ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26, 2019
Washington, D.C.

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge A. Benjamin Goldgar
Jeffery J. Hartley, Esq.
Bankruptcy Judge Melvin S. Hoffman
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Debra Miller, Chapter 13 trustee
Jeremy L. Retherford, Esq.
Professor David A. Skeel
Circuit Judge Amul R. Thapar
District Judge George Wu

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)
Professor Daniel Coquillette, consultant to the Standing Committee (called in)
Professor Catherine Struve, reporter to the Standing Committee (called in)
Bankruptcy Judge Mary Gorman, liaison from the Bankruptcy Committee
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee (called in)
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
Allison R. Bruff, Esq., Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Whaley, National Association of Chapter 13 Trustees

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group. He introduced Judge David Campbell, the chair of the Standing Committee, and Professor Daniel Coquillette, and Professor Catherine Struve, the consultant and reporter for the Standing Committee, who were participating by phone. He also introduced others attending the meeting. He acknowledged Judges Pepper and Thapar, whose terms expire this fall, for their service to the Advisory Committee. He pointed out that the first Consent Agenda item has been moved to the Discussion Agenda and that there are handouts in connection with two items on the agenda.

2. Approval of minutes of San Antonio, Texas April 4, 2019 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) June 25, 2019 Standing Committee meeting

Judge Dow gave the report. The Standing Committee approved the proposed amendments to Bankruptcy Rules 2002, 2004, and 8012 after publication and consideration of comments. The Standing Committee also approved without publication proposed amendments to Bankruptcy Rules 8013, 8015, and 8021 to conform to amended Federal Rule of Appellate Procedure 25(d) in eliminating the requirement of proof of service for documents served through the court's electronic-filing system. The Standing Committee agreed to transmit all amended Rules to the Judicial Conference of the United States for consideration with a recommendation that they be approved and sent to the Supreme Court.

The Standing Committee also approved the recommendation of the Advisory Committee that it approve effective December 1, 2019, amended Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date. The amendment, proposed by an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California, adds a duplicated instruction emphasizing that a debtor should not complete Official Form 122A-2 if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income.

The Standing Committee also approved the request by the Advisory Committee for publication in August 2019 of proposed amendments to Rules 3007, 7007.1, and 9036. With respect to Rule 2005, the Standing Committee recommended that the rule be published for comment rather than adopted as a technical amendment, and made a small amendment to the Advisory Committee draft, inserting the word "relevant."

Judge Dow also provided the Standing Committee information on additional work of the Advisory Committee, in particular on restyling and unclaimed funds.

(B) April 5, 2019 Meeting of the Advisory Committee on Appellate Rules

There was no report at the meeting. The following report was submitted by Judge Pamela Pepper after the meeting:

The Advisory Committee on Appellate Rules met in San Antonio on April 5, 2019.

The Advisory Committee continued discussion of an amended Fed. R. App. P. 3, "Appeal Taken As of Right—How Taken" to address the problem created by a case in the Tenth Circuit in which the court found that if the appellant did not specify every single order being appealed, the appellant had waived the right to appeal any order not mentioned. FRAP 3(c)(1)(B) says that the notice of appeal has to "designate the judgment, order, or part thereof being appealed;" it was this language that led the Tenth Circuit to conclude that if the appellant didn't specify exactly the order or orders—or parts of orders—being appealed, the appellant had waived appeal of any unspecified orders.

The proposed amendment to Rule 3(c)(1)(B) would replace the phrase "being appealed" with the phrase "from which the appeal is taken." A new (c)(4) would refer to the merger rule and clarify that there is no need to include in the notice of appeal orders that merge into the designated judgment or order. A new (c)(6) would repudiate the *expressio unius* rationale. A new (c)(5)(A) would clarify that a notice of appeal that designates an order that disposes of all remaining claims in a case includes the final judgment.

At the April 5 meeting, the appellate rules committee word-smithed the proposed rule. At the end of the discussion, the chair of the standing committee, Judge David Campbell, asked the reporter (Professor Catherine Struve) to check with the bankruptcy and tax committees, and to run the proposed rule by those committees before taking the proposed rule on to the standing committee for publication.

The Advisory Committee also considered a proposed amendment to Rule 42, "Voluntary Dismissal." Rule 42(b) currently says that the clerk of the circuit court "may" dismiss a docketed

appeal if the parties filed a stipulation to dismissal. The proposal would change the word "may" to "must." It would also put the last sentence of that section—"An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court"—into a separate section, to make clear that there's a difference between a *stipulated* dismissal (which, under the new rule, must be dismissed) and a *motion* to dismiss, which the court would need to rule on. There's a third proposed change, about trying to explain what the rule means when it says "no mandate or other process may issue without a court order." This proposed rule change was approved (as revised) to send to the Standing Committee to publish for public comment.

A subcommittee is working on Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing), considering how and when to allow the court to convert a panel rehearing into an *en banc* rehearing and vice versa. There are differences among the circuits. There was discussion about a range of issues, but the subcommittee will continue its work.

The committee had been waiting on the Supreme Court's decision in Nutraceutical v. Lambert, 139 S. Ct. 710 (2019) to see whether there were equitable tolling issues that might require a fix to FRAP 4(a)(5)(C) (motions for extension of time can't exceed 30 days after "the prescribed time," or 14 days after the date when the order granting the motion is entered). Everyone concluded no fix was necessary. The committee also had been thinking about whether it was necessary to create a rule governing how the court of appeals should deal with the vote of a judge who has left the bench, but everyone agreed that the Supreme Court's decision in Yovino v. Rizo, 139 S. Ct. 706 (2019) had resolved that issue. (C) April 3, 2019 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report.

The MDL Subcommittee continues to consider proposals to formulate rules for multi-district litigation cases.

The Civil Rules Committee approved for transmission to the Standing Committee Rule 30(b)(6) on depositions of an organization as amended after publication and comments. The Standing Committee gave final approval to the amended rule.

The Standing Committee, at the request of the Civil Rules Committee, approved for publication and comment an amendment to Rule 7.1(a) that parallels amendments to Bankruptcy Rule 8012 and Appellate Rule 26.

The joint task forced created by the Civil Rules Committee and the Appellate Rules Committee is still considering the Supreme Court decision in *Hall v. Hall*, 138 S.Ct. 1118

(2018), in which the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2), they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. Judge Goldgar is participating in that consideration, because Rule 42 applies in bankruptcy cases. It is too soon to know whether the joint task force will find the problem is one that needs to be addressed.

The mandatory disclosure pilot program is ongoing in two districts and is being assessed.

(D) June 13-14, 2019 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report.

Longtime chair of the Bankruptcy Committee, Judge Karen E. Schreier, has retired and Judge Sara Darrow of the C.D. Ill. is assuming the chair.

One of the major projects the committee is working on is the diversity project. The bankruptcy courts lag other federal courts on diversity, and the Committee has undertaken programs in many major cities to encourage students to think about bankruptcy work and start the process towards diversity in practice and eventually on the bench.

Subcommittee Reports and Other Action Items

4. Report by Appeals, Privacy, and Public Access Subcommittee

(A) Recommendation to conform Bankruptcy Rule 8023 to proposed changes to Federal Rules of Appellate Procedure 42(b)

Judge Ambro and Professor Bartell provided the report. At the meeting of the Standing Committee on June 25, 2019, the Advisory Committee on Appellate Rules presented proposed amendments to Rule 42(b) dealing with voluntary dismissals. The amended version is intended to make dismissal mandatory upon agreement by the parties, as the rule stated prior to its restyling. It also intends to clarify that a court order is required for any action other than a simple dismissal. The rule does not change applicable law requiring court approval of settlements, payments, or other consideration. The revised Rule 42(b) was approved for publication.

Bankruptcy Rule 8023 was modeled on Rule 42(b), and in order to maintain the parallel structure of the rules, the Subcommittee recommended that the Advisory Committee recommend

to the Standing Committee the publication of the conforming changes to Rule 8023 and related committee note. The Advisory Committee approved the recommendation.

(B) Consider Suggestion 19-BK-G from Sai to amend Rule 9006 with a new subsection (h) requiring court calculation and notice of deadlines

Professor Gibson provided the report. The Advisory Committee has received a suggestion (19-BK-G) submitted by Sai (an advocate for pro se litigants) that seeks to shift from parties to the courts the obligation of determining when actions must be taken and documents filed under the various sets of federal rules. The identical suggestion was also submitted to the Civil, Criminal, and Appellate Advisory Committees. Sai noted that the calculation of deadlines under the federal rules can be difficult, even for attorneys and even more so for pro se litigants, and that the consequences of a calculation error can be severe. Sai noted that clerk's offices already calculate these deadlines for court purposes and suggested that they should issue the results of their calculations as "a simple clerk's order" that parties would be permitted to rely on.

In his suggestion to the Advisory Committee, he provided proposed language amending Rule 9006 by adding a new subsection (h) requiring the court to calculate deadlines and give notice of those deadlines to all filers.

The Subcommittee discussed the suggestion and little support was expressed for it. Members feared that the burden it would place on clerk's offices would be excessive and were also concerned that it would impermissibly require those offices to provide legal advice to parties. Some questioned whether, in the case of jurisdictional deadlines, a rule could allow parties to rely on what turns out to be an erroneous calculation by the court.

The Subcommittee referred the matter to the full Advisory Committee for discussion of whether it should be pursued as proposed or in any narrower respect, such as having the clerk's office specify deadlines for only a limited set of actions and filings. The views of the Committee will then be shared with the other advisory committees.

Ken Gardner characterized the suggestion as "problematic" and expressed his view that the suggestion was not a good one. No other member of the Advisory Committee expressed enthusiasm for the suggestion. The consensus was to not take any action with respect to this suggestion. Judge Krieger suggested tabling the suggestion to await views of other committees. Judge Campbell said that the Standing Committee wished to hear the views of the various advisory committees, and the Advisory Committee for the Criminal Rules had already discussed the matter at its fall meeting and was not willing to pursue it. Judge Goldgar proposed a table of deadlines be distributed instead of individualized notice of deadlines. Judge Campbell said that

there are resources on timelines available without creating new ones. Concern was expressed about creating something that litigants rely upon and that could mislead them.

The Advisory Committee voted to table the suggestion, on the understanding that it might be reconsidered if other Advisory Committees find merit in it.

5. Report by the Business Subcommittee

(A) Recommended amendments to Rule 5005 concerning notices sent to the United States trustee

Professor Bartell provided the report. Currently pending before Congress are amendments to Rule 9036 that would allow clerks and 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. The rule would also allow service or noticing on any entity by any electronic means consented to in writing by that person. We anticipate that these amendments will go into effect in December.

Transmittal of papers to the U.S. Trustee is governed by Rule 5005, which requires that such papers be "mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee" and that the entity transmitting the paper file as proof of transmittal a verified statement.

For the last year, the EOUST has been considering whether any changes should be made to Rule 5005 in light of the pending changes to Rule 9036. The EOUST would like to suggest proposed amendments to Rule 5005 to conform this USTP-specific rule to both amended Rule 9036 and current bankruptcy practice under Rule 5005(b). The proposed changes would allow papers to be transmitted to the U.S. Trustee by electronic means, and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Because the Department of Justice has not provided final approval to the proposed amendments, the Advisory Committee voted to table the proposal until the spring meeting.

(B) Recommended Rule and Form amendments needed to implement the Small Business Reorganization Act of 2019

Professor Gibson provided the report. On August 23 the President signed into law the Small Business Reorganization Act of 2019 ("SBRA"), which creates a new subchapter of chapter 11 for the reorganization of small business debtors. It will go into effect 180 days after

that date, which will be February 19, 2020. It does not repeal existing chapter 11 provisions regarding small business debtors, but instead it creates an alternative procedure that small business debtors may elect to use. Proceedings using the current chapter 11 provisions will continue to be called "small business cases," while cases for which the new procedure is elected will be called "cases under subchapter V of chapter 11." Debtors using either procedure are called "small business debtors."

The enactment of SBRA requires amendments to a number of bankruptcy rules and forms, often to exclude subchapter V cases from provisions referring generally to chapter 11 or to add new provisions applying to subchapter V cases.

The Subcommittee examined proposed amendments to nine bankruptcy rules – Rules 1007, 1020, 2003, 2009, 2012, 2015, 3010, 3011, and 3016, and amendments to seven Official Forms – 101, 201, 309E, 309F, 314, 315, and 425A. Professor Gibson summarized each of the amendments and the comments made on the amendments by retired bankruptcy judge Tom Small.

With respect to Rule 1007(h), Judge Hoffman noted that the proposed revisions did not work with respect to a liquidating chapter 11 case when there is no discharge. The language will be amended to keep the current language but carve out subchapter V cases and add a new clause for Subchapter V.

With respect to Rule 1020(b), which specifies when the US Trustee or a party in interest may file an objection to debtor's statement that debtor is a small business debtor, Ramona Elliot raised the issue of whether there could be an election of subchapter V status after the initial petition is filed, and when the US trustee could object in that situation. The same issue arises under the current rule with respect to potential elections made after the initial filing. She does not suggest any change to the rule in this regard.

In Rule 3016(d), "title 11" should be "chapter 11". There was discussion about whether subchapter V cases should be included in this provision, and it was decided that the standard form plan was not required so there was no harm to the inclusion.

On the various versions of Form 309, there was some discussion about how the information about the trustee would be provided prior to the trustee's appointment, and the conclusion was that the line would read "not yet appointed" and disclosed in connection with the notice of the 341 meeting.

Ken Gardner relayed the views of the bankruptcy clerks' advisory group that having separate 309 forms for subchapter V, rather than including the changes in the current forms, was preferable. The Advisory Committee agreed with that approach.

In new form 309E2, the reference to section 1141(d)(5) will be eliminated in line 11.

In the discussion of Form 425, Deb Miller raised the issue about where the computation of projected disposable income would appear. In the third statement on the first page, the form will be modified to replace the disclosure related to "aggregate average cash flow" with one of "projected disposable income" in conformity with Bankruptcy Code § 1191(c)(2). Judge Bernstein suggested a separate box for a subchapter V discharge in Article 9. This language will be circulated for approval after the meeting.

Ramona Elliot suggested that the Advisory Committee recommend no change to Rule 2003, because there is no reason to shorten the time period for holding 341 meetings in subchapter V cases. The Advisory Committee agreed. Judge Gorman spoke in favor of the amendment to Rule 3010 and Rule 3011 to allow for the trustee to dispose of small amounts, and the Advisory Committee agreed.

Deb Miller suggested that Rule 3002 should be amended to include subchapter V cases, and Rule 3003 should be amended to exclude subchapter V cases. The Advisory Committee was not prepared to consider all the implications of those suggestions at the meeting, and recognized that courts can set their own bar dates. If the trustees wish these suggestions to be pursued, the Advisory Committee will consider them at a future meeting.

Finally, there was a discussion of Judge Small's question about whether a subchapter V election can be made with respect to a case pending on the effective date of SBRA, and whether debtors can change their minds in the future. Professor Gibson recommended handling this by motion in individual cases, without any procedural rule changes. The Advisory Committee agreed.

The Advisory Committee approved all amended rules (other than Rule 2003) and forms with the changes and subject to the conditions noted above.

Because SBRA will take effect long before the rulemaking process can run its course, the amended rules will need to be issued initially as interim rules for adoption by each judicial district as local rules or by general order, and amended forms will need to be issued by the Advisory Committee subject to later approval by the Standing Committee and notice to the Judicial Conference.

Professor Gibson asked Scott Myers to explain the process by which the rules and forms might be added. The Advisory Committee would recommend to the Standing Committee a short public comment period, no longer than 30 days. The Advisory Committee and Standing Committee could consider final recommendations in November by email vote, and the Advisory Committee would then ask the Executive Committee of the Judicial Conference to allow the Standing Committee and the Advisory Committee to post and distribute to the courts the interim rules. With that approval, chief judges of the district courts and bankruptcy courts would be asked to adopt the interim rules as local rules or by general order to take effect on February 19, 2020.

The Advisory Committee would then start the process for approval of permanent rules, seeking publication of the interim rules, with any needed revisions, for public comment next August. Following the normal process would lead to an effective date of the rules of December 1, 2022.

Although the rule changes would be presented as interim rules, any form changes could be adopted by the Advisory Committee with later approval by the Standing Committee and notice to the Judicial Conference. The Advisory Committee decided to seek comments on the proposed form amendments when it publishes the proposed rule amendments for comment in October. The Advisory Committee will then adopt the form changes, subject to later approval by the Standing Committee and notice to the Judicial Conference. The Advisory Committee will seek comment on the form changes again in August 2020 when the proposed permanent rule changes are published, and it could revise the forms after that if appropriate.

The Advisory Committee will ask for authority from the Standing Committee to publish the changes for comment in October. The Advisory Committee will then make a final recommendation to the Standing Committee for the approval of interim rules in November.

6. Report by the Consumer Subcommittee

(A) Consideration of suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1

Professor Gibson provided the report. As was discussed at the spring 2019 meeting, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).

Judge Goldgar appointed a working group to review the suggestions and make a recommendation to the Subcommittee. The working group met telephonically several times during the summer and presented a discussion draft of a revised Rule 3002.1 to the Subcommittee. The Subcommittee began its review and discussion of the draft during its August 20, 2019, conference call and will continue its work on the draft this fall.

In addition to considering the content of the suggestions and the language and organization of the draft, the Subcommittee is considering several overarching issues presented by the suggested amendments to Rule 3002.1. They include (1) whether requiring the delay of the effective date of a payment change due to an untimely notice is consistent with the Rules Enabling Act and the Bankruptcy Code; (2) whether Official Forms should be created to implement any new provisions; (3) which, if any, additional enforcement provisions should be proposed; and (4) whether the rule should be divided into two rules to make it easier to read.

The Subcommittee anticipates making a recommendation to the Advisory Committee at the spring 2020 meeting. There was some discussion about whether additional sanctions are needed under the circumstances described in the rule.

(B) Consideration of suggestion 19-BK-F to amend Rule 3002(c)(6)(A) to expand the situations in which a creditor who doesn't get actual or constructive notice in reasonable time to file a proof of claim can seek an extension of the time to file

Professor Bartell provided the report. The Advisory Committee received a suggestion from George Weiss of Potomac, MD, 19-BK-F, with respect to Fed. R. Bankr. P. 3002(c)(6)(A). Rule 3002 requires creditors to file proofs of claim for their claims to be allowed, and specifies, in Rule 3002(c), the deadline for filing those proofs of claim in cases filed under chapter 7, 12 and 13. Rule 3002(c) then provides certain exceptions, including for domestic creditors, in clause (1), when "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a)." Mr. Weiss noted that this would not permit an extension of the deadline for creditors who actually did not get notice either because they were omitted from the matrix or were listed with an improper address.

Professor Bartell noted that the most recent amendments to Rule 3002(c) were made in connection with the adoption of the national chapter 13 plan, and were published twice, in 2013 and 2014. There were extensive comments on the amendments, many of which made the same point that Mr. Weiss is making now. There is no indication that these comments were

considered at the time, probably because of the volume of comments on the national chapter 13 plan.

If the Rule was intended to extend the bar date for domestic creditors only if no list of creditors was filed at all, it will never have any practical impact. There are no reported cases in which the debtor failed to file a list of creditors under Rule 1007(a) and, as a result, the creditor obtained an extension for filing a proof of claim. The prior comments on proposed Rule 3002(c)(6), as well as the current suggestion of Mr. Weiss, suggest that the Advisory Committee should consider expanding the Rule.

There are two possible approaches. The first would be to allow an extension if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." That is the standard now applicable to foreign creditors under Rule 3002(c)(2). The second would be to allow an extension only if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to include the creditor's correct name or its proper address on the list of creditors' names and addresses required by Rule 1007(a)." The Subcommittee made no recommendation as between the two approaches, but referred the matter to the Advisory Committee.

The Advisory Committee recommitted the matter to the Subcommittee to make a recommendation at the next meeting of the Advisory Committee.

7. Report by the Forms Subcommittee

(A) Recommend amendments to Official Forms 122A-1, 122B, and 122C-1 lines 9 & 10 to implement the recently enacted Haven Act of 2019

Professor Bartell provided the report. The "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act" was signed by the President on August 23. This new law amends the definition of "current monthly income" in Section 101(10) of the Code to exclude certain income in connection with a disability, combat-related injury or disability or death of a member of the uniformed services. It also limits retired pay excluded under the new provision.

This exclusion is added to the current exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of international terrorism or domestic terrorism. The current inclusion of pension income and exclusions for social security benefits and other payments are recognized in lines 9 and 10 of each of Form 122A-1, Form 122B and Form 122C-1 in the statement of current monthly income under chapter

7, 11 and 13, respectively. The Subcommittee originally approved the proposed versions of those forms with the amended language that appears in the agenda book, but Professor Catherine Struve proposed revisions to some of the language to make it more comprehensible. After discussions with the reporters, the version of the language contained in the version of Form 122A-1 distributed at the meeting was agreed to with one exception. Judge Goldgar suggested replacing the words "the recipient" with the word "you" in two places in line 9. The Advisory Committee agreed.

The Advisory Committee, upon motion and vote, agreed to approve the amendments to the forms and committee note without publication as conforming changes, pursuant to the authority that the Judicial Conference granted to the Advisory Committee in March 2016, subject to later approval by the Standing Committee and notice to the Judicial Conference.

8. Report by the Restyling Subcommittee

Judge Marcia Krieger, chair of the Subcommittee, and Professor Bartell provided the report. Judge Krieger thanked the AO staff and reporters for their work which made the work of the Subcommittee easier. The Subcommittee members also came to the conference call prepared and ready to comment. The Subcommittee has had two lengthy meetings by conference call and Skype to look at the restyled bankruptcy rules in Part I after the style consultants and the reporters worked out many issues between them on prior drafts. The reporters recently received an initial draft of the restyled rules in Part II, and have provided their comments to the style consultants. The reporters await their second draft which will be the basis of further discussion with the Subcommittee.

Our most important goal in this process is attempting to ensure that the changes made to the language of the rules do not alter the substance of the rules. The Subcommittee remains open to new approaches suggested by the style consultants, such as making references to specific forms in the rules where appropriate. The Subcommittee is also trying to be deferential about matters of pure style.

In addition, if the Subcommittee notes a substantive change that should be made in any rule, it is keeping a list for consideration at a later time by the Advisory Committee.

The Subcommittee still needs to discuss how to handle phrases the style consultants wish to modify that are used in the Code or defined in the Code, such as "small business case," "small business debtor," "health care business," and the like. The style consultants feel very strongly that these terms should be restyled in the rules. The Subcommittee is also attempting to reach a consensus on what terms and phrases are words of art or so-called sacred phrases that it believes

should be retained despite the fact that they are stylistically deficient, such as "meeting of creditors."

Information Items

9. Consideration of conforming amendments to Rule 8003 and Official Form 417A

Professor Gibson provided a report on the status of the Subcommittees' consideration of possible conforming amendments. The Advisory Committee on Appellate Rules has proposed amendments to FRAP 3(c) (Contents of the Notice of Appeal), which were published for public comment in August. The amendments are a response to a line of cases that treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment. The Committee's goal in proposing the amendments is to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal. Along with this rule change, the Appellate Rules Committee is also proposing an amendment to Appellate Form 1, which would split the notice-of-appeal form into two forms.

The Subcommittees were asked to recommend to the Advisory Committee whether Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and the bankruptcy notice-of-appeal form—Official Form 417A—should similarly be amended.

Unlike FRAP 3(c), Rule 8003(a)(3) does not specify the contents of a notice of appeal. Instead it requires substantial conformity with Official Form 417A. The reporter's research revealed only a few bankruptcy cases in which courts held that an appeal was limited to an order designated in the notice of appeal. Members of the Forms Subcommittee expressed concern that creating two notice-of-appeal forms for bankruptcy cases—one for appeals from judgments and the other for appeals from orders and decrees—would lead to confusion. It was pointed out that Rule 9001(7) defines "judgment" to mean "any appealable order," so there does not seem to be a basis for creating separate notices of appeal. While the wording of existing Official Form 417A might be revised in a manner similar to the proposed amendments to FRAP 3(c)(1)(B), the Subcommittee decided to wait until the spring to consider such changes so that it would have the benefit of the comments submitted in response to the publication of the FRAP 3(c) amendments.

The Appeals Subcommittee agreed with the Forms Subcommittee's decision to wait until spring – after it has seen the comments submitted on the FRAP amendments and learned the likely action to be taken by the Appellate Rules Advisory Committee -- to make a recommendation on whether to propose conforming amendments. Members of this

Subcommittee were not sure that the proposed amendments to Rule 8003 are needed for bankruptcy appeals.

The two subcommittees will make recommendations regarding any conforming changes to Rule 8003 and Official Form 417A at the spring meeting. Judge Campbell said the Advisory Committee should be careful about not taking action and potentially creating a trap for the unwary appealing in those jurisdictions that do not apply the merger rule.

10. Extension of the National Guard and Reservists Act of 2008

Professor Gibson provided a report.

In 2008 Congress enacted legislation that amended § 707(b)(2)(D) by adding a new subsection (ii) to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces.

In the years since the enactment of the 2008 legislation, Congress has extended the law's applicability on several occasions so that the exclusion has continued to remain in effect. On August 25 of this year, the President signed the National Guard and Reservists Debt Relief Extension Act of 2019, which makes the exclusion applicable to bankruptcy cases filed for four more years (15 years from the effective date of the 2008 act).

As a result, no changes are needed for Official Forms 122A-1 and 122A-1 Supp. The only changes needed for Interim Rule 1007-I are changes to its footnote to reference the most recent legislation and the extension conferred by that act. Those changes have been made.

11. Recommendations regarding suggestion 19-BK-D and 19-BK-J to amend Rule 7004(h)

Professor Bartell provided the report. George Weiss, an attorney in Potomac, MD, proposed in Suggestion 19-BK-D that Bankruptcy Rule 7004(h) should be amended by "importing the language of" Civil Rule 4(h) (permitting service of process on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process) to replace the requirement that service be made on "an officer," but retaining the requirement that such service be made by certified mail.

Several suggestions have been made in recent years requesting amendments to Rule 7004(h), most recently in 2017, 17-BK-E, which requested inclusion of credit unions in the Rule. Bankruptcy Rule 7004(h) was enacted verbatim by Congress in Section 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Because, under the Bankruptcy Rules

Enabling Act, 28 U.S.C. § 2075, bankruptcy rules cannot override statutory provisions, the Advisory Committee on Bankruptcy Rules lacks the authority to modify Rule 7004(h) in a manner that is inconsistent with federal statutes. Because the text of Rule 7004(h) is in fact statutory, an amendment that modifies that language in the manner suggested by Mr. Weiss is beyond the power of the Advisory Committee, whatever its substantive merits.

Mr. Weiss followed up his initial suggestion with two others. Rather than modifying the statutory language of the rule, he suggests first that the Advisory Committee supplement the rule with a new definition of "officer" to include a resident agent appointed to accept service of process. Although any insured depository institution can designate whomever it chooses as an "officer" of that institution, Professor Bartell expressed her view that it is not within the power of the Advisory Committee to interpret the term "officer" to include someone the institution has not so designated. She recommended no action be taken on this suggestion.

Mr. Weiss's second additional suggestion is that the Advisory Committee add an explanation of what the rule means when it requires certified mail "addressed to an officer of the institution." In particular, he would like the Advisory Committee to add a new provision in Rule 7004 specifying that any service made on an officer need not name the officer but rather can be addressed to "officer of [name of institution]."

This issue is not confined to Rule 7004(h); the same issue arises under the general service of process rule, Rule 7004(b)(3), with respect to service on corporations. Courts are divided on whether service is adequate if the officer is not named, both under Rule 7004(h) and under Rule 7004(b)(3). (Because Federal Rule of Civil Procedure 4(h)(1)(B) requires personal service, the issue does not arise outside of the bankruptcy context.)

This suggestion has not been considered by any subcommittee. The Advisory Committee saw some merit in pursuing this suggestion, and referred the suggestion to the Business Subcommittee to consider it and report back at the spring meeting.

12. Future meetings

The spring 2020 meeting will be in West Palm Beach, FL on April 2, 2020, and may be a two-day meeting. The fall 2020 meeting will be in Washington, D.C. on September 22, 2020.

13. New Business

There was no new business.

14. Adjournment

The meeting was adjourned at 1:35 p.m.

Proposed Consent Agenda

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

1. Forms Subcommittee

(A) Recommendation of no action regarding suggestion 19-BK-C to amend Official Form 309 to list addresses for the debtor for the prior three years