

ADVISORY COMMITTEE ON BANKRUPTCY RULES  
Meeting of April 3, 2018  
San Diego, CA

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair  
District Judge Marica S. Krieger  
District Judge Pamela Pepper  
Bankruptcy Judge Stuart M. Bernstein  
Bankruptcy Judge Dennis Dow  
Bankruptcy Judge A. Benjamin Goldgar  
Bankruptcy Judge Melvin S. Hoffman  
Jeffrey Hartley, Esquire  
David A. Hubbert, Esq.  
Thomas Moers Mayer, Esquire  
Jill Michaux, Esquire  
Debra Miller, Chapter 13 Trustee  
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)  
Circuit Judge Susan Graber  
Bankruptcy Judge Mary Gorman  
Professor Cathie Struve, associate reporter to the Standing Committee  
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer  
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee  
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado  
Molly Johnson, Senior Research Associate, Federal Judicial Center  
Bridget Healy, Esq., Administrative Office  
Scott Myers, Esq., Administrative Office  
Nancy Walle, National Association of Chapter 13 Trustees

Discussion Agenda

1. Greetings and introductions

Judge Sandra Ikuta welcomed everyone to San Diego, and congratulated Judge Dennis Dow on his appointment as the next chair of the Committee.

2. Approval of minutes of Washington, D.C., September 26, 2017 meeting

The minutes were approved with one small edit.

3. Oral reports on meetings of other committees:

(A) January 4, 2018 Standing Committee meeting

Professor Elizabeth Gibson provided the report. This Committee had no action items to report at the meeting, but instead provided a report on several information items, including the potential project to restyle the bankruptcy rules. A draft of the Standing Committee minutes was included at Tab 3 of the agenda materials.

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

Judge Benjamin Goldgar provided the report about the Civil Rules Committee meeting. He noted that they are considering amendments to the mandatory disclosure rules and issues regarding third-party litigation funding.

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

Judge Pamela Pepper provided the report regarding the Appellate Rules Committee meeting. She stated that they are considering an amendment to Rule 26.1, including changes to subsection (c) regarding disclosures in bankruptcy appeals. Also, there is a proposed amendment to Rule 25(d)(1) to match amendments made to the other federal rules. Judge Pepper explained the revised proposed amendment. Finally, she noted that the Appellate Rules Committee will consider possible amendments to Rules 3 and 7.

(D) December 7, 2017 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report for the Bankruptcy Administration Committee. The Bankruptcy Committee continues to work on the issue of unclaimed funds, and one solution may be legislation. If legislation is put forward, the Bankruptcy Rules may be impacted. She detailed a discussion with the Bankruptcy Committee regarding an administrative form used by the Administrative Office to collect case information, and if the form is still necessary.

4. Report by the Subcommittee on Consumer Issues

(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. See memo by Professor Laura Bartell, included in the agenda materials.

Professor Laura Bartell provided the report on the proposed amendment to Rule 4001(c). The group discussed the purpose of the amendment, clarifying that it was not to eliminate the need to file motions for post-petition credit in chapter 13 cases when required by Section 364 of the Bankruptcy Code. The proposed amendment would reduce the requirements for requesting post-petition credit in chapter 13 cases, distinguishing them from chapter 11 cases. A suggestion was made to add a subtitle heading such as “Inapplicability in Chapter 13 Cases” for new subsection (4) to highlight the purpose of the amendment, and to match the remainder of the section. The proposed amendment with the new subheading for subsection (4) was approved by motion and vote.

- (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. See memo by Professor Bartell, included in the agenda materials.

Professor Bartell explained that five comments were filed regarding the proposed amendment to Rule 6007(b). In response to the comments, the subcommittee suggested adding the words “trustee’s and debtor in possession’s” immediately before the word “abandonment” in the last sentence of the amendments to make it clear that the abandonment was not by the court itself. No further changes were suggested in response to the comments. The proposed amendment with the added language was approved by motion and vote.

- (C) Consider comments and make recommendation concerning the proposed amendment to Rule 9037(h) regarding redaction procedures for documents that contained unredacted protected privacy information before being filed in a case. See memo by Professor Gibson, included in the agenda materials.

Professor Gibson advised that the Committee determined to take up the proposed amendments to Rule 9037 to add a new subdivision (h) in response to a suggestion from the Committee on Court Administration and Case Management. The proposed amendment was published in August 2017. There were several comments filed, and the subcommittee suggested several revisions in response to the comments. A revised version of the proposed rule was included in the agenda materials, although Professor Gibson noted that the revised proposed rule would have to be submitted to the style consultants prior to being finalized. In response to the comments, a change was proposed to revise subdivision (h)(1) to make it one sentence that is prefaced with the clause, “Unless the court orders otherwise,” and to delete that language from subdivision (h)(1)(C) to avoid any confusion for courts in interpreting the rule.

One member raised the issue of whether the document to be redacted is still available to CM/ECF users once a motion is filed. Ken Gardner advised that most courts restrict public

access to the document in question once the motion is filed, including for the person filing the motion. Others noted that in some courts the restriction is automatic. Professor Gibson explained that the proposed amendment was revised to strengthen the language regarding restricting access and filing a redacted document. Corresponding changes were made to the Committee Note. Judge Campbell suggested a revised heading to include a reference to redacted document filings.

An issue was discussed regarding the inclusion of the redacted document with a motion. Professor Gibson suggested language requiring the movant to attach a copy of the redacted document with the initial motion, but also require an explanation of the needed redactions in the motion. She advised that one of the filed comments suggested adding language requiring the docketing of the redacted document if the motion is granted. The proposed change would add before the second sentence of subdivision (h)(2), “If the court grants it, the redacted document must be filed.” A minor stylistic change was suggested. The proposed amendment to Rule 9037, including the suggested changes, was approved by motion and vote. The Committee Note, revised to reflect the changes, was approved as well.

#### 5. Report by the Subcommittee on Business Issues

- (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. See memo by Professor Gibson in the agenda materials.

Professor Gibson explained that proposed amendments to Rules 2002(g) and 9036, and Form 410, were published for comment in August 2017. The purpose of the amendments was to expand the use of electronic noticing and service in bankruptcy courts. Several comments were filed, including comments that raised concerns about the technical implementation of the proposed amendments. These comments noted that current CM/ECF is not able to retrieve an email address from Form 410. The change, as proposed for amendment, added to the form a check box and instructed the creditor to check the box “if you would like to receive all notices and papers by email rather than regular mail.” The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest.

Those commenting did not object to the concept of adding a checkbox to the form, but they said that the change would require considerable re-programming in CM/ECF and other court software, and that it would take time. They requested that the effective date of the rules be

delayed. Another issue noted was the prioritization of contact email addresses submitted by users through various sources. If, for example, a party is registered for CM/ECF noticing (or Electronic Bankruptcy Noticing if not a registered CM/ECF user), and that party submits a different email address on Form 410, it would be difficult to determine which address should take priority when receiving notices from a court.

Based on these concerns, the subcommittee decided to delay the proposed amendments to Rule 2002(g) and Form 410, and to seek additional input from the Committee on Court Administration and Case Management and the Administrative Office's Noticing Working Group regarding the technical feasibility issues.

The Committee determined to go forward with approval of the proposed amendments to Rule 9036. Those changes are consistent with the amendments to Civil Rule 5 (which Rule 7005 makes applicable in bankruptcy) and the amendments to Rule 8011, which are on track to go into effect on December 1, 2018.

The Committee voted unanimously to hold the amendments to Rule 2002(g) and Official Form 410 in abeyance, but to approve the amendments to Rule 9036, with minor changes made in response to the comments. The changes include two sentences added to the Committee Note for Rule 9036 in response to a comment. The added sentences read: "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."

- (B) Recommendation concerning suggestion 17-BK-B from the ABA Business Law Section to incorporate "proportionality" language into document requests made under Bankruptcy Rule 2004. See memo by Professor Gibson, included in the agenda materials.

Professor Gibson advised that this suggestion is to amend Rule 2004(c) to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information ("ESI"). The suggestion was considered at the fall 2017 Committee meeting, with a recommendation that it be reconsidered by the subcommittee and re-presented at the spring meeting. There was support for the proposed amendments to Rule 2004(c) which would add references to ESI and conform the rule to the amended subpoena rules, but differing views on the need for an amendment to address proportionality. Based on the discussion at the fall meeting, the subcommittee revised the proposed amendment, retaining the concept of a proportionality requirement, but not specifying factors to determine proportionality.

One member stated an objection to the revised language, arguing that the purpose of Rule 2004, in contrast to Civil Rule 26, is a general exploration of the case rather than specific issues. Others responded that the reason for including the proportionality language is to prevent unduly burdensome and expensive requests for documents and ESI. A suggestion was made that the language regarding proportionality be moved to a different subsection of Rule 2004, and, if left in subsection (c), that the subsection heading be changed. Others voiced concern is that the amendment would lead to an increase in litigation, questioning whether the subpoena rules would provide the protection the proposed rule amendments are attempting to address. By a 7 to 6 vote, the Committee voted to remove the proportionality language.

The Committee unanimously approved seeking publication of amendments to Rule 2004(c) that would add a reference to electronically stored information to the title and first sentence of the subdivision. This would acknowledge the form in which information now commonly exists. The Committee also unanimously approved publication of the proposed amendments to the subpoena provisions of Rule 2004(c) to eliminate the reference to “the court in which the examination is to be held” to conform the rule to provisions of Civil Rule 45 and Bankruptcy Rule 9016.

- (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. See memo by Professor Bartell, included in the agenda materials.

Professor Bartell stated that the subcommittee identified several areas of consideration for the suggestion, the first being whether amendments regarding mediation are needed at all. She advised that the subcommittee is seeking guidance from the Committee prior to going further with the suggestion. Most members noted their support for mediation, but few believed the rule amendments are needed. The Committee generally agreed that the rule amendments are not necessary; if parties want to seek mediation, they will, and local procedures are sufficient. Judge Campbell advised that at this time there isn’t an overall effort within the federal rules committees to develop rules regarding mediation.

- (D) Recommendation concerning suggestion 17-BK-A from Kevin Dempsey, Clerk (IL-S) to revise and modernize the record keeping requirements of Rule 2013. See memo by Professor Gibson and memo by Molly Johnson summarizing survey of bankruptcy courts, included in the agenda materials.

Professor Gibson explained that the suggestion was to modify Rule 2013 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. Kevin Dempsey suggested that CM/ECF has replaced the need for the type of record that the rule calls for. He proposed that, rather than being abrogated, Rule 2013 be amended to require the clerk to make information about fees awarded to professionals available upon request.

At the request of the Committee, Molly Johnson completed a survey to determine if the rule is being used by courts. In addition, she gathered information regarding the use of the rule by the Executive Office for U.S. trustees and academics. Dr. Johnson reported on her survey, advising that most bankruptcy clerks responded that they prepare the required annual summary and maintain the public record; however, fewer than half submit the summary to the U.S. trustee's office, for a variety of reasons. Also, she found that very few courts receive requests for the information. From her study, she learned that in most courts, the report is generated through CM/ECF, even though the CM/ECF version of the report doesn't completely comply with Rule 2013. She explained that in some cases, orders are not included in the report based on mistakes in how orders are titled, or in variations in order titles. The suggestion is to keep the rule but not require the annual summary, and the majority of those responding agreed with this suggestion, to make the information available upon request rather than automatically.

Ramona Elliott reported on her survey of the U.S. trustees' offices. She stated that the report is useful for monitoring chapter 7 trustees. Many of the reports are posted on local courts websites, and this may be a possible change to the rule, i.e., to include the report on courts' websites. Ken Gardner spoke with several bankruptcy clerks, and he advised that if the information is properly entered into CM/ECF, the report will be accurate. Finally, Ms. Johnson stated that few academics use the Rule 2013 report.

The Committee discussed the suggestion and survey results, with several members suggesting that the rule be amended to work better with today's court environment. Others noted that an educational effort would be helpful, and that it would be helpful to communicate the information to the Bankruptcy Clerks Advisory Group. After this discussion, the Committee voted to take no further action on the suggestion.

## 6. Report by the Restyling Subcommittee

Consider process for soliciting feedback on possible restyling of the Federal Rules of Bankruptcy Procedure. See memo by Professor Bartell, along with the proposed survey questions and the example of restyled rule, included in the

agenda materials.

Judge Dow initiated the discussion regarding the proposal to restyle the bankruptcy rules. He explained that the subcommittee determined to seek the input of the bankruptcy community, and in that effort, asked Dr. Johnson to prepare a survey. The survey will be sent to various groups, with a link to the survey available on [uscourts.gov](http://uscourts.gov) as well. Many organizations will be contacted, including 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. The subcommittee sought approval of the process of surveying the bankruptcy community, and said it would report back to the Committee on the results of the survey at the fall meeting. Professor Bartell noted that the sample restyled rule is not something that the subcommittee has approved, but it is merely the rule as restyled by the style consultants. The subcommittee suggested that it be included with the survey to give participants an understanding of the nature of restyling.

The group discussed the survey and whether to include the style consultants' comments along with the sample restyled rule. One member noted that there may be a way to survey the broader question of whether the rules need to be restyled. Professor Gibson responded that she believes the restyled rule example helps. It provides a framework for understanding the nature of restyling. Other members suggested referring survey participants to restyled Civil Rules as examples. Several members agreed with this suggestion to avoid getting into bankruptcy-specific responses. Others stated that including a bankruptcy rule is more reflective of the potential restyling process, and that this will get better responses.

Judge Campbell explained that the point of restyling in general is to make the rules clearer, less cluttered, and more consistent. The other federal rules have been restyled. The Standing Committee will take the advice of this Committee as to whether the project should move forward.

Generally, the group agreed that including restyled Rule 4001 with the survey makes sense, but that the footnotes would be distracting. Instead, a note could be added that the rule example is merely that, and not an approved amended rule. Judge Dow suggested that Rule 4001, as restyled, be reviewed again by the subcommittee, and a version be developed that best reflects the comments made at the meeting, including a decision whether to attach just subsection (a) or the entire rule. In addition, the subcommittee will add introductory language for the survey regarding the inclusion of terms of art and the desire to avoid substantive rule changes. The group agreed with these ideas, and that if these changes are made, the survey can be sent out.



## 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. The proposed amendment to (h) was made by the Advisory Committee at its spring and fall 2017 meetings. The proposed amendments are incorporated into a technical amendment to Rule 2002(k) which is proposed for publication in August 2018.

Professor Gibson explained that the subcommittee recommends publication of three amendments to Rule 2002. The proposed amendments to subsections (f) and (h) were approved at the spring and fall 2017 meetings, respectively. The proposed amendment to Rule 2002(k) is technical, and would add a reference to subsection (a)(9). If approved, the combined proposed amendments to Rule 2002 will be presented to the Standing Committee.

The Committee approved the combined proposed amendments to Rule 2002, recommending that they be published for comment. The amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

- (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 Appellate Rule 26.1 amendment.

Professor Gibson explained that the Appellate Rules Committee will consider proposed amended Rule 26.1 at its spring meeting. Bankruptcy Rule 8012 will conform to these amendments. The group discussed the proposed amendments to Appellate Rule 26.1, specifically, the use of the word “cases” versus “proceedings” in subsection (c). Generally, the group agreed with the use of the term “cases.” An edit was suggested to the Appellate Rule 26.1’s Committee Note to delete the reference to “adversary proceedings.”

The Committee approved for publication amendments to Rule 8012 that track the relevant amendments to Appellate Rule 26.1.

8. Report concerning Advisory Committee on Civil Rules consideration of an amendment to Rule 30(b)(6) and implications for bankruptcy. See memo by Professor Bartell, included in the agenda materials.

Professor Bartell reported that Judge Goldgar advised the Civil Rules Committee that the Committee generally supports the proposed changes to Civil Rule 30(b)(6), but that it would not support amendments to Civil Rule 26(f)(2), if they were to go forward.

9. Items Retained for Further Consideration.

The matters listed below are part of the noticing project and will be considered in the future.

- (A) Suggestion 14-BK-E (Richard Levin, National Bankruptcy Conference) 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 of 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).
- (C) Comments 12-BK-005, 12-BK-008, 12-BK-026, 12-BK-040 were 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). This suggestion proposes 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, see memo of March 1, 2018, by Mr. Myers.

No report was made at the meeting.

11. Future meetings:

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

12. New business.

13. Adjourn.

### Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were noted, and all recommendations were approved by acclamation at the meeting.

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. See memo by Professor Gibson in the agenda materials

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. See memo by Professor Gibson in the agenda materials.

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). See memo by Professor Gibson in the agenda materials.