else the court names. The single-tier rewrite would have service going to *both* the committee and its agent *and* (illogically) to the creditors. —Style Consultants.

ORIGINAL	REVISION
(2) *Ex Parte Relief.* Relief from a stay under §362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to §363(e) may be granted without prior notice only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and §362(f) or §363(e) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay or reconsideration of the order prohibiting or conditioning the use, sale, or lease of property. In that event, the court shall proceed expeditiously to hear and determine the motion.	**(2)** ***Ex Parte Relief.*** Relief from a stay under § 362(a)[5]—or a request to prohibit or condition the use, sale, or lease of property under § 363(e)—may be granted without prior notice only if: (A) specific facts—shown by either affidavit or a verified motion—demonstrate[6] that the movant will suffer immediate and irreparable injury, loss, or damage before the adverse party or its attorney can be heard in opposition; and (B) the movant's attorney certifies to the court in writing what efforts, if any, have been made to give notice and why notice should not be required. **(3)** ***Notice of Relief; Motion for Reinstatement or Reconsideration.*** A party that obtains relief under Rule 4001(a)(2) and either § 362(f) or § 363(e) must immediately give oral notice both to the debtor and to the trustee or the debtor-in-possession[7]—and must promptly send to the adverse party or parties a copy of the order granting relief. After 2 days' notice to the party who obtained relief[8]—or on shorter notice as the court may direct—the adverse party may appear and move to reinstate the stay or reconsider the order. The court must proceed expeditiously to hear and decide[9] the motion.

5 No section was cited for relief from a stay in subpart (a)(1), which instead referred only to "the Code." So this reference to § 362(a) seems to pop up out of nowhere. Can a party obtain relief from a stay under more than one section of the Code? If not, delete "under § 362(a)" here. —Style Consultants.

6 Even though we don't intend a substantive change here, we recommend deleting *clearly*—which probably muddles the standard of proof and potentially raises questions whenever it isn't used elsewhere. —Style Consultants.

7 The Advisory Committee wants *debtor-in-possession* to be left unhyphenated. We think otherwise, partly because the hyphenated form would allow much more syntactic flexibility, including possessives. It's probably for that reason that *Black's Law Dictionary* records it as hyphenated. *See Black's Law Dictionary* 490 (10th ed. 2014).

ORIGINAL	REVISION
(3) *Stay of Order*. An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.	**(4)** ***Stay of Order.*** Unless the court orders otherwise, an order granting a motion for relief from an automatic stay made under Rule 4001(a)(1) is stayed for 14 days after its entry.
(b) USE OF CASH COLLATERAL. (1) *Motion; Service.* (A) *Motion*. A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.	**(b) Using**[10] **Cash Collateral.** **(1)** ***Motion; Contents; Service.*** (A) *Motion*. A motion for authorization[11] to use cash collateral must comply with Rule 9014 and must be accompanied by a proposed form of order.

We reiterate our position that style decisions such as these should be based on accepted style guides and authorities. —Style Consultants.

8 Original says "relief from the stay without notice"; the paragraph also covers relief under 363(e) granted without prior notice. This is probably a drafting error in the original rule because the sentence does suggest that the adverse party may seek reconsideration of the order (presumably the order under 363(e)). But this is a substantive correction of the rule. —Advisory Committee.

9 We recommend ordinary usage: *decide* instead of *determine* a motion. Formal words are to be discouraged. *See* H.W. Fowler, *A Dictionary of Modern English Usage* 208–09 (Ernest Gowers ed., 2d ed. 1965); *Garner's Modern English Usage* 406–07 (4th ed. 2016). —Style Consultants.

10 See note 1.

11 The original uses *authority* and *authorization* interchangeably; in making this wording consistent, we opted for *authorization*, since it avoids the potential miscue inherent in *authority*'s dominant legal meaning of "cited support for a proposition." —Style Consultants.

ORIGINAL	REVISION
(B) *Contents*. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including: (i) the name of each entity with an interest in the cash collateral; (ii) the purposes for the use of the cash collateral; (iii) the material terms, including duration, of the use of the cash collateral; and (iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.	(B) *Contents*. The motion must consist of or begin with a statement of the action requested,[12] no longer than five pages.[13] The statement must list or summarize all material provisions (citing their precise locations in the relevant documents), including: (i) the name of each entity with an interest in the collateral; (ii) how the collateral will be used; (iii) the material terms of the collateral's use, including duration; and (iv) all liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the collateral or, if no such protection[14] is proposed, an explanation of how each entity's interest is adequately protected.

12 The original wording, "relief requested," misstates the motion, which seeks authorization—not relief. The problem crops up in two other places in this Rule 4001, but in different guises. We've opted for *action requested* as being more accurate for all three contexts. —Style Consultants.

13 Note the awkwardness and perhaps even incoherence of the five-page references in the original. —Style Consultants.

14 Advisory Committee suggests retaining the original phrase, *additional adequate protection*. We prefer not repeating the phrase for reasons of concision. *Such protection* has to mean "liens, cash payments, or other adequate protection." —Style Consultants.

ORIGINAL	REVISION
(C) *Service*. The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, the creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.	(C) *Service*. The motion must be served on: (i) each entity with an interest in the cash collateral; and (ii) all those listed in Rule 4001(a)(1)(A)–(B).[15]
(2) *Hearing*. The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.	**(2)** ***Hearing; Notice.*** (A) *Hearing*. The court may begin[16] a final hearing on the motion no earlier than 14 days after it has been served. If the motion so requests, the court may conduct a preliminary hearing before that 14-day period ends. After a preliminary hearing, the court may authorize using only as much cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.
(3) *Notice*. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.	(B) *Notice*. Notice of either hearing must be given to the parties who must be served with the motion and to any other entity[17] that the court directs.

[15] Although we're no fans of multiplicitous cross-references, this one results in a big saving—here as well as in subparts (c)(1)(C) & (d)(1)(C). —Style Consultants.

[16] We recommend using the more common word *begin* instead of the formal *commence* here. *See* Garner, *The Redbook* § 11.2(b), at 216; cf. note 9. —Style Consultants.

[17] See note 3.

ORIGINAL	REVISION
(c) OBTAINING CREDIT. (1) *Motion; Service.* (A) *Motion*. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.	**(c) Obtaining Credit.** **(1)** ***Motion; Contents; Service*****.** (A) *Motion*. A motion for authorization[18] to obtain credit must comply with Rule 9014 and must be accompanied by a copy of the credit agreement and a proposed form of order.

[18] See note 11.

ORIGINAL	REVISION
(B) *Contents*. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2). In addition, the motion shall describe the nature and extent of each provision listed below:	(B) *Contents*.[19] The motion must consist of or begin with a statement of the action requested,[20] no longer than five pages.[21] The statement must list or summarize the material terms of the credit agreement and form of order (citing their precise locations in the relevant documents), including interest rates, maturity dates, default provisions, liens, and borrowing limits and conditions. If the credit agreement or form of order includes any of the provisions listed in Rule 4001(c)(1)(B)(i)–(xi) below, the statement must also describe each one's nature and extent, cite its precise location, and identify any that would remain effective if interim approval were to be[22] granted but final relief denied under Rule 4001(c)(2). The applicable provisions are:

19 The Advisory Committee suggests reformulating this subpart to follow (b)(1)(B). But such a revision isn't quite possible—superficially appealing but unworkable. We tried implementing it ourselves and ultimately determined that this created more problems than it solved. For one thing, breaking out *interest rates* through *borrowing limits and conditions* into an enumerated list, as in (b)(1)(B)(i)–(iv), would leave the following sentence ("If the credit agreement or form of order includes . . .") as unnumbered dangling flush text—a prohibited phrasing. *See* Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, 169 F.R.D. 176, 208 (1996); Garner, *Guidelines for Drafting and Editing Legislation* § 3.4(E), at 96 (2016). And breaking out the revision's second and third sentences as list items means that the second listed requirement would begin with a condition, which interrupts the syntactical flow ("The statement must: . . . (ii) if the proposed credit agreement . . ."). It would also require a cross-reference to the list of provisions that would appear in a separate subpart, would split the list of content requirements across two subparts, and would upset (c)(1)'s structural parallelism with the corresponding subparts, (b)(1) and (d)(1). —Style Consultants.

20 See note 12.

21 See note 13.

22 The Advisory Committee wants to delete *to be*. But we believe the full infinitive with the subjunctive mood to be appropriate here so that the parallelism between *granted* and *denied* is more immediately apparent. *See Garner's Modern English Usage* 869 (4th ed. 2016). —Style Consultants.

ORIGINAL	REVISION
(i) a grant of priority or a lien on property of the estate under §364(c) or (d);	(i) a grant of priority or a lien on estate property[23] under § 364(c) or (d);
(ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under §364 to make cash payments on account of the claim;	(ii) the providing of adequate protection or priority for a claim that arose before the case commenced,[24] including a lien on estate property,[25] the use of the property,[26] or a cash payment to the claimant from funds obtained under § 364;
(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;	(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the case commenced,[27] or of any lien securing the claim;
(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;	(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;
(v) a waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under §363(c), or request authority to obtain credit under §364;	(v) a waiver or modification of an entity's authorization[28] or right to file a plan, seek to extend the time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authorization[29] to obtain credit under § 364;

23 The Advisory Committee suggests that *property of the estate* is a term of art that should be used throughout here. But using the *of*-genitive—particularly four times in one sentence, as in the original here—is more verbose, clumsy, and potentially grammatically ambiguous than using the noun phrase *estate property* (with *estate* attributively modifying *property*). This is especially true when the sentence contains additional of-phrases—of which there are 29 in the original, and 18 even in the revision. *See Garner's Modern English Usage* 647 (4th ed. 2016). Finally, we don't think that anyone could plausibly argue that this style improvement amounts to a substantive change. —Style Consultants.

24 Despite note 16, we retain *commenced* here because cases, actions, and suits—unlike hearings—properly *commence* rather than *begin*. —Style Consultants.

25 See note 23.

26 See note 23.

ORIGINAL	REVISION
(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;	(vi) the establishment of deadlines for filing a plan of reorganization, approving a disclosure statement, holding a hearing on confirmation, or entering a confirmation order;
(vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;	(vii) a waiver or modification of the applicability of nonbankruptcy law relating to perfecting a lien on estate property,[30] or to enforcing the lien;
(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;	(viii) a release, waiver, or limitation on a claim[31] belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence[32] an action;
(ix) the indemnification of any entity;	(ix) the indemnification of any entity;[33]
(x) a release, waiver, or limitation of any right under §506(c); or	(x) a release, waiver, or limitation of any right under § 506(c); or
(xi) the granting of a lien on any claim or cause of action arising under §§544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).	(xi) the granting of a lien on a claim[34] arising under § 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

27 See note 24.

28 See note 11.

29 See note 11.

30 See note 23.

31 *Or other cause of action* is unnecessary under federal rules. The Federal Rules of Civil Procedure are specifically drafted to use *claim* instead of *cause of action*. —Style Consultants.

32 See note 24.

33 See note 3.

34 See note 31.

ORIGINAL	REVISION
(C) *Service*. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity that the court directs.	(C) *Service*. The motion must be served on all those listed in Rule 4001(a)(1)(A)–(B).[35]
(2) *Hearing*. The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.	**(2)** ***Hearing; Notice.*** (A) *Hearing*. The court may begin[36] a final hearing on the motion no earlier than 14 days after it has been served. If the motion so requests, the court may conduct a preliminary hearing before that 14-day period ends. After a preliminary hearing, the court may authorize obtaining credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.
(3) *Notice*. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.	(B) *Notice.* Notice of either hearing must be given to the parties that must be served with the motion and to any other [person or] entity[37] that the court directs.

35 See note 15.

36 See note 16.

37 See note 3.

ORIGINAL	REVISION
(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT. (1) *Motion; Service.* (A) *Motion.* A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:	**(d) Agreement Relating to Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Providing Adequate Protection; Using[38] Cash Collateral; and Obtaining Credit.** **(1)** ***Motion; Contents; Service.*** (A) *Motion.* A motion to approve any of the following types of agreement must be accompanied by a copy of the agreement and a proposed form of order:
(i) an agreement to provide adequate protection; (ii) an agreement to prohibit or condition the use, sale, or lease of property; (iii) an agreement to modify or terminate the stay provided for in §362; (iv) an agreement to use cash collateral; or (v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property.	(i) an agreement to provide adequate protection; (ii) an agreement to prohibit or condition the use, sale, or lease of property; (iii) an agreement to modify or terminate the stay provided for in § 362; (iv) an agreement to use cash collateral; or (v) an agreement between the debtor and an entity that has a lien or interest in estate property[39] under which the entity consents to the creation of a lien that is senior or equal to the entity's lien or interest in the property.

38 See note 1.

39 See note 23.

ORIGINAL	REVISION
(B) *Contents*. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.	(B) *Contents*.[40] The motion must consist of or begin with a statement of the action requested,[41] no longer than five pages.[42] The statement must: (i) list or summarize all the agreement's material provisions (citing their precise locations in the relevant documents); and (ii) briefly list or summarize, precisely cite, and describe the nature and extent of each provision in the proposed form of order, agreement, or other document listed in Rule 4001(c)(1)(B).
(C) *Service*. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.	(C) *Service*. The motion must be served on all those listed in Rule 4001(a)(1)(A)–(B).[43]

40 As with (c)(1)(B) (see note 19), the Advisory Committee suggests structuring this subpart to parallel (b)(1)(B). And as with (c)(1)(B), such a revision would only create more problems or change original meaning. Subpart (b)(1)(B) is the simplest of the three Contents provisions; (c)(1)(B) and this subpart each refer to provisions in multiple documents and create additional requirements for those additional documents. Subpart (c)(1)(B) introduces a long list of provision types triggering those additional requirements; this subpart imposes additional requirements on the documents (not provisions) listed in (c)(1)(B). We think that imposing any uniform structure on all three subparts would be a procrustean solution at best. —Style Consultants.

41 See note 12.

42 See note 13.

43 See note 15.

ORIGINAL	REVISION
(2) *Objection*. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 14 days of the mailing of the notice.	**(2)** ***Objection.*** Notice of the motion, along with the time within which objections may be filed and served on the debtor-in-possession[44] or trustee, must be mailed to the parties on whom service of the motion is required and to any other entity[45] that the court directs. Unless the court sets a different time, any objections must be filed within 14 days after mailing.
(3) *Disposition; Hearing*. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.	**(3)** ***Disposition; Hearing.*** If no objection is filed, the court may enter an order approving or disapproving the agreement without holding a hearing. If an objection is filed or if the court decides[46] that a hearing is appropriate, the court must hold one after giving at least seven days' notice to the objector, the movant, the parties who must be served with the motion, and any other entity[47] that the court directs.
(4) *Agreement in Settlement of Motion*. The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.	**(4)** ***Agreement in Settlement of Motion.*** The court may decide[48] that a motion made under Rule 4001(a), (b), or (c) was sufficient to give reasonable notice of the agreement's material provisions and an opportunity for a hearing. If so, the court may direct that the procedures prescribed in Rule 4001(d)(1)–(3) will not apply and that the agreement may be approved without further notice.

44 See note 7.

45 See note 3—and notice the inconsistency in the original wording here. —Style Consultants.

46 See note 9.

47 See note 3.

48 See note 9.

EXHIBIT B

The Advisory Committee on Bankruptcy Rules is tasked with recommending to the Committee on Rules of Practice and Procedure (the Standing Committee) whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

The goal of restyling the rules would be to make the rules simpler, clearer, and easier to understand, without changing any of their substance. The guidelines used for restyling all of the rules that have been restyled were prepared by Bryan A. Garner, and can be viewed at http://www.uscourts.gov/sites/default/files/guide.pdf. The process of restyling all the bankruptcy rules would be a lengthy one, with multiple layers of review and opportunities for comment.

In making its recommendation to the Standing Committee, the Advisory Committee wishes to receive input from all constituencies who use, interpret, or are affected by the Federal Rules of Bankruptcy Procedure. Working with the Federal Judicial Center, we have developed a survey, which can be accessed using the link provided below, to solicit that input. To provide more specific context to those responding, the Advisory Committee asked the Standing Committee's style consultants to produce a restyled version of Fed. R. Bank. P. 4001. The original version of the rule and a restyled version of the rule appear at the beginning of the survey. (Note that this restyled version is not being proposed for adoption at this time, but is supplied merely to provide an example of the type of changes that might be made to the current rules.)

To access the survey, please click on this link:

[link here]

[A version of this intro, along with the original and restyled Rule 4001, will appear at the beginning of the questionnaire]

1. To provide context to your answers, please indicate the professional capacity in which you are responding to this questionnaire [check all that apply]

- Bankruptcy judge
- Other judge → Please specify: _____
- Bankruptcy clerk of court

- Bankruptcy practitioner [we can break this down by the types of clients they primarily represent – I could use guidance on the best categories to use/how broad they should be]
- Bankruptcy trustee [categories]
- Bankruptcy administrator
- Official representative of a bankruptcy-related organization → Please specify
- Other → Please specify:

The following questions ask about your opinions on restyling the Federal Rules of Bankruptcy Procedure. Please use the introduction above and the sample restyled rule as context for the answers you provide.

2. Regardless of your overall opinion on restyling, what **benefits,** if any, do you think restyling the Bankruptcy Rules could provide?

3. Regardless of your overall opinion on restyling, what **drawbacks**, if any, do you think restyling the Bankruptcy Rules could produce?

4. Do you believe any benefits of restyling would outweigh any drawbacks?

- No
- Yes

5. Do you have any specific stylistic concerns (not proposed substantive changes) with the current Bankruptcy Rules?

- No
- Yes → Please specify the concerns you have:

6. Overall, do you support the idea of restyling the Federal Rules of Bankruptcy Procedure?

- No → Please explain why you do not support the idea of restyling the Federal Rules of Bankruptcy Procedure:

- Yes → Please explain why you support the idea of restyling the Federal Rules of Bankruptcy Procedure:

7. Is there anything specific you would like the Advisory Committee to consider when making its decision about whether to move forward with restyling?

- No
- Yes → Please specify:

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: FRCP 30(b)(6)/26(f) ON DUTY TO CONFER

DATE: MAR. 9, 2018

Beginning in April 2016, in response to several submissions suggesting changes to Fed. R. Civ. P. 30(b)(6) dealing with notice of depositions of organizations, the Advisory Committee on Civil Rules began exploring the desirability of amending the rule and created a subcommittee for that purpose. (That rule is applicable to adversary proceedings in bankruptcy cases under Fed. R. Bankr. P. 7030 and contested matters under Fed. R. Bankr. P. 9014(c)). Initially there were as many as sixteen different issues presented by the suggestions that might result in revisions to the rule, but after further deliberations with both the Advisory Committee on Civil Rules and the Standing Committee, the Rule 30(b)(6) Subcommittee narrowed those issues to six and solicited comments on the proposals from the public both in writing and at public fora. More than 100 written comments were submitted. After reviewing these comments, the Rule 30(b)(6) Subcommittee concluded that many of the proposed changes might produce more problems than they would solve. However, the Rule 30(b)(6) Subcommittee continued to believe that encouraging or requiring communication about potential problem areas in a deposition would be a positive step.

In Nov. 2017, the Rule 30(b)(6) Subcommittee brought to the Advisory Committee on Civil Rules a draft amendment that would have required that, before or promptly after giving notice of a deposition or serving a subpoena, the party either must or should "in good faith confer [or attempt to confer] with the deponent about the number and description of the matters for examination." The Advisory Committee on Civil Rules suggested that the obligation to confer should be bilateral (imposed on both the party requesting the deposition and the organization being deposed) and that the identity of the persons to be designated to testify should be disclosed. The Advisory Committee on Civil Rules also asked whether some change to Rule 26(f) (describing the required conference of the parties) would be helpful.

The Rule 30(b)(6) Subcommittee had a further conference call in January 2018, and agreed to a revised draft to the amended Rule 30(b)(6) which reflected the comments of the Advisory Committee on Civil Rules. That draft is attached as Exhibit A. The Rule 30(b)(6) Subcommittee rejected suggestions by the Lawyers for Civil Justice that the rule add more specifics about topics that must be covered in the conference. The Rule 30(b)(6) Subcommittee also declined to add a general requirement that the parties discuss "logistics" of the deposition or "the process for the deposition" because such language might open the door to more disputes if it were required by the rule. However, the Subcommittee invited the Reporter to introduce the idea in the Committee Note (without being too prescriptive). The Reporter circulated language and received a number of comments on the draft. The current version of the Committee Note to revised Rule 30(b)(6) is attached as Exhibit B.

The Rule 30(b)(6) Subcommittee also considered whether Rule 26(f) should also be changed to suggest that the parties may discuss "the process and timing of [contemplated] depositions under Rule 30(b)(6)" in their Rule 26(f) conference. (Rule 26(f) also applies to adversary proceedings under Fed. R. Bankr. P. 7026 but does not apply to contested matters under Fed. R. Bankr. P. 9014(c) unless the court directs otherwise.) There is some concern that the Rule 26(f) conference occurs too early in the process to deal with prospective Rule 30(b)(6) depositions. In most cases, the parties cannot be sure that such depositions will be needed, much less what issues they will cover, at the time the conference is held.

The Rule 30(b)(6) Subcommittee decided not to recommend any change in Rule 26(f) for publication. However, the Rule 30(b)(6) Subcommittee decided to keep the idea of an amendment to Rule 26(f) in the package for now, in case the Advisory Committee on Civil Rules thinks there would be some value in soliciting public comments, even if neither the Rule 30(b)(6) Subcommittee nor the Advisory Committee on Civil Rules endorses such a change. The proposed language, along with the draft Committee Note, is attached as Exhibit C.

The Business Subcommittee of the Advisory Committee on Bankruptcy Rules reviewed the proposed changes to Rule 30(b)(6) and recommended that the Advisory Committee on

Bankruptcy Rules support them insofar as they will apply in bankruptcy cases. The Business Subcommittee also recommended that the Advisory Committee on Bankruptcy Rules not support changes to Rule 26(f). Having received the support of the Advisory Committee on Bankruptcy Rules to this recommendation, Judge Goldgar, as liaison to the Advisory Committee on Civil Rules, sent the following communication to Judge Joan Ericksen, Chair of the Advisory Committee on Civil Rules, and to Richard Marcus, Reporter to that Committee, on February 21, 2018:

I write to convey the Bankruptcy Rules Advisory Committee's views on the proposed amendment to Rule 30(b)(6) and accompanying possible amendment to Rule 26(f)(2).

As I mentioned at several Civil Rules Committee meetings, the amendments are matters of concern to the Bankruptcy Rules Committee because Rule 30(b)(6) applies in all adversary proceedings and contested matters in bankruptcy through Bankruptcy Rules 7030 and 9014(c), and Rule 26(f) applies in adversary proceedings through Bankruptcy Rule 7026. Rule 30(b)(6) depositions are in fact fairly common in larger business chapter 11 cases.

The Bankruptcy Rules Committee has discussed the proposed amendments. We support the amendment to Rule 30(b)(6), and we have no comments on the language of the proposed rule or committee note. On the other hand, we oppose the amendment to Rule 26(f)(2). In our view, consideration of Rule 30(b)(6) questions is unlikely to be profitable at a Rule 26 scheduling conference because the conference takes place so early in the litigation.

Thank you again for allowing us to weigh in at this early stage.

EXHIBIT A

Rule 30. Depositions by Oral Examination

* * * * *

(b) NOTICE OF THE DEPOSITION; OTHER FORMAL REQUIREMENTS

* * * * *

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the named organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

EXHIBIT B

DRAFT COMMITTEE NOTE

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served, regarding the number and description of matters for examination and the identity of persons who will testify. At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition at least some of the documents it intends to use during the deposition, thereby alerting the organization about the topics on which the witness must be prepared. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate one or more witnesses to testify. It provides for collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designee, discussion about the identity of persons to be designated to testify may avoid later disputes. It may be productive also to discuss "process" issues, such as the timing and location of the deposition.

The amended rule directs that the conference occur either before or promptly after the notice or subpoena is served. If the conference occurs before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined during the conference.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. [An amendment to Rule

26(f) notes that Rule 30(b)(6) depositions may be a suitable topic for discussion during that conference for planning discovery.[1]] [In some cases, discussion at the Rule 26(f) conference may itself satisfy the Rule 30(b)(6) requirement that the serving party confer with the named organization.[2]] In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

[1] If the Rule 26(f) amendment idea is not recommended for publication, this sentence would be dropped.

[2] Would including this sentence potentially create problems? It might be cited to weaken or nullify the duty to confer we are introducing in cases in which the parties mentioned 30(b)(6) depositions in passing during their Rule 26(f) conference.

EXHIBIT C

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY

* * * * *

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; must make or arrange for the disclosures required by Rule 26(a)(1); must discuss any issues about preserving discoverable information; may consider issues regarding [contemplated] depositions under Rule 30(b)(6); and must develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

DRAFT COMMITTEE NOTE

Rule 30(b)(6) is amended to require that, before or promptly after service of the notice or subpoena, the serving party and the organization subject to the notice or subpoena confer about the matters for examination and the identity of each person who will testify.

Rule 26(f) is amended to recognize that, in some cases, Rule 30(b)(6) depositions may already be contemplated by the time this discovery-planning conference occurs. If so, it may be productive to begin the discussion of the matters for examination and the identity of persons to testify during this conference. It may even be possible to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3). In some cases, the discussion during

the Rule 26(f) conference may satisfy the Rule 30(b)(6) conference requirement.

This amendment does not require the parties to discuss Rule 30(b)(6) depositions during their Rule 26(f) conference. [It is limited to "contemplated" Rule 30(b)(6) depositions.] Whatever initial discussion of those depositions occurs during that conference, it will be important for the parties to recognize that later developments in the case may bear significantly on the need for such depositions, the matters for examination, and the best person or persons to address those matters. Accordingly, any reference to Rule 30(b)(6) depositions in the discovery plan should recognize the possible importance of later developments in the case.

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MEMORANDUM

TO: The Rules Committees

FROM: Scott Myers -- Rules Committee Support Office

RE: Rules Coordination Report

DATE: March 1, 2018

At its June 2016 meeting, the Standing Committee asked the Rules Committee Support Office (RCSO) to identify and coordinate proposed changes to rules that have implications for more than one set of rules. The proposed changes listed below implicate more than one rule set.

Rules published for comment in 2017

Appellate Rule 26.1 (Disclosure Statement)

The Appellate Rules Committee published proposed amendments to Appellate Rule 26.1 (Disclosure Statement) to add a new subdivision (b) that follows pending 2018 amendments to Criminal Rule 12.4(a)(2) (Disclosure Statement). The proposed appellate version of the disclosure rule also adds a new subdivision that would require disclosures of certain actors when an appeal originates from a bankruptcy proceeding. The Bankruptcy Rules Committee reviewed proposed FRAP 26.1 at its fall 2017 meeting and anticipates publishing conforming amendments to its appellate disclosure rule, Bankruptcy Rule 8012 in 2018 – after considering the version of FRAP 26.1 that is recommend for final approval.

Rules changes under consideration

Civil Rule 30(b)(6)

The Advisory Committee on Civil Rule has established a subcommittee to develop a proposal to improve the procedure for taking depositions of an organization under Rule 30(b)(6), with a goal to consider a proposed amendment for publication at its spring 2018 meeting. Rule 30 is wholly incorporated into Bankruptcy Rule 7030, and therefore applies in bankruptcy adversary proceeding and contested matters. The Bankruptcy Rules Committee has been kept apprised of developments in the Rule 30(b)(6) proposal, and has endorsed the leading option under consideration by the Civil Rules subcommittee considering the matter.

Appellate Rule 7.

The Advisory Committee on Appellate Rules has discussed a potential issue related to Rule 7 and whether attorney fees are "costs on appeal" under the rule. It determined to refer the issue to the Civil Rules Committee and to form a subcommittee to monitor any developments.

Proof of Service Rules

The Appellate Rules Committee is considering amendments to Rule 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) to eliminate the phrase "proof of service" because pending changes to Rule 25(d) will eliminate the requirement to file a proof of service when a paper is presented for filing other than through the Court's electronic filing system.

The Civil, Criminal, and Bankruptcy Rules Committees may want to consider whether similar changes are needed in their rule sets.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: TECHNICAL AMENDMENT TO RULE 2002(k)

DATE: MARCH 12, 2018

Included in the package of amendments accompanying the chapter 13 plan form was an amendment to Rule 2002 (Notices) that added a new subdivision (a)(9). The amendment went into effect on December 1, 2017, and it provides that at least 21 days' notice be given to the debtor, trustee, creditors, and indenture trustees of "the time fixed for filing objections to confirmation of a chapter 13 plan." Previously Rule 2002(b) had required that at least 28 days' notice of that objection deadline be given.

In making this change and relocating the provision from subdivision (b) to subdivision (a)(9), the need to amend Rule 2002(k) was overlooked. Subdivision (k) provides for transmitting notices under specified parts of Rule 2002 to the U.S. trustee. Included within this provision is the requirement to provide the U.S. trustee with notices under subdivision (b). Thus, prior to December, the rule required transmitting notice to the U.S. trustee of the deadline for objecting to confirmation of a chapter 13 plan.

Because that deadline is now located in subdivision (a)(9), which is not specified in subdivision (k), the rule no longer requires that notice to be transmitted to the U.S. trustee. **The Subcommittee recommends curing this oversight by amending the first sentence of Rule 2002(k) to read as follows**:

> (k) NOTICES TO UNITED STATES TRUSTEES. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the

United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. * * * * *

Committee Note

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

Because the proposed amendment is a conforming one, there probably is no need to publish it for public comment. But because the Committee will be proposing for publication this summer amendments to Rule 2002(f)(7) and (h), which were approved for publication by the Advisory Committee last spring,[1] the Subcommittee recommends that the amendment to Rule 2002(k) be included with the other amendments to that rule and that the two Committee Notes be consolidated. The proposed amendments and the accompanying Committee Note would then read as follows:

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

*** * * * ***

(f) OTHER NOTICES. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all

[1] At the fall 2017 meeting, the Advisory Committee voted to also add chapter 12 cases to Rule 2002(h).

creditors, and indenture trustees notice by mail of:

* * * * *

(7) entry of an order confirming a chapter 9, 11, ~~or~~12, or 13 plan;

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. ~~In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code~~In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified

in the preceding sentence.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEES. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses.

* * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: SUGGESTION 17-BK-E REGARDING SERVICE OF PROCESS ON CREDIT UNIONS

DATE: MARCH 12, 2018

California attorney A. Lysa Simon has submitted a suggestion that Rule 7004(h) be amended to include credit unions within the special requirement that service in an adversary proceeding or contested matter be by certified mail (unless one of three exceptions applies). Currently the provision applies only to "an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)." That definition, which is limited to depository institutions that are insured by the Federal Deposit Insurance Corporation, does not include credit unions, which are instead insured by the National Credit Union Administration. **For the reasons discussed below, the Subcommittee recommends that no action be taken in response to this suggestion.**

The Suggestion

Ms. Simon represents one or more credit unions, and she argues that it is unfair that they are not entitled to the same heightened service as banks and savings and loans. Instead, although they are also insured by a federal government entity, they are covered by the general service provision of Rule 7004(b)(3), which allows service by first class mail on foreign and domestic corporations. She surmises that "the intent of . . . subsection [(h)] was to ensure that governmental entities and governmentally insured institutions, i.e., financial institutions, actually

receive notice of actions that can negatively impact them." Suggestion 17-BK-E at 2. She says that if that is correct, credit unions should also be included.

Ms. Simon argues that there is a special reason that credit unions should be served by certified rather than first class mail. There is often confusion in serving credit unions, she says, because their name is frequently similar to "their largest membership common bond," often a particular employer. She notes examples from her experience in which the employer has received the credit union's mail and vice versa.

Ms. Simon therefore suggests that Rule 7004(h) be amended as follows:

> (h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act, and Title 12, Chapter 14, Subchapter 1 (12 U.S.C. Section 1752) of the Federal Credit Union Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution;
> >
> > (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Legislative History of Rule 7004(h)

Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Section 114 of that law declared that "Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended" to add the text of new subdivision (h). This enactment adopted § 114 of the House bill (H.R. 5116), rather than the corresponding provision of the Senate bill (§ 113 of S. 540). The Senate provision would have amended Rule 7004(b)(3)

to require certified or registered mail for service of a summons and complaint on all domestic and foreign corporations, partnerships, and unincorporated associations.

It appears that there was no conference committee report, so there is no official explanation for why the heightened service requirement was not extended to all corporations or why it was limited to insured depository institutions as defined by the Federal Deposit Insurance Act. The Senate report (S. Rep. 103-168) explained its broader provision as follows: "This section requires certain bankruptcy notices to be sent by certified or registered mail rather than through the ordinary U.S. mail. This modification is designed to enhance the likelihood that creditors receive notice of a bankruptcy filing in order to preserve their ability to act in a timely fashion to protect whatever rights they may have as bankruptcy creditors." The House report (H. Rep. 103-835) merely restated the language of § 114.

Basis for the Subcommittee's Recommendation

The history of the enactment of Rule 7004(h) sketched out above shows that Congress had the opportunity to require service by certified or registered mail on all corporations, but it chose not to disturb the existing general rule of service by first class mail on corporations. Instead it carved out a narrow exception for insured depository institutions as defined by the Federal Deposit Insurance Act. Whether omitting credit unions from that provision was an oversight is unknown, but if it was, Congress has had almost 24 years to make a correction, and it has not done so.

Ms. Simon's suggestion raises the questions (1) whether there is authority to amend Rule 7004(h) through the rulemaking process and, (2) even if there is, whether the rule *should* be expanded to require service by certified mail on credit unions. With respect to the first question, if subdivision (h) is read as requiring service by certified mail only on the specified institutions

and rejecting it for all others, then a rule requiring service in that manner on credit unions would be inconsistent with the congressional enactment. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize bankruptcy rules to override statutory procedural provisions. It lacks a supersession provision like the one contained in the general Rules Enabling Act, 28 U.S.C. § 2072. Subsection (b) of the latter statute says, "All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect." Promulgated without such authority, bankruptcy rules must be consistent with federal statutes.[1]

If the enactment of Rule 7004(h) is viewed as providing for service by certified mail on the specified depository institutions but not taking a position on when it might be appropriate for other entities, then a rule amendment extending that heightened service requirement to credit unions would be permissible. The Subcommittee therefore considered the second question stated above: Should service on credit unions by certified mail be required in adversary proceedings and contested matters?

The Subcommittee decided that it should not be required. Under Rules 7004 (for adversary proceedings) and 9014 (for contested matters), service by first class mail is generally sufficient. Furthermore, the Advisory Committee has recently proposed amendments to reduce further the cost and burden of service by expanding service by electronic means (Rule 7005's incorporation of Civil Rule 5, Rule 8011, and Rule 9036) and by clarifying that service of claim objections on most claimants does not have to be by the means specified in Rule 7004 (Rule 3007). Imposing a requirement of service by certified mail on credit unions—a method not imposed by the rules committees—would be contrary to this trend.

[1] Of course, both bankruptcy and all of the other federal rules must not "abridge, enlarge, or modify any substantive right." 28 U.S.C. §§ 2072(b), 2075(b). The Subcommittee assumed that a rule specifying a method of service is procedural.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

SUBJECT: RECONCILIATION OF RULE 9010(c) and DIRECTOR'S FORMS 4011A AND 4011B

DATE: MARCH 12, 2018

In reviewing the Bankruptcy Rules to determine which ones authorize modification of Official Forms, Scott Myers and the reporter discovered an inconsistency between Rule 9010(c) (Power of Attorney) and current Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney). As part of the Forms Modernization Project, the power-of-attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director's Forms, the use of which is optional unless required by local rule. This change took effect on December 1, 2015. Rule 9010(c), however, provides that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). In order to bring the rule and forms into conformity, either Rule 9010(c) needs to be amended to delete the reference to an Official Form, or the power-of-attorney forms need to be returned to Official Form status. The Subcommittee recommends the latter action.

Reason for the Switch from Official to Director's Forms

The Forms Modernization Project group recommended that the power-of-attorney forms be changed to Director's Forms in order to allow greater flexibility in their use, in light of the prospect of amended Rule 9009 increasing restrictions on making modifications to Official

Forms. The committee note accompanying the abrogation of Official Forms 11A and 11B explains as follows:

> Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.
>
> The Director's Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

The Advisory Committee supported this change, and the abrogation of Official Forms 11A and 11B was approved by the Judicial Conference.

Basis for the Subcommittee's Recommendation

In considering whether to recommend a change to Rule 9010(c) or to Director's Forms 4011A and 4011B, the Subcommittee considered whether the reason given for the switch to the use of Director's Forms remains valid. If it does, then the Subcommittee thought that reconciliation should be accomplished by amending Rule 9010(c) to allow the use of Director's Forms.

The Subcommittee concluded, however, that Director's Forms are not needed to allow modifications of the power-of-attorney forms. Rule 9009 allows modifications of Official Forms "as provided in these rules." The relevant rule here—Rule 9010(c)—only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that "conforms substantially" to an Official Form have been interpreted by the Advisory Committee to permit modifications of those forms, and they are included in the chart of Alterations Permitted by Bankruptcy Rules that Mr. Myers prepared and that were approved at the Advisory Committee's fall 2017 meeting. See http://www.uscourts.gov/rules-policies/about-rulemaking-

process/permitted-changes-official-bankruptcy-forms. Treating Rule 9010(c) as permitting modifications of the power-of-attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii).

The Subcommittee agreed that flexibility is desirable for the power-of-attorney forms and that Rule 9010(c) as currently written allows modification. The Subcommittee then considered whether amending the rule or amending the forms was preferable to achieve consistency. The more efficient choice would be to amend the forms, i.e. make them Official Forms once again. The process for amending or adopting Official Forms is one year shorter than the process for amending a rule since form amendments do not have to be sent to the Supreme Court and Congress. **The Subcommittee therefore recommends that the Advisory Committee propose that current Director's Forms 4011A and 4011B be repromulgated as Official Forms 411A and 411B.**

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United States Bankruptcy Court

_____ District Of _____

In re _____ Case No. _____
Debtor

Chapter _____

GENERAL POWER OF ATTORNEY

To _____ of * _____ , and

_____ of * _____ .

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to vote on any question that may be lawfully submitted to creditors of the debtor in the above-entitled case; [if appropriate] to vote for a trustee of the estate of the debtor and for a committee of creditors; to receive dividends; and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: _____

Signed: _____

By: _____

as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____ .

[*If executed on behalf of a partnership*] Acknowledged before me on _____ , by _____ who says that he [*or* she] is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____ , by _____ who says that he [*or* she] is _____ of the corporation named above and is authorized to execute this power of attorney in its behalf.

_____

_____

[*Official character.*]

* State mailing address.

COMMITTEE NOTE

This form replaces Director's Bankruptcy Form 4011A, which, in turn, was derived from former Official Form 11A in 2015 as part of the Bankruptcy Forms Modernization project.

Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. Because the exact language of the form is not needed, and Rule 9009, as amended on December 1, 2017, generally restricts alteration of the Official Forms, the form was abrogated as an Official Bankruptcy Form and reissued as a Director's Bankruptcy Form.

Bankruptcy Rule 9010(c), however, requires that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). The form is therefore reissued as an Official Form. Because only substantial conformity to the Official Form is required by Rule 9010(c), parties will be able to continue modifying the form as needed to conform to state law, the needs of the case, or local practice.

United States Bankruptcy Court

_____ District Of _____

In re _____ Case No. _____
Debtor

Chapter _____

SPECIAL POWER OF ATTORNEY

To _____ of * _____ , and

_____ of * _____ .

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned [*if desired*: and with full power of substitution,] to attend the meeting of creditors of the debtor or any adjournment thereof, and to vote in my behalf on any question that may be lawfully submitted to creditors at such meeting or adjourned meeting, and for a trustee or trustees of the estate of the debtor.

Dated: _____

Signed: _____

By: _____

as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____ .

[*If executed on behalf of a partnership*] Acknowledged before me on _____ ,
by _____ who says that he [*or* she] is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on _____ ,
by _____ who says that he [*or* she] is _____
of the corporation named above and is authorized to execute this power of attorney in its behalf.

_____

_____

[*Official character.*]

* State mailing address.

COMMITTEE NOTE

This form replaces Director's Bankruptcy Form 4011B, which, in turn, was derived from former Official Form 11B in 2015 as part of the Bankruptcy Forms Modernization project.

Parties routinely modify the Special Power of Attorney form to conform to state law, the needs of the case, or local practice. Because the exact language of the form is not needed, and Rule 9009, as amended on December 1, 2017, generally restricts alteration of the Official Forms, the form was abrogated as an Official Bankruptcy Form and reissued as a Director's Bankruptcy Form.

Bankruptcy Rule 9010(c), however, requires that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). The form is therefore reissued as an Official Form. Because only substantial conformity to the Official Form is required by Rule 9010(c), parties will be able to continue modifying the form as needed to conform to state law, the needs of the case, or local practice.