

**ADVISORY COMMITTEE  
ON  
BANKRUPTCY RULES**

Washington, DC  
September 17, 2018

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# ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 17, 2018

Washington, DC

## Discussion Agenda

1. Greetings and introductions (Judge Ikuta)
2. Approval of minutes of San Diego April 3, 2018 meeting (Judge Ikuta)
  - Tab 2A:** Draft minutes.
3. Oral reports on meetings of other committees:
  - (A) June 12, 2018 Standing Committee meeting (Judge Dow, Professor Gibson, Professor Bartell)
    - Tab 3A:** Draft minutes of Standing Committee meeting.
  - (B) April 10, 2018 Meeting of the Advisory Committee on Civil Rules. (Judge Goldgar)
  - (C) April 6, 2018 Meeting of the Advisory Committee on Appellate Rules. (Judge Pepper)
  - (D) June 14-15, 2018 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 Business Issues (Judge Bernstein)

- (A) Status report concerning proposed expansion of the use of electronic noticing and service through amendments to Rules 2002(g) and Official Form 410A (held in abeyance at spring 2018 meeting), and related suggestion 18-BK-D that would require certain high-volume notice recipients to transition from paper to electronic notices. (Judge Bernstein and Professor Gibson)

**Tab 4A:** Memo of August 24, 2018, by Professor Gibson.

- (B) Recommendation to amend Rule 3007(a)(2)(ii) to eliminate the inclusion of credit unions from the heightened service requirements of Rule 7004(h).

**Tab 4B:** Memo of August 21, 2018, by Professor Gibson.

### 5. Report by the Forms Subcommittee (Judge Dow and Professor Bartell)

- (A) Recommendation for amendment to Official Form 113 (Judge Dow and Professor Gibson)

**Tab 5A:** August 21, 2018 memo, by Professor Gibson.

- (B) Recommendation in support of Suggestion 18-BK-B to amend Director's Form 3180W (Order of Discharge under § 1328(a))

**Tab 5B:** Memo of August 22, 2018, by Professor Bartell  
Directors' Form 3180W (redline).

- (C) Recommendation of no action in response to Suggestion 18-BK-E to amend Official Forms 101A and 101B.

**Tab 5C:** Memo of August 22, 2018, by Professor Bartell.

6. Report by the Restyling Subcommittee (Judge Dow and Professor Bartell)
  - (A) Recommendation regarding restyling the Federal Rules of Bankruptcy Procedure (Judge Dow and Professor Bartell)

**Tab 6A:** Memo of August 22, 2018, by Professor Bartell.  
Memo of August 24, 2018 by Molly Johnson.  
Survey responses.

### **Information Items**

7. Business Subcommittee Consideration of possible changes to Rule 5005 in light of pending changes to Rule 9036 (Judge Bernstein, Professor Bartell)

**Tab 7A:** Memo of August 22, 2018, by Professor Bartell.

8. Coordination Items.

**Tab 8A:** Pending Rules Chart.

**Tab 8B:** September 2018 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States.

9. Future meetings:

The spring 2019 meeting will be in Austin, Texas, on April 4, 2019.

The fall 2019 meeting will be in Washington D.C.

Suggestions for the spring 2020 meeting.

10. New business.

11. 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, September 10, 2018.**

1. Subcommittee on Appellate Issues.

- (A) Recommendation for conforming technical changes to Rules 8012, 8013, and 8015.

**Tab Consent 1A:** Memo of August 21, 2018, by Professor Gibson.

- (B) Recommendation of no action in response to Suggestion 18-BK-C to amend Rule 9033.

**Tab Consent 1B:** Memo of August 22, 2018, by Professor Bartell.

2. Subcommittee on Business Issues.

- (A) Recommendations to refer Suggestion 14-BK-E (from the National Bankruptcy Conference) to the Consumer Subcommittee, and to take no action with respect to informal suggestions from committee member Jill Michaux, and former committee member David Lander

**Tab Consent 2A:** August 10, 2018 memo to the Subcommittee on Business Issues by Professor Gibson.

# Tab 1

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**COMMITTEES ON RULES OF PRACTICE AND PROCEDURE**  
**CHAIRS and REPORTERS**

|  |  |
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| <b>Chair, Committee on Rules of Practice and Procedure</b><br><i>(Standing Committee)</i>    | <b>Honorable David G. Campbell</b><br>United States District Court<br>Sandra Day O'Connor<br>United States Courthouse<br>401 West Washington Street, SPC 58<br>Phoenix, AZ 85003-2156            |
| <b>Reporter, Committee on Rules of Practice and Procedure</b><br><i>(Standing Committee)</i> | <b>Professor Daniel R. Coquillette</b><br>Boston College Law School<br>885 Centre Street<br>Newton Centre, MA 02459  |
| <b>Associate Reporter, Committee on Rules of Practice and Procedure</b>                      | <b>Professor Catherine T. Struve</b><br>University of Pennsylvania Law School<br>3501 Sansom Street<br>Philadelphia, PA 19104  |
| <b>Chair, Advisory Committee on Appellate Rules</b>  | <b>Honorable Michael A. Chagares</b><br>United States Court of Appeals<br>United States Post Office and Courthouse<br>Two Federal Square, Room 357<br>Newark, NJ 07102-3513                      |
| <b>Reporter, Advisory Committee on Appellate Rules</b>                                       | <b>Professor Edward Hartnett</b><br>Richard J. Hughes Professor of Law<br>Seton Hall University School of Law<br>One Newark Center<br>Newark, NJ 07102   |
| <b>Chair, Advisory Committee on Bankruptcy Rules</b>   | <b>Honorable Sandra Segal Ikuta</b><br>United States Court of Appeals<br>Richard H. Chambers Court of Appeals Building<br>125 South Grand Avenue, Room 305<br>Pasadena, CA 91105-1621            |
| <b>Reporter, Advisory Committee on Bankruptcy Rules</b>                                      | <b>Professor S. Elizabeth Gibson</b><br>Burton Craige Professor of Law<br>5073 Van Hecke-Wettach Hall<br>University of North Carolina at Chapel Hill<br>C.B. #3380<br>Chapel Hill, NC 27599-3380 |
| <b>Associate Reporter, Advisory Committee on Bankruptcy Rules</b>                            | <b>Professor Laura Bartell</b><br>Wayne State University Law School<br>471 W. Palmer<br>Detroit, MI 48202  |

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

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

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| <b>Chair, Advisory Committee on Evidence Rules</b>    | <b>Honorable Debra Ann Livingston</b><br>United States Court of Appeals<br>Thurgood Marshall United States Courthouse<br>40 Centre Street, Room 2303<br>New York, NY 10007-1501 |
| <b>Reporter, Advisory Committee on Evidence Rules</b> | <b>Professor Daniel J. Capra</b><br>Fordham University<br>School of Law<br>150 West 62nd Street<br>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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**ADVISORY COMMITTEE ON BANKRUPTCY RULES**

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



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| <b>Members, Advisory Committee on Bankruptcy Rules (cont'd)</b>                         | <b>Professor David Arthur Skeel</b><br>University of Pennsylvania Law School<br>3501 Sansom Street<br>Philadelphia, PA 19104<br><br><b>Honorable Amul R. Thapar</b><br>United States Court of Appeals<br>United States Courthouse<br>35 West Fifth Street, Room 473<br>Covington, KY 41011                              |
| <b>Clerk of Court Representative, Advisory Committee on Bankruptcy Rules</b>            | <b>Kenneth S. Gardner</b><br>Clerk, United States Bankruptcy Court<br>United States Custom House<br>721 19th Street, Room 116<br>Denver, CO 80202-2508  |
| <b>Consultants, Advisory Committee on Bankruptcy Rules</b>                              | <b>Patricia S. Ketchum, Esq.</b><br>113 Richdale Avenue #35<br>Cambridge, MA 02140<br><br><b>James H. Wannamaker, Esq.</b><br>330 St. Dunstons Road<br>Baltimore, MD 21212  |
| <b>Liaison Member, Advisory Committee on Bankruptcy Rules</b>                           | <b>Honorable Susan P. Graber</b> <i>(Standing)</i><br>United States Court of Appeals<br>Pioneer Courthouse<br>700 S.W. Sixth Avenue, Suite 211<br>Portland, OR 97204  |
| <b>Liaison Member, U. S. Department of Justice, Executive Office for U. S. Trustees</b> | <b>Ramona D. Elliott, Esq.</b><br>Deputy Director/General Counsel<br>Executive Office for U.S. Trustees<br>20 Massachusetts Avenue, N.W. - Suite 8100<br>Washington, DC 20530   |
| <b>Liaison Member, Committee on the Administration of the Bankruptcy System</b>         | <b>Honorable Mary Patricia Gorman</b><br>Chief Judge<br>United States Bankruptcy Court<br>Paul Findley Federal Building and<br>United States Courthouse<br>600 East Monroe Street, Room 235<br>Springfield, IL 62701  |
| <b>Secretary, Standing Committee and Rules Committee Chief Counsel</b>                  | <b>Rebecca A. Womeldorf</b><br>Secretary, Committee on Rules of Practice &<br>Procedure and Rules Committee Chief Counsel<br>Thurgood Marshall Federal Judiciary Building<br>One Columbus Circle, N.E., Room 7-240<br>Washington, DC 20544<br>Phone 202-502-1820; Fax 202-502-1755<br>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<br>Chair               | C        | Ninth Circuit       | Member: 2010<br>Chair: 2014 | ----<br>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<br>Reporter        | ACAD     | North Carolina      | 2008                        | Open         |
| Laura B. Bartell<br>Associate Reporter | ACAD     | Michigan            | 2017                        | 2022         |

Principal Staff: Rebecca Womeldorf 202-502-1820

Scott Myers 202-502-1913

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

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Advisory Committee on Bankruptcy Rules  
Subcommittee/Liaison Assignments, Effective July 12, 2018

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| <p><b>Consumer Subcommittee</b><br/>         Judge A. Benjamin Goldgar, Chair<br/>         Judge Dennis R. Dow<br/>         Jeff J. Hartley, Esq.<br/>         Debra L. Miller, Esq.<br/>         Jill Michaux, Esq.<br/>         Judge Pamela Pepper<br/>         Ramona D. Elliott, Esq., <i>EOUST liaison</i><br/>         Kenneth S. Gardner, <i>ex officio</i></p>                | <p><b>Business Subcommittee</b><br/>         Judge Stuart M. Bernstein, Chair<br/>         Judge Thomas Ambro<br/>         Judge Marcia S. Krieger<br/>         Jeff J. Hartley, Esq.<br/>         Judge Melvin Hoffman<br/>         Tom Mayer, Esq.<br/>         Professor David Skeel<br/>         Judge Amul R. Thapar<br/>         Ramona D. Elliott, Esq., <i>EOUST liaison</i><br/>         Kenneth S. Gardner, <i>ex officio</i></p> |
| <p><b>Forms Subcommittee</b><br/>         Judge Dennis R. Dow, Chair<br/>         Judge A. Benjamin Goldgar<br/>         Judge Melvin Hoffman<br/>         Debra L. Miller, Esq.<br/>         Jill Michaux, Esq.<br/>         Ramona D. Elliott, Esq., <i>EOUST liaison</i><br/>         David Hubbert, Esq., <i>ex officio</i><br/>         Kenneth S. Gardner, <i>ex officio</i></p> | <p><b>Privacy, Public Access, and Appeals Subcommittee</b><br/>         Judge Thomas Ambro, Chair<br/>         Judge A. Benjamin Goldgar<br/>         Tom Mayer, Esq.<br/>         Judge Pamela Pepper<br/>         Ramona D. Elliott, Esq., <i>EOUST liaison</i><br/>         David Hubbert, Esq., <i>ex officio</i></p>   |
| <p><b>Restyling Subcommittee</b><br/>         Judge Dennis R. Dow, Chair<br/>         Judge Susan P. Graber, <i>Standing Committee Liaison</i><br/>         Judge Marcia S. Krieger<br/>         Judge A. Benjamin Goldgar<br/>         Jeff J. Hartley, Esq.<br/>         Jill Michaux, Esq.</p>  | <p><b>Technology and Cross Border Insolvency Subcommittee</b><br/>         Judge Marcia S. Krieger, Chair<br/>         Judge Melvin Hoffman<br/>         Professor David Skeel<br/>         Ramona D. Elliott, Esq., <i>EOUST liaison</i></p>   |
| <p><b>Civil Rules Liaison:</b><br/>         Judge Benjamin Goldgar</p>   | <p><b>Appellate Rules Liaison:</b><br/>         Judge Pamela Pepper</p>   |

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# Tab 2

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# Tab 2A

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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.

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**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
Meeting of June 12, 2018 | Washington, D.C.

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**ATTENDANCE**

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its spring meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12, 2018. The following members participated:

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

The advisory committees were represented by their chairs and reporters:

Advisory Committee on Appellate Rules –

Judge Michael A. Chagares, Chair  
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –

Judge Dennis R. Dow, Incoming Chair  
Professor S. Elizabeth Gibson, Reporter  
Professor Laura Bartell, Associate  
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, Federal Programs Branch, Civil Division, represented the Department of Justice 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   | 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   |
| Bridget M. Healy                | Attorney Advisor, RCS                  |
| Scott Myers                     | Attorney Advisor, RCS                  |
| Julie Wilson                    | Attorney Advisor, RCS                  |
| Frances F. Skillman             | Paralegal Specialist, 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 apologized to any Washington Capitals fans who would miss the Stanley Cup victory parade in D.C. because of the meeting.

He welcomed Judge Dennis Dow of the U.S. Bankruptcy Court for the Western District of Missouri, who will be the Chair of the Advisory Committee on Bankruptcy Rules beginning October 1, 2018. Because the current Chair, Judge Sandra Segal Ikuta, could not attend the meeting, Judge Dow is attending in her place. Judge Campbell also welcomed Professor Ed Hartnett who was recently appointed as Reporter to the Advisory Committee on Appellate Rules. He also noted that Chief Justice Roberts reappointed Judges Bates and Molloy as Chairs of their respective Advisory Committees for another year. Judge St. Eve was recently appointed to the U.S. Court of Appeals for the Seventh Circuit, and although Director Duff appointed Judge St. Eve to the Judicial Conference Committee on the Budget, Judge St. Eve graciously agreed to serve her remaining term on the Standing Committee.

Judge Campbell remarked that Judge Zouhary's tenure on the Standing Committee ends on September 30, 2018. Judge Zouhary will continue to help with the pilot projects going forward. He thanked Judge Zouhary for his service, noting that he is an innovator in district court case management.

In addition, Judge Campbell lamented the passing of Professor Geoffrey C. Hazard, Jr., a longtime member of and consultant to the Standing Committee. Professor Hazard passed shortly after the Committee's meeting in January 2018, and Judge Campbell said that he will be greatly missed.



Lastly, Judge Campbell discussed Professor Dan Coquillette’s upcoming retirement from his role as Reporter to the Standing Committee in December 2018 but noted that Professor Coquillette will remain as a consultant thereafter. Chief Justice Roberts appointed Professor Catherine Struve as Associate Reporter, and we will ask the Chief Justice to appoint Professor Struve as Reporter while Dan transitions to a consulting role. Judge Campbell thanked Professor Coquillette for his service and looks forward to the celebration later this evening.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process, which is included in the Agenda Book. Also included are the proposed rules approved by the Judicial Conference in September 2017, adopted by the Supreme Court, and transmitted to Congress in April 2018. If Congress takes no action, the rule package pending before Congress will become effective December 1, 2018.

### **APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING**

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 4, 2018 meeting.**

### **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Chagares and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met on April 6, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of five action items and presented a few information items.

#### *Action Items*

*Appellate Rules 3 and 13 – Electronic Service.* The Advisory Committee sought final approval for proposed amendments to Appellate Rules 3 and 13, both of which concern notices of appeal. The proposed amendments were published for public comment in August 2017 and received no comments.

The proposed amendments to Rules 3 and 13 reflect the increased reliance on electronic service in serving notice of filing notices of appeal. Rule 3 currently requires the district court clerk to serve notice of filing the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words “mailing” and “mails” to “sending” and “sends,” and deletes language requiring certain forms of service. Similarly, Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk’s office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

One Committee member remarked that use of “sends” and “sending” in Rule 3 seemed vague and inquired why more specific language was not used. Judge Chagares responded that a more general term was used to cover a variety of ways to serve notices of appeal, reflecting the various approaches courts use as they transition to electronic service.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 3 and 13.**

*Appellate Rules 26.1, 28, and 32 – Disclosure Statements.* The Advisory Committee sought final approval for proposed amendments to Appellate Rules 26.1, 28, and 32. The proposed amendment to Rule 26.1 changes the disclosure requirements in several respects designed to help judges decide whether they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term “corporate disclosure statement” to “disclosure statement.” These proposed amendments were published in August 2017. The proposed amendments to Rules 28 and 32 received no public comments whereas Rule 26.1 received a few.

The National Association of Criminal Defense Lawyers (“NACDL”) suggested that the Committee Note include additional language to help deter overuse of the government exception in 26.1(b) concerning organizational victims in criminal cases. In response, the Advisory Committee revised the Rule 26.1 Committee Note to more closely follow the Committee Note for Criminal Rule 12.4 and account for the NACDL comment. In addition, Charles Ivey suggested that Rule 26.1(c) include additional language referencing involuntary bankruptcy proceedings and requiring that petitioning creditors be identified in disclosure statements. The Advisory Committee consulted Professor Gibson, Reporter to the Bankruptcy Rules Committee, and accepted Professor Gibson’s suggestion that no change was needed. Finally, two commentators argued that the meaning of 26.1(d) regarding intervenors was ambiguous. In response, the Appellate Rules Committee folded language from 26.1(d) regarding intervenors into a new last sentence in 26.1(a) and changed the title of subsection (a) to reflect that intervenors are subject to the disclosure requirement.

One member asked what constitutes a “nongovernment corporation” and whether this term includes entities such as Fannie Mae and Freddie Mac, which are government-sponsored publicly traded companies. This member also questioned why Rule 26.1 was limited to corporations, noting that limited partnerships can raise similar issues as corporations. One Committee member stated that disclosures should be broader rather than narrower and did not see the harm in deleting “nongovernmental.” Another member questioned whether it is onerous to list governmental corporations. A different member reiterated that other types of entities can present similar problems as corporations.

Professor Struve noted that the goal of the proposed amendments to Rule 26.1 is to track the other disclosure provisions in the Civil, Criminal, and Bankruptcy Rules. Professor Cooper relayed the history of these disclosure statement rules, stating that the Civil Rules Committee decided to limit the disclosure statement to “nongovernment corporations” given the significant variation among local disclosure rules. Judge Chagares reiterated Professor Struve’s point that the purpose underlying the proposed change to Appellate Rule 26.1 is consistency with the other federal rules regarding disclosure statements. Professors Beale and King noted a memo by Neal Katyal exploring why the disclosure statement is limited to “nongovernmental corporations” and concluding that this limitation was not causing a practical problem.

A member noted the federal rules should be consistent with each other. However, a bigger problem is whether the newly consistent rules provide judges with adequate information for recusal. Judge Campbell said that there are two distinct issues: first, whether to approve Rule 26.1 to make it consistent with the other federal rules, and second, whether to change or revisit the current policy underlying the disclosure statement rules. He argued that the second question was not ripe for the Committee's consideration.

A member asked if 26.1(b)'s disclosure obligation is broader than 26.1(a). Judge Campbell responded that subsection (b) is parallel with Criminal Rule 12.4 whereas subsection (a) is parallel with Civil Rule 7.1. He reiterated that the scope of the disclosure obligation should perhaps be reconsidered at a later time.

A member suggested deleting "and intervenors" in Rule 26.1(a)'s title, and Judge Chagares concurred. For consistency with other subsection titles, another member recommended making "victim" and "criminal case" plural in Rule 26.1(b)'s title, as well as deleting the article "a" preceding "criminal case." The Committee's style consultants recommended making a few stylistic changes in subsection (c), including adding a semicolon after "and" as well as deleting "in the bankruptcy case" in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 26.1, 28, and 32, subject to the revisions made to Rule 26.1 during the meeting.**

*Appellate Rule 25(d) – Proof of Service.* The Advisory Committee sought final approval for a proposed amendment to Appellate Rule 25(d), which is designed to eliminate unnecessary proofs of service in light of electronic filing. This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court. But after discussion at the January 2018 meeting, the previously submitted version was withdrawn for revision to address the possibility that a document might be filed electronically but still require service through means other than the court's electronic filing system on a party who does not participate in electronic filing. The Advisory Committee now seeks final approval of the revised language. Judge Campbell thanked Professor Struve for noting the potential issue. Judge Chagares also noted a few minor changes that should be made, including adding a hyphen between "electronic filing" in 25(d)(1) and deleting the words "filing and" in the Committee Note. Judge Chagares noted the Advisory Committee's view that the proposed revision to 25(d) was technical in nature, and did not require republication.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 25(d), subject to the revisions made during the meeting.**

*Appellate Rules 5, 21, 26, 32, and 39 – Proof of Service.* If the proposed amendment to Appellate Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee sought final approval without public comment of what it views as technical and conforming amendments to Rules 5, 21, 26, 32, and 39. Proposed amendments to

Rules 5, 21(a)(1), and 21(c) delete the phrase “proof of service” and add “and serve it,” consistent with Rule 25(d)(1). Rule 26(c) eliminates the “proof of service” term and simplifies the current rule for when three days are added for certain kinds of service. Current Rule 32(f) lists the items that are excluded when computing length limits, including “the proof of service.” Given the frequent occasions in which there would be no proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all of the articles in the list of items. Rule 39(d) removes the phrase “with proof of service” and replaces it with “and serve.” Judge Chagares explained that the Advisory Committee did not think public comment was necessary for these technical, conforming amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 5, 21, 26, 32, and 39.**

*Appellate Rule 35 – En Banc Determinations.* The Advisory Committee sought approval for publication of proposed amendments to Appellate Rules 35 and 40, which would establish length limits applicable to responses to petitions for rehearing en banc. Also, Rule 40 uses the term “answer” whereas Rule 35 uses the term “response.” The proposed amendment would change Rule 40 to use the term “response” for consistency.

Some members noted other inconsistencies between the two rules. For instance, one member stated that Rule 35(e) just concerns the length limit whereas Rule 40 imposes additional requirements. Professor Hartnett responded that although the Advisory Committee has formed a subcommittee to examine Rules 35 and 40 more comprehensively, the committee felt it appropriate to move forward with this amendment in the interim. Judge Campbell asked if the Advisory Committee has a time table for when this review will conclude, and Judge Chagares stated they hope to finish this review in the fall. One Committee member noted that clarifying the length limits in the appellate rules is generally helpful and important.

One Committee member commented that the Committee Note to Rule 35 states “a court,” instead of “the court” like the text of rule. The Committee’s style consultants concurred that “a” should be changed to “the.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rules 35 and 40, subject to the revisions made during the meeting.**

#### *Information Items*

Judge Chagares announced the formation of three subcommittees to examine: (1) Rule 3(c)(1)(B) and the merger rule; (2) Rule 42(b) regarding voluntary dismissals, and; (3) whether any amendments are appropriate in light of the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S. Ct. 13 (2017). One member asked if the Rule 42(b) subcommittee will explore whether different rules regarding voluntary dismissals should exist for class actions, and Judge Chagares stated that the subcommittee is exploring why judicial discretion over voluntary dismissals may be necessary, including in the class action context.

In addition, Judge Chagares noted that the Advisory Committee examined the problem of appendices being too long and including too much irrelevant information, as well as how much the requirements vary by circuit. However, technology is changing quickly which may transform how appendices are done. Accordingly, the Advisory Committee decided to remove this matter from the agenda and to revisit it in three years. Judge Chagares stated that the Advisory Committee also removed from its agenda an item relating to Rule 29 and blanket consents to amicus briefs, and an item relating to whether “costs on appeal” in Rule 7 includes attorney’s fees. The Committee discussed the Supreme Court’s recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), but that discussion did not give rise to an agenda item.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Incoming Chair Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 3, 2018, in San Diego, California. The Advisory Committee sought approval of eight action items and presented three information items.

### *Action Items*

*Bankruptcy Rule 4001(c) – Obtaining Credit.* The Advisory Committee sought final approval for a proposed amendment to Bankruptcy Rule 4001(c), which details the process for obtaining approval of post-petition credit in a bankruptcy case. The proposed amendment would make this rule inapplicable to chapter 13 cases. The Advisory Committee received no comments on this proposed change. Some post-publication changes were made, such as adding a title and a few other stylistic changes. No Standing Committee members had any comments or questions about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 4001(c).**

*Bankruptcy Rule 6007(b) – Abandonment or Disposition of Property.* The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 6007(b). The proposed amendments are designed 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 the procedures set forth in Rule 6007(a). The Advisory Committee received some comments on this rule, some of which they accepted but others they declined to adopt. The Committee’s style consultants suggested changes to subpart (b) which would have improved the overall language. Because the purpose of the current amendment is simply to parallel the text of Rule 6007(a), the Advisory Committee declined to accept these suggestions, but will revisit the styling improvements if the restyling project goes forward.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 6007(b).**

*Bankruptcy Rule 9036 – Notice and Service Generally; Deferral of Action on Rule 2002(g) and Official Form 410.* These amendments are designed to expand the use of electronic noticing and service in bankruptcy courts. 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. The published amendments to Rule 9036 allow not only clerks but also parties to provide notices or to serve documents through the court’s electronic-filing system. The proposed amendments to Official Form 410 add a check box for opting into email service and noticing.

The Advisory Committee received four comments, each raising concerns about the technological feasibility of the proposed changes and how conflicting email addresses supplied by creditors should be prioritized given the different mechanisms for supplying email addresses for service. The AO and technology specialists with whom the Advisory Committee consulted confirmed these concerns. Consequently, the Advisory Committee unanimously recommended deferring action on amendments to Rule 2002(g) and Official Form 410. By holding these amendments in abeyance, the Advisory Committee will have additional time to sort out these technological issues.

Nevertheless, the Advisory Committee recommends approving the amendments to Rule 9036. In Rule 9036, the word “has” in the second sentence of the Committee Note should be changed to “have.” One Committee member asked if the phrase “in either of these events” should be “in either of these cases,” and the Committee’s style consultants noted that they try not to use “case” unless referring to a lawsuit.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9036, subject to the revision made during the meeting.**

*Bankruptcy Rule 9037(h) – Motion to Redact a Previously Filed Document.* The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 9037, which adds 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 Advisory Committee received comments on the proposed changes, including one seeking to expand the amendments to address how documents placed under seal by the bankruptcy court should be handled on appeal. The Advisory Committee rejected this concern as beyond the scope of the rule amendment.

Another comment suggested an explicit waiver of the filing fee if a party bringing the motion seeks to redact protected privacy information disclosed by a different party (i.e., a debtor motion to redact his or her social security number inappropriately revealed in an attachment to a creditor’s proof of claim). The Advisory Committee agreed with this sentiment but did not think that changing the rule was necessary because Judicial Conference guidelines already permit the court to waive the filing fee in this situation. A third commenter noted that nothing in the rule required filing the redacted document. In response, the Advisory Committee added language making it clear that the redacted document must be filed.

A final comment argued that restrictions on accessing the originally filed document should not go into effect until the redacted document is filed. The current rule as written imposes restrictions on the document once the motion to redact is filed. The Advisory Committee rejected this comment, finding such restrictions necessary and appropriate because other people will be made aware of this sensitive information when the motion to redact is filed.

Judge Campbell asked if the language of “promptly restrict” is sufficient to guide clerks and whether clerks know to restrict access to these documents upon the filing of a motion to redact. Judge Dow responded affirmatively and noted that the clerk member of the Advisory Committee advised that clerks already impose restrictions as a matter of course. Judge Chagares asked about the scope of the rule and whether it applies to an opinion, which is also a “document filed.” Judge Dow stated that it could, and Professor Bartell noted that the rule only applies to the protected privacy information listed in Rule 9037(a).

A member stated that he is generally supportive of the rule change and asked whether the rule should apply more broadly, including in the Civil and Criminal Rules. Professor Beale noted that the Advisory Committees on Civil and Criminal Rules, respectively, have considered this question and decided against a parallel rule change because outside the bankruptcy context, where the problem is more frequent, judges routinely and quickly handle these matters when they arise.

This same member also asked why the information is limited to the information listed in Rule 9037(a). Professors Gibson and Beale explained that Rule 9037(a) is the bankruptcy version of the privacy rules adopted by the advisory committees to limit certain information in court documents as required by the E-Government Act. Professor Capra noted that the E-Government Act does not prohibit going farther than the information listed and that the Committee could decide to prohibit disclosing additional information. He added that if the issue is taken up, it should apply across the federal rules and not just in bankruptcy.

A member questioned why the rule uses the term “entity.” Judge Dow explained that the term “entity” is a defined term in the Bankruptcy Code, and the broadly defined term even encompasses governmental entities.

This member also asked if the Advisory Committee considered any changes to 9037(g) regarding waiver. Professor Bartell explained that the waiver rule is still intact and that the Advisory Committee decided no change was needed. A member inquired about local court rules that address this waiver problem, and Professor Bartell noted that bankruptcy courts have such rules.

Another Committee member suggested adding language in the Committee Note stating that 9037(g) does not abrogate the “waiver” provision. Professor Gibson was reluctant to make that change absent discussion with the Advisory Committee. Judge Campbell stated that, under the current rule, a problem already exists. Parties are currently filing motions to redact, and in certain situations it is possible such a motion could conflict with the waiver provision. This rule just creates a formal procedure for filing a motion to redact. It does not affect the current case law regarding waiver.

Professor Hartnett asked what happens when the motion is granted and whether the court, not the party, is required to docket the redacted document. Professor Gibson noted that the filing party must attach the redacted document to its motion to redact and that the court has the responsibility to docket the redacted document. The Advisory Committee explored requiring the moving party to file the redacted document as a separate document, but rejected this approach.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9037.**

*Official Forms 411A and 411B – Power of Attorney.* Proposed Official Forms 411A and 411B are used to execute power of attorney. As part of the Advisory Committee's Forms Modernization Project, prior versions of these forms were changed from Official Forms to Director's Forms 4011A and 4011B. However, Judge Dow explained that this created a problem because Bankruptcy Rule 9010(c) requires execution of a power of attorney on an Official Form, and these forms are no longer Official Forms. To rectify this problem, the Advisory Committee sought approval to re-designate Director's Forms 4011A and 4011B as Official Forms 411A and 411B. Because there would be no substantive changes for which comment would be helpful, the Advisory Committee sought final approval of the forms without publication.

Judge Campbell asked if the Judicial Conference can designate these forms as Official Forms, or if Supreme Court approval is required. Professor Gibson and Mr. Myers said that under the Rules Enabling Act, the Judicial Conference makes the final decision in approving Official Bankruptcy Forms, and that if it acts this September, the changes will become effective on December 1, 2018.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the designation of Director's Forms 4011A and 4011B as Official Forms 411A and 411B effective December 1, 2018.**

*Bankruptcy Rule 2002(f), (h), and (k) – Notices.* Bankruptcy Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee sought approval to publish amendments to three of the rule's subdivisions for public comment. These amendments would: 1) require giving notice of the entry of an order confirming a chapter 13 plan; 2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and 3) add a cross-reference reflecting the relocation of the provision specifying the deadline for an objection to confirmation of a chapter 13 plan. The Standing Committee had no questions or comments about these proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rule 2002(f), (h), and (k).**

*Bankruptcy Rule 2004(c) – Examinations.* Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. The



Advisory Committee sought approval to publish an amendment to 2004(c) adding a reference to electronically stored information to the title and first sentence of the subdivision. The Standing Committee had no questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 2004(c).**

*Bankruptcy Rule 8012 – Corporate Disclosure Statement.* The Advisory Committee sought approval to publish an amendment to Rule 8012 concerning corporate disclosure statements in bankruptcy appeals. The amendment adds a new subdivision (b) to Rule 8012 to require disclosing the names of any debtors in an underlying bankruptcy case that are not revealed by the caption in an appeal and, for any corporate debtors in the underlying bankruptcy case, disclosing the information required of corporations under subdivision (a) of the rule. Other amendments track Appellate Rule 26.1 by adding a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal, and make stylistic changes to what would become subdivision (c) regarding supplemental disclosure statements.

Professor Gibson noted that the reference to subdivision (c) will be dropped from the Committee Note. A Committee member asked if the term “corporation appearing” already captures corporations seeking to intervene. Professor Gibson responded that it might be better to track the language used in FRAP 26.1. The first sentence should read: “Any nongovernmental corporation that is a party to a proceeding in the district court . . . .” She also noted that Rule 8012(b) will incorporate the language changes made to FRAP 26.1(c) at the meeting today, including adding a semicolon before “and” as well as deleting “in the bankruptcy case” in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 8012, subject to the revisions made during the meeting.**

#### *Information Items*

Judge Dow stated that a Restyling Subcommittee is exploring whether to recommend that the Advisory Committee restyle the Federal Rules of Bankruptcy Procedure. To inform this recommendation, the Committee’s style consultants produced a draft of a restyled Rule 4001. In consultation with the FJC, the Subcommittee is conducting a survey of interested parties, including judges, clerks of courts, and other bankruptcy organizations, which will conclude on June 15, 2018. The survey uses a restyled example of 4001(a). The Subcommittee will analyze the survey responses and make a recommendation to the Advisory Committee at its September 2018 meeting. Although only preliminary results were available at the time of the meeting, Judge Dow said that responses from most bankruptcy judges and clerks were positive.

Professor Capra asked whether the Bankruptcy Rules could be restyled given that they track language in the Bankruptcy Code. Judge Dow noted that the parallels with the Code do not prohibit restyling; rather, they provide a reason for caution in undertaking that restyling effort. He

emphasized that no decision on restyling has been made. Informed by the survey of interested parties, the Advisory Committee will consider the advantages and disadvantages of restyling and determine how, if at all, to move forward.

## **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on April 24, 2018, in Washington, D.C. The Advisory Committee sought approval of two action items and shared two information items.

### *Action Items*

*New Criminal Rule 16.1 – Pretrial Discovery Conference.* Judge Molloy reviewed the history of the proposal, which originated as a suggestion by members of the defense bar to amend Rule 16 to address disclosure and discovery in complex criminal cases, including those involving voluminous information and electronically stored information. At Judge Campbell’s suggestion, a subcommittee held a mini-conference to gather information on the problem and potential solutions. Mini-conference participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. This conference significantly helped the Advisory Committee develop the proposed new Rule 16.1 by, among other things, building consensus on what sort of rule was needed and whether the rule should apply to all criminal cases. One member echoed that the mini-conference was fantastic and helped the Advisory Committee reach consensus on this rule. Judge Campbell applauded the Advisory Committee for finding consensus.

The new rule has two new sections. The first section, Rule 16.1(a), requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. The second section, Rule 16.1(b), states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.”

Publication of the rule produced six comments. One comment from the DOJ expressed concern that the new rule could be read to grant new discovery authorities that could undermine important legal protections. The Advisory Committee agreed and decided to conform the language of the proposed rule to the phrasing of Criminal Rule 16(d)(2)(A). Two comments addressed whether the rule required the government to confer with pro se litigants and the Advisory Committee, in turn, changed the rule’s language to “the government and the defendant’s attorney” reasoning that it would not be practical for the government to confer about discovery with each pro se defendant. Two commenters recommended relocating the rule, but the Advisory Committee rejected this suggestion. One commenter suggested adding “good faith” to the meet and confer requirement but the Advisory Committee had already explored and rejected this idea. Professor Beale noted that the words “try to agree” capture this idea of conferring in good faith.

Lastly, two comments concerned whether the new rule would displace local rules or orders imposing shorter times for discovery. As published, the Committee Note stated that the rule “does not displace local rules or standing orders that supplement its requirements or limit the authority

of the district court to determine the timetable and procedures for disclosure.” The Advisory Committee determined that the Committee Note affirms the district courts retain authority to impose additional discovery requirements by local rule or court order, and that no further clarification was needed.

Many Committee members expressed concern that the Committee Note did not address adequately the concern about displacing local rules. One member reads the note to authorize local rules that are inconsistent with Rule 16.1. Judge Bates said that this issue has come up in his court and he shares the same concern. Professor Capra stated that whether a local rule that supplements the Federal Rules is inconsistent remains an open question. Professor Marcus discussed the history of Civil Rule 83 dealing with local rules.

Judge Campbell proposed addressing this concern by adding the language “and are consistent with.” Professor Cooper suggested that it would be helpful to add a comment that the local rules must be consistent with the Federal Rules. He also proposed adding a citation to Rule 16 to ensure that Rule 16.1 is not interpreted as altering Rule 16’s discovery obligations. Judge Livingston echoed Professor Cooper’s concern that this last sentence is too freestanding and could benefit from a citation.

Professor Beale responded that this Committee Note language satisfied the interested parties and that she did not think that referencing other rules in the Committee Note is a good idea. Instead, she proposed adopting Judge Campbell’s proposal. A Committee member expressed similar sentiments asking why the Committee Note does not use the phrase “consistent with.” Judge Campbell reminded the Committee that the proposed language reflected an accord that had been carefully worked out among the interested parties.

After much discussion, consensus emerged to revise the last sentence in the third paragraph of the Committee Note as follows: “Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure.”

Other Committee members raised stylistic concerns with Rule 16.1. In an email sent prior to the meeting, a Committee member raised some grammatical and stylistic comments about Rule 16.1, which Judge Molloy and the Reporters agree require revisions. First, the word “shortly” in the first sentence in the Committee Note should be replaced with “early in the process, no later than 14 days after arraignment,” to better track the language of the rule. Second, an errant underline between “it” and “displace” in the third paragraph of the Committee Note will be removed. Third, the phrase “determine or modify” will be added in the fifth paragraph of the Committee Note to more closely parallel the rule’s language. Lastly, this member also noted that the commas in Rule 16.1(b) should not be bolded.

Another Committee member proposed using words like “process” or “procedure” instead of “standard” in the third paragraph of the Committee Note reasoning that such terms better reflect that Rule 16.1 is instituting a new procedure. The Committee’s style consultants stated that the

word “procedure” would be appropriate to use. Judge Molloy and the Reporters agreed with this change.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed new Rule 16.1, subject to the revisions made during the meeting.**

*Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings – Right to File a Reply.* Judge Richard Wesley, a former member of the Standing Committee, raised this issue with the Advisory Committee, noting a conflict in the cases construing Rule 5(d) of the Rules Governing Section 2255 Proceedings. This rule currently states that “[t]he moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the Committee Note and history of the rule make clear an intent to give the inmate a right to file a reply, some courts have held that the inmate has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right. After reviewing the case law, the Advisory Committee concluded that the text of the current rule contributes to a misreading of the rule by a significant number of district courts. A similar problem was found with regard to parallel language in Rule 5(e) of the Rules Governing Section 2254 Cases. The Advisory Committee agreed to correct this problem by placing the provision concerning the time for filing in a separate sentence, thereby making clear in the text of each rule that the moving party (or petitioner in § 2254 cases) has a right to file a reply.

Three comments were received during publication. The Advisory Committee determined that the issues raised by the comments were considered at length prior to publication and no changes were required. No Standing Committee members raised any questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings.**

#### *Information Items*

*Criminal Rule 16 – Pretrial Discovery Concerning Expert Witnesses.* The Advisory Committee received two suggestions from district judges recommending that Rule 16’s provisions concerning pretrial discovery of expert testimony should be amended to provide expanded discovery similar to that under Civil Rule 26. Judge Molloy noted that there are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil cases. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded discovery of forensic expert testimony. While there will not be a simple solution, there is consensus among the Advisory Committee members that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Evidence Rules) and also plans to hold a mini-conference.

*Task Force on Protecting Cooperators.* Judge St. Eve updated the Committee on the efforts of the Task Force on Protecting Cooperators. In April 2018, Director Duff sent 18 recommendations identified by the Task Force for implementation by the Bureau of Prisons (“BOP”). A day before the Director’s scheduled meeting with the BOP, the BOP Director resigned, and that meeting did not occur. Since then, meetings have taken place with the BOP’s Acting Director, who had attended the Task Force meetings. He and his staff are preparing the BOP’s response, which they anticipate sending to Director Duff and the Task Force later this month. Some of the BOP Recommendations must be approved by the BOP union. Ms. Womeldorf has drafted the Task Force’s second and final report, which will be submitted sometime next month to Director Duff. Some of the Task Force’s recommendations may have to be considered by the Standing Committee and the Committee on Court Administration and Case Management. That said, Judge St. Eve stated that the Task Force’s work is coming to a close.

Judge Campbell noted that, last January, the Standing Committee reviewed the Advisory Committee’s decision not to recommend any rules implementing the CACM Interim Guidance or similar approaches to protecting cooperator information in case files and dockets based on the Task Force’s recommendations. The Advisory Committee on Criminal Rules will revisit this decision after the Task Force’s second and final report.

## **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on April 10, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of one action item and presented four information items.

### *Action Item*

*Rule 30(b)(6) – Deposition of an Organization.* The Advisory Committee sought approval for publication of proposed amendments to Rule 30(b)(6) which would impose a duty to confer. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to Rule 30(b)(6). In the summer of 2017, the subcommittee invited comment on a preliminary list of possible rule changes. Over 100 comments were received. Discussions eventually focused on imposing a duty on the noticing and responding parties to confer in good faith. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule.

As drafted, the duty to confer is iterative, and the proposed language requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each person who will testify. The first topic has not proved controversial; however, the second topic – the identity of the witnesses – has generated more discussion. Some fear the rule might be interpreted to require that organizations obtain the noticing party’s approval of its selection of witnesses. Nevertheless, the Advisory Committee decided to keep the identity of witnesses as a topic of conferring, at least for the public comment process, because the proposal carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf, and the Committee Note affirms that the choice of the designees is ultimately up to the organization.

Judge Bates noted that the Standing Committee received comments about the Advisory Committee's decision to include the identity of witnesses as a topic on which the parties must confer. Although these comments were addressed to the Standing Committee, he assured the Standing Committee that the Advisory Committee considered their substance when deciding to recommend publication. He noted that there is some force to the concerns stated in the comments, but that the Advisory Committee decided to include this topic because it is tied to the question of the matters for examination (the other question about which the parties must confer). Discussing what kind of person will have knowledge about a matter for examination may help avoid later disputes. Judge Bates also emphasized that the amendment only adds a requirement to confer; it does not require that the parties agree nor lessen the organization's ability to choose its witnesses.

Moreover, he cautioned that the comments to the Standing Committee are coming from only one segment of the bar, particularly from the defense bar and those who represent organizations who often must identify such witnesses. Interestingly, one letter from past, present, and upcoming Chairs of the ABA Section of Litigation did raise concerns about the "identity" topic. That said, Judge Bates anticipates receiving many comments on this topic if the proposed amendment is approved for public comment, and he thinks comments from other groups will be informative. He guaranteed that these late submissions will be included as part of the Advisory Committee's broader assessment after public comment concludes.

Judge Campbell noted that the Standing Committee has received eight to ten last-minute comments about the proposed amendments to Rule 30(b)(6). This happens from time to time, but having received a number of them, he stated that the Standing Committee needs to clarify when it is appropriate to address comments directly to the Standing Committee. Clarification will help ensure that the public has fair notice of when to properly submit comments and that all commenters are treated equally. The Reporters discussed these questions at their lunch meeting today, and the Standing Committee will consider this procedural issue at its January 2019 meeting.

Many of these late comments noted by Judge Campbell expressed concern that the noticing party would have the ability to dictate the witnesses the organization must produce for deposition. In response, Judge Campbell stated that this is not the intent of the rule. Moreover, he noted that the rule also lists the matters for examination as a topic of conferring. Under the logic of the comments, it could be said that the organization now can dictate the matters for examination. Again, this is not the intent of the rule.

Lastly, Judge Bates reported that the Advisory Committee rejected adding a reference to Rule 30(b)(6)'s duty to confer in Rule 26(f) because Rule 26(f) conferences occur too early.

After this introduction, the Standing Committee engaged in a robust discussion about the Rule 30(b)(6) amendments. One member asked whether the conference must always occur and whether complex litigation concerns were driving this requirement. Professor Marcus responded that many complained about the inability to get the parties to productively engage on these matters and that the treatment here reflects repeat reports from the bar about issues with Rule 30(b)(6). This same member questioned whether the iterative nature of the confer requirement needs to be included in the rule. Judge Bates answered that it is important to signal in the rule the continuing

obligation to confer because the topics of the conference may not be resolved in an initial meeting. For example, the identity of the organization's witnesses may have to be decided once the matters for examination are confirmed. The member stated this is a helpful change to a real problem and that it avoids the "gotcha" element of Rule 30(b)(6) depositions by requiring more particularity.

Another member asked whether it may be wise to require parties to identify and produce documents they will use at the deposition. By providing all such documents in advance of the deposition, parties can better focus on the issues. Moreover, Rule 30(b)(6) notices often list the matters to be discussed and providing the documents to be used will enable parties to get more specific. Another member agreed, asserting that documents ought to be identified prior to the deposition. Professor Marcus noted that such a practice could help focus the issues, but it also could lead to parties dumping a bunch of documents they may not use.

One member suggested that identifying documents is a best practice and should be highlighted in the Committee Note to Rule 30(b)(6). Professor Coquillette responded that committee notes should not be used to discuss best practices but to illustrate what the rule means. A member noted that nothing in the proposed rule would prohibit providing the document in advance; in fact, it would not change what many lawyers already do. One member recommended deleting "at least some of" from the first paragraph of the Committee Note, which discusses how it may be productive to discuss other matters at the meet and confer such as the documents that will be used at the deposition.

Other members questioned why the rule does not address timing. One member proposed adding a provision requiring the parties to make such disclosures within a certain number of days before the deposition. Another member seconded this concern. Judge Bates stated that this is a rule about conferring, not about timing, and the Advisory Committee learned that timing is often not the real issue facing the bar.

Echoing a point raised in the letter from present, past, and incoming Chairs of the ABA Section of Litigation, one Committee member expressed concern about previous committee notes – the 1993 Committee Note stating that a Rule 30(b)(6) deposition counts as a single deposition (for purposes of the presumptive limit on the number of depositions), and the 2000 Committee Note indicating that, if multiple witnesses are identified, each witness may be deposed for seven hours. The member thought this approach could carry unintended consequences. Professor Marcus discussed the history of the seven-hour rule and stated that the Advisory Committee has twice studied this issue carefully, most recently when Judge Campbell served as Chair. Getting more specific seemed to generate more problems, and although the Advisory Committee considered this, they do not think there is a cure because any solution would lead to other problems. The Advisory Committee consequently concluded that a requirement to confer was a step in the right direction.

Committee members discussed at length the "identity" requirement. One member noted his agreement with the criticism that "identity" is unclear. He does not know if it is helpful to require conferencing about "identity." The member stated that he conducted an informal survey and said that this is not much of an issue, especially for good lawyers. Another member noted that she does not see Rule 30(b)(6) issues often unless they concern the scope of the deposition, which

the “matters for examination” topic addresses. She shared her colleague’s concern that “identity” is unclear.

Judge Bates noted that district court judges do not see many Rule 30(b)(6) issues, but the Advisory Committee heard from the practicing bar that problems do not always get to the judge. The proposal is responsive to the practicing bar’s concerns. Judge Campbell explained that they write rules for the weakest of lawyers and that the “identity” topic responds to the concerns of practitioners who complain that they cannot get organizations to identify the witnesses. Judge Bates reminded everyone that the proposed language is not final, but rather is the proposed language for public comment. The comments received thus far are from one constituency – members of the bar that primarily represent organizations – and comments have yet to be received from the rest of the bar.

Another Committee member remarked that the “identity” topic is important because it will inform the serving party whether the organization has no responsive witness and must identify a third party to depose. This member also suggested adding something encouraging the parties to ask the court for help in resolving their Rule 30(b)(6) disputes and to remind them of this practice’s efficacy. Judge Bates noted that committee notes typically do not remind parties to come to the court to resolve such disputes, and Professor Marcus noted that judicial members on the Advisory Committee objected to inclusion of this concept in an earlier draft.

Despite this conversation, a Committee member stated that he was still uncomfortable with the “identity” language. He proposed stating “and when reasonably available the identity of each person who will testify.” Another Committee member noted that such language would reinforce the iterative nature of the rule because organizations could identify witnesses shortly after conferring on the matters for examination.

Professor Cooper expressed skepticism about this Committee member’s proposal. After conferring with Judge Bates and Professor Marcus, Professor Cooper recommended adding “the organization will designate to” so that the topic for conferral will be “the identity of each person the organization will designate to testify.” The additional language – “the organization will designate to” – will reinforce that organizations maintain the right to choose who will testify and thus better respond to the concerns raised. If they make this change, they also recommended deleting the earlier use of “then.”

Another Committee member noted that the Committee Note’s use of the phrase “as necessary” was confusing and could be interpreted as requiring multiple conferences. He recommended instead: “The duty to confer continues if needed to fulfill the requirement of good faith.” Judge Bates liked this proposal, in part because it used fewer words and clarified the iterative nature of the rule.

After this discussion, Judge Campbell summarized the proposed modifications: (1) deleting “then” before the word “designate”; (2) deleting “who will” and adding “the organization will designate to”; (3) deleting “at least some of” from the first paragraph of the Committee Note; and (4) changing the wording of the penultimate sentence of the third paragraph of the Committee Note to read “The duty to confer continues if needed to fulfill the requirement of good faith.”



Judge Bates noted that they may need to explain the deletion of “then” in the Committee Note, and Judge Campbell said that he and Professors Cooper and Marcus can explore this after the meeting. If such language is needed, a proposal can be circulated to the Standing Committee for consideration and approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 30(b)(6), subject to the revisions made during the meeting.**

#### *Information Items*

*Rules for Multidistrict Litigation.* The subcommittee formed to consider creating rules for multidistrict litigation is still in the information gathering phase. Proposed legislation in Congress known as the Class Action Fairness Bill would affect procedures in MDL proceedings. Judge Bates noted that consideration of this subject will be a long process, and that the subcommittee is attending various conferences on MDLs. The subcommittee has identified eleven topics for consideration, including the scope of any rules and whether they would apply just to mass torts MDLs or all types of MDLs, the use of fact sheets and *Lone Pine* orders, rules regarding third-party litigation financing, appellate review, etc. He encouraged Committee members to provide the subcommittee their perspective on any of these topics. Judge Bates noted that the subcommittee has not decided if rules are necessary or whether a manual and increased education would be better alternatives.

*Social Security Disability Review Cases.* A subcommittee is considering a suggestion from the Administrative Conference of the United States to create rules governing Social Security disability appeals in federal courts. The subcommittee has not concluded its work, and whatever rules it may recommend, if any, still need to be considered by the Advisory Committee. The most significant issues concerning these types of proceedings are administrative delay within the Social Security Administration and the variation among districts both in local court practices and in rates of remand to the administrative process. Whatever court rules may be proposed will not address the administrative delay.

### **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 26-27, 2018, in Washington, D.C. The Advisory Committee presented two action items and seven information items.

#### *Action Items*

*Evidence Rule 807 – Residual Exception.* The Advisory Committee sought final approval for proposed amendments to Evidence Rule 807. Professor Capra reviewed the history of suggestions to amend the rule, noting that the Advisory Committee found that the rule was not working as well as it could. The proposal deletes the language requiring guarantees of trustworthiness “equivalent” to those in the Rule 803 and Rule 804 hearsay exceptions and instead

directs courts to determine whether a statement is supported by “sufficient” guarantees of trustworthiness in light of the totality of the circumstances of the statement’s making and any corroborating evidence. Subsections (a)(2) and (a)(4) are removed because they are at best redundant in light of other provisions in the Evidence Rules. The amendments also revise Rule 807(b)’s notice requirement, including by permitting the court, for good cause, to excuse a failure to provide notice prior to the trial or hearing.

One member asked if this proposal will increase the admissibility of hearsay evidence. Professor Capra noted that any increase will be marginal, perhaps in districts that adhere to a strict interpretation of the rule regarding “near miss” hearsay.

Ms. Shapiro noted the fantastic work Professor Capra did to help improve this rule and stated that the DOJ is incredibly grateful for his work.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 807.**

*Evidence Rule 404(b) – “Bad Acts” Evidence.* The Advisory Committee sought approval to publish proposed amendments to Evidence Rule 404(b). Professor Capra explained various Rule 404(b) amendments considered and rejected by the Advisory Committee. The Advisory Committee, however, accepted a proposed amendment from the DOJ requiring the prosecutor to provide notice of the non-propensity purpose of the evidence and the reasoning that supports that purpose. The Advisory Committee liked this suggestion because articulating the reasoning supporting the purpose for which the evidence is offered will give more notice to the defendant about the type of evidence the prosecutor will offer. The Advisory Committee also determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Professor Bartell asked whether the Advisory Committee considered designating a specific time period for the prosecutor to provide notice. Professor Capra said the Advisory Committee considered this idea but thought it was too rigid.

One member inquired about implementing a notice requirement for civil cases. Professor Capra responded that notice was not necessary in civil cases because this information comes out during discovery. Judge Campbell also noted that lawyers in civil cases are not bashful about filing Rule 404 motions in limine.

Another member asked whether it would be better that subsection 404(b)(3) track the language of 404(b)(1) instead of stating “non-propensity purpose.” Professor Capra said the Advisory Committee will consider this idea during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 404(b).**

### *Information Items*

Judge Livingston provided a brief update of the Advisory Committee's other work. First, the Advisory Committee decided not to proceed with rule changes to Evidence Rules 606(b) and 801(d)(1)(A).

Second, the Advisory Committee considered at its April 2018 meeting the results of the Symposium held at Boston College School of Law in October 2017 regarding forensic expert testimony, Rule 702, and *Daubert*. The Symposium proceedings are published in the Fordham Law Review. No formal amendments to Rule 702 have been considered yet but the Advisory Committee is exploring two possible changes: 1) an amendment focusing on forensic and other experts overstating their results and 2) an amendment that would address the fact that a fair number of courts have treated the reliability requirements of sufficient basis and reliable application in Rule 702 as questions of weight and not admissibility.

Lastly, Judge Grimm proposed amending Rule 106 regarding the rule of completeness to provide that: 1) a completing statement is admissible over a hearsay objection, and 2) the rule covers oral as well as written or recorded statements. The courts are not uniform in their treatment of Rule 106 issues, and the Advisory Committee decided to consider this proposal in more depth at its next meeting.

### **THREE DECADES OF THE RULES ENABLING ACT**

To honor Professor Coquillette's thirty-four years of service to the Standing Committee and his upcoming retirement as Reporter to the Standing Committee, Judge Sutton – a former Chair of the Standing Committee – led a question and answer session with Professor Coquillette. The discussion was wide-ranging and provided current Committee members with helpful history on challenges faced by the rules committees over time. Professor Coquillette noted that the Rules Enabling Act ("REA") has been so successful in part because the Department of Justice played an integral role in the REA process. He thanked the DOJ for recognizing the value of the REA and for helping preserve its integrity. Although the Standing Committee must be sensitive to the political dynamics Congress faces, Professor Coquillette cautioned that the REA process should not become partisan football. He stated that the Committee must "check its guns at the door" and do the fair and just thing. It is so important that the Committee be seen as fair, Professor Coquillette explained, because the manner in which the Committee is perceived when reaching its decisions is vital to preserving the REA and faith in the rules process.

### **JUDICIARY STRATEGIC PLANNING**

Brian Lynch, the Long-Range Planning Officer for the federal judiciary, discussed the strategic planning process and how the Standing Committee can provide feedback on the *Strategic Plan for the Federal Judiciary*. He emphasized that the Committee's reporting on long-term initiatives will help foster dialogue between the Executive Committee and other judicial committees.

Following Mr. Lynch’s presentation, Judge Campbell directed the Committee to a letter dated July 5, 2017, in which the Standing Committee provided an update on the rules committees’ progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*. Judge Campbell proposed updating this letter to reflect its ongoing initiatives that support the judiciary’s strategic plan. In 2019, the Committee will be asked to update the Executive Committee on its progress regarding these identified initiatives.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved authorizing Judge Campbell to update and forward to Chief Judge Carl Stewart correspondence reflecting the Committee’s long-term initiatives supporting the *Strategic Plan for the Federal Judiciary*.**

### LEGISLATIVE REPORT

Julie Wilson of the Rules Committee Staff (“RCS”) briefly delivered the legislative report. She noted that two new pieces of legislation have been proposed since January 2018 – namely, H.R. 4927 regarding nationwide injunctions, and the Litigation Funding Transparency Act of 2018 (S. 2815) regarding the disclosure of third-party litigation funding in class actions and MDLs. Neither bill has advanced through Congress. Ms. Wilson indicated that the RCS will continue to monitor these bills as well as others identified in the Agenda Book and will keep the Committee updated.

### CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Standing Committee will next meet on January 3, 2019 in Phoenix, Arizona. He reminded the Committee that at this next meeting it will confer about its policy regarding comments on proposed rules addressed directly to the Standing Committee outside the typical public comment period.

Respectfully submitted,

Rebecca A. Womeldorf  
Secretary, Standing Committee

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: AMENDMENTS TO EXPAND THE USE OF ELECTRONIC NOTICING AND SERVICE

DATE: AUGUST 24, 2018

On the Advisory Committee's recommendation, the Standing Committee in August 2017 published for public comment proposed amendments to two rules and to one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts. The proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. As published, the amendments to Rule 9036 (Notice or Service Generally) allowed 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. It also allowed service or noticing on any person by any electronic means consented to in writing by that person. Under the proposed amendments, electronic service was declared to be complete upon filing or sending, unless the filer or sender received notice that the electronic service was not received by the person to be

served. Finally, the proposed amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. It instructed the creditor to check the box “if you would like to receive all notices and papers by email rather than regular mail.”

In response to publication, four sets of comments were submitted that addressed the proposed amendments. 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 fell into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions.

Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Subcommittee recommended 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. The Advisory Committee accepted these recommendations at the spring meeting, and it referred the Rule 2002(g) and Official Form 410 amendments back to the Subcommittee for consideration of what further actions, if any, should be taken regarding electronic noticing and service. In June the Standing Committee gave final approval to the Rule 9036 amendments, sending them on to the Judicial Conference.<sup>1</sup>

#### CACM Suggestion

After the spring meeting, the Committee on Court Administration and Case Management (CACM) submitted a suggestion (18-BK-D) that Rule 9036 be amended to provide for mandatory electronic service on “high volume notice recipients,” a category that would initially

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<sup>1</sup> The text of the proposed amendments to Rule 9036, as approved by the Standing Committee, is attached to this memorandum.

be composed of entities that each receive more than 100 court-generated paper notices from one or more courts in a calendar month. Judge Wm. Terrell Hodges, CACM chair, explained that the suggestion built upon a 2015 suggestion submitted by the Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The Advisory Committee had voted not to act on that suggestion for mandatory electronic service on high volume notice recipients because it concluded that § 342(e) and (f) of the Bankruptcy Code allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. Judge Hodges explained that the current suggestion takes account of that concern by making the mandatory electronic noticing program “subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code.”

CACM suggests that Rule 9036 be amended to read as follows:

**Rule 9036. Notice and Service Generally**

(a) Electronic Noticing. Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk or a person designated by the court 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 the person consented to in writing.

(b) Mandatory Electronic Noticing for High Volume Notice Recipients. Subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code, and notwithstanding Rule (5)(b) F.R.Civ.P., and Rules 2002(g), and 9022(a), the first time an entity is sent court-generated notices by mail, in a number that exceeds the Minimum Threshold Amount, and is so notified, the entity will be required to enroll in Electronic Bankruptcy Noticing and thereafter accept delivery of all court-generated notices by electronic transmission, as provided in subparagraphs (b)(1)-(4) of this rule.

(1) Minimum Threshold Amount. The Minimum Threshold Amount will initially be set at 100 court-generated notices by mail from one or more courts within a calendar month. At least once a year, the Director of the Administrative

Office of the U.S. Courts shall review the Minimum Threshold Amount and may adjust the Minimum Threshold Amount, in the Director's discretion.

(2) Threshold Notice. The Director of the Administrative Office of the U.S. Courts or the Director's noticing agent will notify an entity that it has been sent by mail the Minimum Threshold Amount of court-generated notices and that the entity must comply with the requirements in subparagraphs (b)(3)-(4) of this rule.

(3) Enrollment for Electronic Noticing. Within 45 days of the date of threshold notice, an entity must enroll in Electronic Bankruptcy Noticing with the U.S. Courts' Bankruptcy Noticing Center. This requirement also applies to entities currently enrolled in Electronic Bankruptcy Noticing for delivery of some, but not all, court-generated notices.

(4) Commencement of Electronic Noticing.

(A) Enrolled Entities. Entities that timely enroll in Electronic Bankruptcy Noticing must be prepared to accept all court-generated notices by electronic transmission within 135 days of the date of the threshold notice. Extensions may be granted under guidelines for Electronic Bankruptcy Noticing established by the Director of the Administrative Office of U.S. Courts.

(B) Unenrolled Entities. For entities that do not timely enroll in Electronic Bankruptcy Noticing, the Director of the Administrative Office of U.S. Courts or the Director's noticing agent may give notice to the entity that: (1) timely enrollment in Electronic Bankruptcy Noticing has not occurred; (2) beginning 30 days from the date of the notice, court-generated notices will be sent to an electronic account created by the U.S. Courts' Bankruptcy Noticing Center; (3) the entity may access that electronic account by following instructions contained in the notice; and (4) failure to timely enroll in Electronic Bankruptcy Noticing constitutes a waiver of the right to receive court-generated notices by mail with the exception of the notice

required under Rule 2002(a)(1) and notices in cases commenced under Rule 3 F.R.Civ.P.

(c) Service or notice under this rule 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.

In support of the CACM suggestion, Judge Hodges explained that for the 2019 fiscal year, the judiciary has budgeted \$14 million for bankruptcy noticing, and his committee has developed several proposals for reducing that expense. CACM strongly urges the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. Administrative Office of the Courts (AO) staff members who work with noticing issues have estimated that the savings could equal \$3 million or more a year.<sup>2</sup>

#### Discussions with Judge Isgur and AO Staff

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<sup>2</sup> They have explained that savings as follows:

The proposed rule change to mandate e-noticing for persons/entities that receive 100 or more notices in a month would be very effective at increasing electronic noticing and reducing costs, even exempting those who have designated a preferred address under section 342(e) or (f). As of June 2018, 44.75% of all BNC notices went out electronically, pursuant to 47,310 Electronic Bankruptcy Noticing (EBN) agreements. Separately, 10,286 people/entities have registered preferred address-only agreements with the BNC under section 342(f) (there are very few section 342(e) case-specific address notices).

A mandatory e-noticing rule change for people/entities receiving over 100 notices in a month would increase EBN from 44.75% to approximately 60% of all BNC notices. Backing out preferred address recipients under section 342 reduces this, but only by about 2%, so we would still be about 58% total EBN. That's a very substantial increase -- to put it in perspective, a 13.25% increase in EBN (from 44.75% to 58%) would greatly exceed the 8.75% increase in EBN over the last five years (EBN was at approximately 36% in 2013).

Moreover, at 58% EBN, based on current volume with current BNC prices, we would save approximately \$3 million in one fiscal year, or \$30 million over 10 years. Keep in mind, however, this is an extremely low-volume time for case filings and, therefore, noticing. We've done more than double our current noticing volume in past years, so potential savings could be more than double in the highest-volume years.

In preparation for the Subcommittee's conference call, Judge Bernstein, Scott Myers, and the reporter had telephone discussions with a member of the Bankruptcy Noticing Working Group (BNWG), AO staff, and Judge Marvin Isgur (Bankr. S.D. Tex.), chair of the CACM subcommittee that developed the CACM suggestion. Those discussions were helpful in clarifying current noticing practices and understanding how those practices would be affected by proposed suggestions for expanding electronic noticing.

The discussions led to the tentative conclusion that the Bankruptcy Rules should address electronic noticing and service by the courts separately from noticing and service by parties. Doing so would take into account that courts have access to addresses registered with the Bankruptcy Noticing Center (BNC), while parties do not. When we asked whether parties could be given access to the BNC database, we were told no because the agreements for electronic notice with BNC are limited to service and noticing by the courts and many creditors provide multiple addresses for service, which could lead to noticing errors.

In discussions with Judge Isgur regarding the CACM suggestion, we noted that the proposed draft of the amendments regarding the high-volume-notice-recipient program probably contained more detail than was needed in a procedural rule. Instead, details about the operation of the program could be left up to the AO and BNC. Rule 9036 could then just recognize the existence of such a program and provide for service and noticing on its participants.

If court noticing and servicing are treated separately from party noticing and service, the priority problems in the case of conflicting email addresses that were raised in response to the proposed amendments to Rule 2002(g) and Official Form 410 could be eliminated. The email address on a proof of claim could have a priority just after CM/ECF for parties and a lower priority for court-generated documents. The priorities might be as follows:

## **I. Court-generated notices**

1. *Served on registered users (attorneys)* – Service by CM/ECF pursuant to pending amendments to Civil Rule 5(b) and Rule 9036.
2. *Served on High Volume Notice Recipients and other EBN registrants* – Electronic service by BNC (subject to right under § 342(e) and (f) to designate a mailing address).
3. *Served on creditors not registered for EBN* – Electronic service by BNC at email address given on POC.
4. *Served on others* – Served by BNC as follows: by mail to (a) address registered with BNC (pursuant to § 342(e) and Rule 2002(f)); (b) mailing address given on POC; (c) mailing address in debtor’s matrix.

## **II. Party-generated notices and served papers**

1. *Served on registered users (attorneys)* – Service by CM/ECF pursuant to pending amendments to Civil Rule 5(b) and 9036.
2. *Served on others (including creditors who filed claim without counsel)* – Served electronically with written consent, including opt-in on POC.
3. Otherwise served by mail, delivery, or other method specified in Civil Rule 5(b)

### The Subcommittee’s Deliberations

During the Subcommittee’s conference call on August 13, members of the Subcommittee reviewed drafts of possible amendments to Rule 9036 submitted by CACM, AO staff, and the reporter. All of the drafts in one way or another sought to increase the use of electronic noticing and service in the bankruptcy courts by authorizing or mandating its use by or on clerks, attorneys, high volume recipients, or other parties. After discussing various issues presented by the drafts, the Subcommittee did not feel that it was in a position yet to make a recommendation to the Advisory Committee. It was interested in learning more about current court practices with respect to bounce-backs of electronic notices and about the operation of the proposed high-volume-notice-recipient program. Because of the uncertainty about what amendments might

eventually be proposed, the Subcommittee concluded that the currently pending amendments to Rule 9036 should be allowed to proceed through the approval process.

The Subcommittee is therefore not recommending that the Advisory Committee take any action at this meeting. Instead it presents this report as an information item for general discussion by the Advisory Committee. Although it is still a work in progress, the current working draft of an amended Rule 9036, developed by the reporter, Judge Bernstein, and AO staff after the Subcommittee's teleconference, is set out below. The Subcommittee invites discussion and feedback from the Advisory Committee on the draft.

1     **Rule 9036.     Notice and Service Generally**

2             (a)   SENDING NOTICE OR MAKING SERVICE.

3     Subject to the right of an entity or creditor to designate an  
4     address pursuant to 11 U.S.C. § 342(e) or (f), whenever these  
5     rules require or permit sending a notice or serving a paper by  
6     mail or other means, the notice may be sent—or the paper  
7     served— as follows:

8             (1) *Notices from and Service by the Court.* The  
9     clerk shall send notice to or serve

10            (A) a registered user—by filing it with the  
11     court's electronic-filing system; or

12            (B) any other recipient—by sending it by  
13     electronic means that the recipient consented to in  
14     writing, including by designating an electronic



15 address for receipt of notices pursuant to Rule  
16 2002(g)(1); but

17 (C) if a recipient has registered an electronic  
18 address with the Administrative Office of the  
19 United States Courts' bankruptcy noticing  
20 program, the clerk may send the paper to that  
21 address rather than any address given pursuant to  
22 Rule 2002(g)(1); and

23 (D) if an entity that has been designated by  
24 the Director of the Administrative Office of the  
25 United States Courts as a high-volume-paper-  
26 notice recipient—the clerk may send it  
27 electronically to an address designated by the  
28 Director.

29 (2) *Notices from and Service by Others.* An entity  
30 may send notice to or serve

31 (A) a registered user—by filing it with the  
32 court's electronic-filing system; or

33                   (B) any other recipient—by sending it by  
34                   electronic means that the recipient consented to in  
35                   writing, including by designating an electronic  
36                   address for receipt of notices pursuant to Rule  
37                   2002(g)(1).

38                   (b) COMPLETION OF NOTICE OR SERVICE.

39                   Electronic notice or service is complete upon filing or  
40                   sending but is not effective if the filer or sender receives  
41                   notice that it did not reach the person to be served.

42                   (c) INAPPLICABILITY. This rule does not apply  
43                   to any paper required to be served in accordance with  
44                   Rule 7004.

## Attachment

1     **Rule 9036.     Notice and Service Generally** (as approved  
2                             by Standing Committee June 2018)

3             Whenever these rules require or permit sending a notice  
4     or serving a paper by mail, the clerk, or some other person  
5     as the court or these rules may direct, may send the notice  
6     to—or serve the paper on—a registered user by filing it with  
7     the court’s electronic-filing system. Or it may be sent to any  
8     person by other electronic means that the person consented  
9     to in writing. In either of these events, service or notice is  
10    complete upon filing or sending but is not effective if the  
11    filer or sender receives notice that it did not reach the person  
12    to be served. This rule does not apply to any pleading or  
13    other paper required to be served in accordance with  
14    Rule 7004.

### **Committee Note**

    The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery have 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 it may be limited by other conditions.

# Tab 4B

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES  
FROM: SUBCOMMITTEE ON BUSINESS ISSUES  
SUBJECT: SERVICE ON CREDIT UNIONS  
DATE: AUGUST 21, 2018

In April Judge Hoffman called to the attention of the Subcommittee a discussion among several bankruptcy judges on the Bankruptcy Best Practices Forum regarding the requirements for service on credit unions in bankruptcy cases. The discussion was prompted by the question whether a credit union must be served pursuant to Rule 7004(h) when a debtor seeks to value collateral under Rule 3012(b) or avoid a lien impairing an exemption under Rule 4003(d). Rule 4003(d), as recently amended, requires “service on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint,” and Rule 3012(b) requires the same manner of service on the holder of a claim of a request to value collateral.

In the course of the forum discussion, it was pointed out that, in contrast to these provisions that refer generally to Rule 7004, Rule 3007(a)(2)(A)(ii) requires service of an objection to a claim “on an insured depository institution[] in the manner provided by Rule 7004(h).” That observation led to a discussion of whether “insured depository institution” under Rule 7004(h) includes credit unions as well as banks, an issue that the Advisory Committee recently decided in the negative, and whether the meaning of “insured depository institution” is the same under Rule 3007(a)(2)(A)(ii) as under Rule 7004(h). With respect to the latter issue, a participant in the forum discussion pointed out that “insured depository institution” is defined by Bankruptcy Code § 101(35) to include credit unions as well as insured depository institutions governed by the Federal Deposit Insurance Act.

The forum discussion revealed several things: (1) there is confusion among members of the bench (and likely bar) about the current Bankruptcy Rule requirements for service on credit unions; (2) the Rules themselves may not be consistent in their requirements for serving credit unions; and (3) a policy question exists about whether there is any basis for treating service on banks and on credit unions differently. Judge Ikuta referred the matter to this Subcommittee for its consideration. In particular, the Subcommittee was asked to consider whether imposition of the service requirement for insured depository institutions under Rule 3007(a)(2)(A)(ii) inadvertently extended to credit unions service requirements that are not otherwise applicable to them under Rule 7004(h). **Based on its consideration of the matter, the Subcommittee recommends that an amendment be proposed to Rule 3007(a)(2)(A)(ii) to make its coverage the same as the coverage of Rule 7004(h).**

#### The Rules as They Currently Stand

Rule 7004 governs service of a summons and complaint in adversary proceedings, and Rule 9014(b) makes Rule 7004 applicable to service of a motion initiating a contested matter. Rule 7004(b) provides generally for service by first class mail, in addition to the methods of service specified by Civil Rule 4(e)-(j). Rule 7004(b), however, is made subject to an exception set out in subdivision (h). The latter provision states:

(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) 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;  
or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

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).

At the spring 2018 Advisory Committee meeting, the Committee agreed with the Subcommittee that Rule 7004(h) is not applicable to credit unions because, being insured by the National Credit Union Administration, credit unions do not fall within section 3 of the Federal Deposit Insurance Act.<sup>1</sup> The Committee also accepted the Subcommittee’s recommendation not to take further action on Suggestion 17-BK-E, which sought an expansion of Rule 7004(h) to include credit unions.

Because of the limited scope of Rule 7004(h), other rule provisions that require service in the manner provided “by Rule 7004” allow service by first class mail under Rule 7004(b) on credit unions. These rules include Rules 3012(b) (request for a determination of the amount of a secured claim in a chapter 12 or 13 plan), 4003(d) (avoidance of a lien on exempt property in a chapter 12 or 13 plan), 5009(d) (motion for an order declaring a lien satisfied and released), 9011(c)(1) (motion for sanctions), and 9014(b) (motion initiating a contested matter).

The 2017 amendments to Rule 3007 were intended to clarify that objections to claims are generally not required to be served in the manner provided by Rule 7004. Instead, those objections can be served on most claimants by mailing them to the person designated on the

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<sup>1</sup> Section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(c)(2), provides, “The term ‘insured depository institution’ means any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter.” The “Corporation” is the Federal Deposit Insurance Corporation. *Id.* at § 1811(a).

proof of claim. But that rule is subject to two exceptions. One of them is set forth in subdivision (a)(2)(A)(ii). It provides that “insured depository institutions” must be served “in the manner provided by Rule 7004(h).” The Advisory Committee added that exception in an effort to comply with the legislative mandate in Rule 7004(h) that such institutions be served by certified mail in contested matters and adversary proceedings.<sup>2</sup>

The discussion on the Bankruptcy Best Practices Forum brought to light that the promulgation of Rule 3007(a)(2)(A)(ii) failed to take account of the Code definition of “insured depository institution.”<sup>3</sup> The effect of that definition was not raised during the Advisory Committee’s lengthy consideration of the Rule 3007 amendments. The Code definition, which includes credit unions in addition to banks insured by the FDIC, is made applicable to the Bankruptcy Rules by Rule 9001. However, the Subcommittee concluded that it does not change the scope of Rule 7004(h), because in the latter provision Congress expressly included a specific and narrower definition of insured depository institution—one defined in section 3 of the Federal Deposit Insurance Act. That specific reference in Rule 7004(h) overrides the more general definition in § 101(35). *See Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.”).

The existence of a Code definition of insured depository institution does, however, affect the scope of Rule 3007(a)(2)(A)(ii). That provision does not say that service according to Rule 7004 is required; instead, it specifically requires service according to Rule 7004(h). And it

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<sup>2</sup> The other exception, not relevant here, is for service on the United States or any of its officers or directors. They must be served according to Rule 7004(b)(4) or (5).

<sup>3</sup> Section 101(35) provides that the “term ‘insured depository institution’—(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and (B) includes an insured credit union (except in the case of paragraphs (21B) and (33A) of this subsection).”

applies to an “insured depository institution” without providing any special definition of that term. Accordingly, the § 101(35) definition applies, and credit unions are brought within the requirement that Rule 7004(h) service be made. That means that only under this one rule are credit unions entitled to service by certified mail.

#### What to Do About Rule 3007(a)(2)(A)(ii)?

The Subcommittee considered whether to recommend any amendments to Rule 3007(a)(2)(A)(ii) in light of the “newly discovered” definition in § 101(35). The issue before it was whether the provision should be left as it is, thus requiring heightened service on credit unions in this one instance, or be revised so as to apply only to banks insured by the FDIC. (Another possible option—amending Rule 7004(h) to include credit unions—is discussed in the next section of this memo.)

The Subcommittee recommends that Rule 3007(a)(2)(A)(ii) be revised to eliminate the inclusion of credit unions. The underlying intent of the Advisory Committee in proposing the amendments to Rule 3007 was to clarify that Rule 7004 service is generally not required for objections to claims. The exception in subdivision (a)(2)(A)(ii) was included based on the belief that it was required by the congressionally imposed requirement of Rule 7004(h); there was no intent, however, to expand the scope of that heightened service requirement. To clarify that intent, the Subcommittee recommends that the provision be revised as follows:

#### **Rule 3007. Objections to Claims**

##### (a) TIME AND MANNER OF SERVICE

\* \* \* \* \*

##### (2) *Manner of Service.*

(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the

claimant’s original or amended proof of claim as the person to receive notices, at the address so indicated; and

\* \* \* \* \*

(ii) if the objection is to a claim of an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act, in the manner provided in Rule 7004(h).

\* \* \* \* \*

The Subcommittee suggests that the accompanying Committee Note could be used to explain the limited scope of Rule 7004(h), thereby perhaps eliminating some of the existing confusion about service on credit unions.

### **Committee Note**

Subdivision (a)(2)(A)(ii) is amended to clarify that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act. Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994. It applies only to insured depository institutions that are insured by the Federal Deposit Insurance Corporation and does not include credit unions, which are instead insured by the National Credit Union Administration. A credit union, therefore, may be served with an objection to a claim according to Rule 3007(a)(2)(A)—by first-class mail sent to the person designated for receipt of notice on the credit union’s proof of claim.

### Should Credit Unions and Banks Be Treated the Same?

The broader policy question raised by the Bankruptcy Best Practices Forum discussion—whether to have the same method of service for banks and credit unions—was previously considered by the Advisory Committee. In response to Suggestion 17-BK-E, which sought an expansion of Rule 7004(h) to include credit unions, the Subcommittee last spring recommended that no change be made, and the Advisory Committee agreed. Although the forum discussion shows that the wisdom of this disparate treatment can be questioned and that it may cause confusion, the Subcommittee believes that the rationale for declining to amend Rule 7004(h)

remains valid. The Subcommittee’s March 12 memorandum to the Advisory Committee explained as follows:

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.<sup>4</sup>

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

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<sup>4</sup> 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.

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.

Accordingly, the Subcommittee recommends proposing for publication the amendment to Rule 3007(a)(2)(A)(ii) to eliminate its applicability to credit unions and making no amendment to Rule 7004(h).

# Tab 5

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# Tab 5A

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES  
FROM: SUBCOMMITTEE ON FORMS  
SUBJECT: SUGGESTION FOR CHANGES TO OFFICIAL FORM 113 AND RULE 3015.1  
DATE: AUGUST 21, 2018

Alane A. Becket, a consumer creditors' attorney in Pennsylvania, has submitted a suggestion (18-BK-A) for two changes: one to the new chapter 13 plan form (Official Form 113) and one to the rule that imposes requirements for local chapter 13 plan forms (Rule 3015.1). The suggested changes are intended to eliminate possible ambiguities regarding the effect of a debtor's failure to properly provide notice to creditors of certain provisions in a chapter 13 plan.

### Suggested Change to Official Form 113

As adopted in 2017, Part 1 of the national chapter 13 plan form contains a notice to creditors in which the debtor indicates whether the following provisions are or are not included in the plan:

- A limit on the amount of a secured claim, set out in Section 3.2, which may result in a partial payment or no payment at all to the secured creditor;
- Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Section 3.4; and
- Nonstandard provisions, set out in Part 8.

In anticipation of the possibility that a debtor might fail to properly complete this section of the form, the instructions in Part 1 state in bold, **“Debtors must check one box on each line to state whether or not the plan includes each of the following items. If an item is checked as ‘Not**

**Included’ or if both boxes are checked, the provision will be ineffective if set out later in the plan.”**

The Advisory Committee included this provision in Official Form 113 in order to provide clear notice to creditors of plan provisions that significantly affect their interest or that deviate from the form provisions. In her suggestion Ms. Becket points out that one possible scenario is missing from the bolded instructions—the failure of a debtor to check any box. In order to be complete and to leave no room for argument, she suggests that the second bolded sentence be amended as follows: **“If an item is checked as ‘Not Included,’ if no box is checked, or if both boxes are checked, the provision will be ineffective if set out later in the plan.”**

#### Suggested Change to Rule 3015.1

Rule 3015(c) allows a district to opt out of the requirement that Official Form 113 be used if it adopts a local form in compliance with Rule 3015.1. Among the requirements of the latter rule is that a local form “include[] an initial paragraph for the debtor to indicate that the plan does or does not” contain the same type of provisions as are specified in Part 1 of the national form (set out on page 1 of this memo). Rule 3015.1(c). Ms. Becket points out that, unlike Official Form 113, local plans are not required to state the effect of noncompliance with that disclosure provision. She explains:

At least one local form I have encountered does not contain Official Form 113’s notice that if a box is not checked, any provision set out later in the plan is ineffective, and Bankruptcy Rule 3015.1 does not require such a notice. It could therefore be argued that a provision in a confirmed plan is effective even if the box on the first page is not checked. At the very least, the effectiveness of such a provision in a confirmed plan could lead to unnecessary challenges to the validity of the provision.

Ms. Becket suggests that Rule 3015.1 be amended to require a local form to include a notice regarding ineffectiveness similar to the one in Official Form 113, as proposed for amendment.

### The Subcommittee's Consideration of the Suggestion

The Subcommittee agreed that Ms. Becket's point regarding Official Form 113 was valid. Even though Part 1 of that form requires the debtor to check a box on each of the three lines, it fails to state what the effect of not doing so is. While it might be implied that a debtor cannot benefit by failing to comply, the absence of a no-boxes-checked possibility in the second bolded sentence raises some doubt. The Subcommittee concluded that adding the language suggested by Ms. Becket would eliminate any possible uncertainty.

The Subcommittee was divided regarding the absence of a provision in Rule 3015.1 requiring local plan forms to include a statement about noncompliance resulting in ineffectiveness. It was noted that Rule 3015(c) provides that “[w]ith either the Official Form or a Local Form, a nonstandard provision is effective only if it is included in a section of the form designated for nonstandard provisions and *is also identified in accordance with any other requirements of the form*” (emphasis added). That provision, however, does not take care of the problem Ms. Becket raised. First, it deals only with nonstandard provisions and not lien-stripping or lien avoidance ones. And second, as a rule provision rather than part of a plan, it would not render ineffective an improperly placed nonstandard provision in a confirmed plan. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) (student-loan-discharge provision in a chapter 13 plan is enforceable despite bankruptcy court's legal error in confirming it because creditor had notice and failed to object or timely appeal).

Some members of the Subcommittee favored recommending the following amendment to Rule 3015.1 in response to the suggestion:

1  
2  
3

**Rule 3015.1. Requirements for a Local Form for Plans Filed in a Chapter 13 Case**

4 Notwithstanding Rule 9029(a)(1), a district may require that a Local Form  
5 for a plan filed in a chapter 13 case be used instead of an Official Form adopted  
6 for that purpose if the following conditions are satisfied:

7  
8 \* \* \* \* \*

9 (c) the Local Form includes an initial paragraph for the debtor to  
10 indicate that the plan does or does not:

11 (1) contain any nonstandard provision;

12 (2) limit the amount of a secured claim based on a  
13 valuation of the collateral for the claim; or

14 (3) avoid a security interest or lien;

15 (d) the Local Form states that the failure to provide an indication as  
16 required by the initial paragraph described in Rule 3015.1(c) renders the  
17 provision in question ineffective;

18 (de) \* \* \* \* \*

19 (ef) \* \* \* \* \*

20 At least one member of the Subcommittee was not in favor of proposing an amendment  
21 to Rule 3015.1(c). He thought that the content of instructions on a local form should be left up to  
22 each district, rather than being dictated by a national rule.

23 In the end, the Subcommittee concluded that it is not clear that any amendment to Rule  
24 3015.1(c) is needed. Ms. Becket said that she was aware of one district that did not have the  
25 instruction about ineffectiveness, the District of New Jersey. Examination of its website,  
26 however, revealed that the district has corrected the perceived problem by adding the following  
notice to its chapter 13 plan form: “If an item is checked as ‘Does Not’ or if both boxes are  
checked, the provision will be ineffective if set out later in the plan.” Use of that revised plan  
will be required as of September 1, 2018. Members of the Subcommittee were not aware of any  
other district with a local plan that lacks the ineffectiveness instruction. Until the Subcommittee

has had an opportunity to determine if the asserted problem exists anywhere, it does not think that an amendment to Rule 3015.1 should be proposed.

#### Recommendation

The Subcommittee recommends that the Advisory Committee approve the following amendment to the bolded language just before the checkboxes in Part 1 of Official Form 113:

- 1                   **If an item is checked as ‘Not Included,’ if no box is checked, or**
- 2                   **if both boxes are checked, the provision will be ineffective if set**
- 3                   **out later in the plan.’”**

#### **Committee Note**

Part 1 of the form is amended to add language regarding the effect of a debtor’s failure to check either box in Section 1.1, 1.2, or 1.3.

The Subcommittee recommends that no action be taken on the suggested amendment to Rule 3015.1(c) until it is determined whether there is in fact a problem that needs addressing.

The Subcommittee further recommends that, if the Advisory Committee approves the amendment to Official Form 113, it hold the amendment in abeyance until it can be determined if other amendments need to be made to the form or related rules. Official Form 113, amended Rule 3015, and new Rule 3015.1 just went into effect last December. It is possible that experience with the new form and rules will bring to light the need for additional modifications. Moreover, because of the considerable controversy that resulted from the proposal of a national chapter 13 plan form, the Subcommittee thought it advisable to allow for a period of respite before introducing any changes.

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# Tab 5B

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES  
FROM: FORMS SUBCOMMITTEE  
SUBJECT: DIRECTOR'S FORM 3180W (CHAPTER 13 DISCHARGE)  
DATE: AUG. 22, 2018

Travis A. Gagnier submitted Suggestion 18-BK-B with respect to Director's Form 3180W (Order of Discharge under § 1328(a)). The form includes the following language:

“Some debts are not discharged

Examples of debts that are not discharged are:

\*\*\*

■ debts for most fines, penalties, forfeitures, or criminal restitution obligations; \*\*\*”

Mr. Gagnier states that the example is not accurate, in that “non-criminal fines and penalties ARE discharge by a completed Chapter 13 plan.” He suggests revising the language to read “debts for criminal restitution, criminal fines and/or criminal penalties,” or changing the word “most” to “some.”

Current Form 3180W is the renumbered version of former Form 18W, which was adopted in 2007 as one of a number of director's forms providing orders for discharge under various provisions of the Bankruptcy Code other than chapter 7. It was modeled on Official Form 18 (now Official Form 318), the court order for a chapter 7 discharge, which also includes the language quoted above. Indeed, all the other director's forms (3180F, 3180FH, 3180RI, 3180WH) providing orders for regular discharge under Chapter 12, hardship discharge under Chapter 12, individual discharge under Chapter 11 and hardship discharge under Chapter 13, respectively, include the same language with respect to fines, penalties, forfeitures, and criminal restitution obligations.

The suggestion states that debts for most fines, penalties, forfeitures, or criminal restitution obligations are not, in fact, excluded from discharge under § 1328(a) (the section for which Form 3180W provides the applicable form of discharge order).

Under §1328(a), upon successful completion of a chapter 13 plan, the court must “grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.”

The exclusions described in clauses (1) and (2) do not include any debts for fines, penalties, forfeitures or restitution. Indeed, clause (2) excludes from the list of debts excluded from discharge those described in § 523(a)(7) (debts “for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit” (other than certain tax penalties)), § 523(a)(13) (debts “for an payment of an order of restitution issued under title 18, United States Code”), § 523(a)(14B) (debts for “fines or penalties imposed under Federal Election law”), or § 523(a)(19) (debts for certain fines, penalties, restitutionary payments, disgorgement payments and other payments under court or administrative order).

It is likely that the language included in former Official Form 18 (current form 318) refers to the provisions of § 523(a)(7) and § 523(a)(13), dealing with fines, penalties, forfeitures and orders of restitution in criminal cases. Those provisions are not applicable to chapter 13 discharges under §1328(a). (They are applicable to individual discharges in chapter 11, see § 1141(d)(2), all discharges in chapter 12, see § 1228(a)(2) and §1228(c)(2), and hardship discharges in chapter 13, see § 1328(c)(2). Therefore, the other director's forms for discharge are accurate, but Form 3180W is not). The criticism of Mr. Gagnier is therefore valid.

There are several options to address this problem.

(1) Simply remove the example quoted above.

(2) Modify the example to read “debts for criminal restitution, criminal fines and/or criminal penalties,” as suggested by Mr. Gagnier.

(3) Modify the example to read “debts for some fines, penalties, forfeitures or criminal restitution obligations,” as suggested by Mr. Gagnier.

(4) Modify the example to read “debts for restitution, or a criminal fine, included in a sentence on debtor's criminal conviction”

Because § 1328(a)(3) explicitly excludes from discharge debts for restitution and fines in criminal cases, the Subcommittee not believe the first option is helpful. The second option refers to criminal “penalties” which are not mentioned in §1328(a)(3). The third option also includes additional terms not mentioned in §1328(a)(3). Therefore, the Subcommittee recommends the fourth option, which closely tracks the language of § 1328(a)(3). Because this is a Director’s Form, such a change does not require publication.

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**Information to identify the case:**

Debtor 1 \_\_\_\_\_ Last 4 digits of Social Security number or ITIN \_\_\_\_\_  
 First Name Middle Name Last Name EIN \_\_\_\_ - \_\_\_\_\_

Debtor 2 \_\_\_\_\_ Last 4 digits of Social Security number or ITIN \_\_\_\_\_  
 (Spouse, if filing) First Name Middle Name Last Name EIN \_\_\_\_ - \_\_\_\_\_

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_  
 (State)

Case number: \_\_\_\_\_

Order of Discharge 12/18

**IT IS ORDERED:** A discharge under 11 U.S.C. § 1328(a) is granted to:

\_\_\_\_\_ [\_\_\_\_\_]  
 [include all names used by each debtor, including trade names, within the 8 years prior to the filing of the petition]

\_\_\_\_\_ **By the court:** \_\_\_\_\_  
 MM / DD / YYYY United States Bankruptcy Judge

Explanation of Bankruptcy Discharge in a Chapter 13 Case

This order does not close or dismiss the case.

**Creditors cannot collect discharged debts**  
 This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

This order does not prevent debtors from paying any debt voluntarily. 11 U.S.C. § 524(f).

**Most debts are discharged**  
 Most debts are covered by the discharge, but not all. Generally, a discharge removes the debtors' personal liability for debts provided for by the chapter 13 plan.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

**Some debts are not discharged**  
 Examples of debts that are not discharged are:

- debts that are domestic support obligations;
- debts for most student loans;
- debts for certain types of taxes specified in 11 U.S.C. §§ 507(a)(8)(C), 523(a)(1)(B), or 523(a)(1)(C) to the extent not paid in full under the plan;

**For more information, see page 2 ►**

- debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;
- debts for restitution, or a criminal fine, included in a sentence on debtor's criminal conviction;
- some debts which the debtors did not properly list;
- debts provided for under 11 U.S.C. § 1322(b)(5) and on which the last payment or other transfer is due after the date on which the final payment under the plan was due;
- debts for certain consumer purchases made after the bankruptcy case was filed if obtaining the trustee's prior approval of incurring the debt was practicable but was not obtained;

- debts for restitution, or damages, awarded in a civil action against the debtor as a result of malicious or willful injury by the debtor that caused personal injury to an individual or the death of an individual; and
- debts for death or personal injury caused by operating a vehicle while intoxicated.

In addition, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as an insurance company or a person who cosigned or guaranteed a loan.

**This information is only a general summary of a chapter 13 discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case.**

**Deleted:** most fines, penalties, forfeitures, or criminal restitution obligations



# Tab 5C

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: FORMS 101A AND 101B

DATE: AUGUST 22, 2018

Debbie Lewis, Legal Advisor to the U.S. Bankruptcy Court for the Southern District of Florida, submitted Suggestion 18-BK-E with respect to Official Forms 101A and 101B.

Both Official Forms were newly adopted in the recent Forms Modernization Project effective Dec. 1, 2015. Official Form 101A, Initial Statement About an Eviction Judgment Against You, and Official Form 101B, *Statement About Payment of an Eviction Judgment Against You*, replaced the “Certification by a Debtor Who Resides as a Tenant of Residential Property” section on Official Form 1, *Voluntary Petition*.

### Statutes

The statutory basis for the Forms is Section 362(b)(22) of the Bankruptcy Code, which excepts from the automatic stay:

(22) subject to subsection (l), under subsection (a)(3) [automatic stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate”], or the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

Under Section 362(l)(5)(A),

Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

The form of certification is also statutorily prescribed in Section 362(l)(5)(B):

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

Subsection (l)(1) allows the lessee/debtor to remain in the residential property for thirty days after the filing of the bankruptcy petition under certain circumstances:

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

Section 362(l)(2) allows the tenant/debtor to remain in the residential property beyond the thirty days upon compliance with its provisions:

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

With respect to both certifications (under Section 362(l)(1) and Section 362(l)(2), the lessor retains the right to object and bring the matter before the court for resolution. See Section 362(l)(3).

The other relevant statutory provision relating to the suggestions is Section 525(a) of the Bankruptcy Code, which provides in relevant part:

“[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against ... a person that is or has been a debtor under this title ... solely because such ... debtor ... has not paid a debt that is dischargeable in the case under this title....”

### Forms 101A and B

Form 101A must be filed by an individual debtor if the debtor rents his or her residence and the landlord “has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called eviction judgment) against [the debtor] to possess [the] residence. The debtor also provides the landlord’s name and address, all in compliance with Section 362(l)(5)(A).

If the debtor wishes to take advantage of the opportunity to remain in his or her residence for thirty days after the bankruptcy filing under Section 362(l)(1),<sup>1</sup> on Form 101(A) the debtor also must comply with the requirements of Section 362(l)(5)(B) by making the following two statements also required by Section 362(l)(1):

“Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.”

“I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).”

If the debtor files Form 101A and seeks to remain in his or her residence beyond the thirty-day period prescribed under Section 362(l)(1), the debtor must file Form 101B under which the debtor certifies, consistent with Section 362(l)(2):

---

<sup>1</sup> If the debtor fails to file the certification indicating a desire to remain in the residence, the stay does not restrict the landlord from taking action. See Section 362(l)(4):

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

“Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.”

“Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).”

#### Suggestion 18-BK-E

Ms. Lewis suggests modifications to both Form 101A and Form 101B. On Form 101A, she suggests that the certification should include an additional box for the debtor to state that either no rent is due in the next 30 days or there is some other reason why funds will not be paid to the bankruptcy clerk. She provides no examples of situations in which this might be true, and the Associate Reporter has found no cases in which such an assertion was made. However, Form 101A requires only a certification that “I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).” If there is no “rent that would be due during” the applicable 30-day period, presumably the debtor could provide the certification without any difficulty.<sup>2</sup> Because Ms. Lewis does not provide any other indication of another excuse for the debtor to decline to make payment to the clerk of the rent that would be due during the next thirty days, the Subcommittee does not recommend any change to the certification in Form 101A.

Ms. Lewis suggests that Form 101B should be modified to reflect the possibility that the debtor is in public housing and that the governmental authority who is the lessor is precluded from evicting the debtor under Section 525(a) of the Bankruptcy Code if the debtor discharges the monetary obligation that was the basis for the judgment for possession. Her point is based on unsettled law.

The first question is whether Section 525(a) protects public housing tenants from discriminatory action by their governmental landlords at all, that is, whether a lease is “a license, permit, charter, franchise, or other similar grant” within the meaning of that statute. The Second Circuit has concluded that Section 525(a) does apply to such leases, *see Stolz v. Brattleboro Housing Authority (In re Stolz)*, 315 F.3d 80 (2d Cir. 2002), and other courts have reached the same conclusion, *see Curry v. Metropolitan Dade County (In re Curry)*, 148 B.R. 966 (S.D. Fla. 1992); *Sudler v. Chester Housing Authority (In re Sudler)*, 71 B.R. 780 (Bankr. E.D. Pa. 1987); but there is authority to the contrary, *see Housing Authority of the City of Pittsburgh v. Smith*, 2014 WL 7016081 (W.D. Pa. Dec. 11, 2014); *In re Hobbs*, 221 B.R. 892 (Bankr. M.D. Fla. 1997).

Even if Section 525(a) protects debtors from losing their leases in public housing due to prepetition dischargeable rent, the impact of Section 362(b)(22) on Section 525(a) is not

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<sup>2</sup> Note that Section 362(l)(1) (unlike Section 362(b)(22) to which it is an exception) applies only when the judgment for possession was based on a monetary default. *See In re Paul*, 473 B.R. 474 (Bankr. S.D. Ga. 2012); *In re Griggsby*, 404 B.R. 83 (Bankr. S.D.N.Y. 2009); *In re Alberts*, 381 B.R. 171 (Bankr. W.D. Pa. 2008); *In re Williams*, 371 B.R. 102 (Bankr. E.D. Pa. 2007). Therefore, it seems unlikely that there would not be a monetary obligation going forward.

definitively settled. Ms. Lewis cited to the leading case of *In re Kelly*, 356 B.R. 899 (Bankr. S.D. Fla. 2006) in which the court held that a tenancy protected by Section 525(a) could not be terminated under Section 362(b)(22) for failure to cure the prepetition monetary default that was subject to discharge. Several other bankruptcy courts have followed this analysis. *See In re Carpenter*, 2015 WL 1956272 (Bankr. D. Vt. Apr. 29, 2015); *In re Aikens*, 503 B.R. 603 (Bankr. S.D.N.Y. 2014); *In re Bain*, 2010 WL 10489036 (Bankr. S.D. Fla. Apr. 20, 2010). But the issue has not been addressed by a higher court and, as discussed above, the issue arises only if the jurisdiction has concluded that Section 525(a) applies to public housing leases, about which courts differ.

Given the limited authority of the Bankruptcy Rules Committee under the Rules Enabling Act, the Subcommittee does not believe it is appropriate effectively to amend the requirements for certification set forth in Section 362(l)(2) to reflect unsettled case law as to whether a debtor who is a tenant in public housing has the protection of Section 525(a) and if so, whether the debtor must comply with Section 362(l)(2) to prevent the operation of Section 362(b)(22). Therefore the Subcommittee recommends that the Advisory Committee take no action in response to the suggestions.

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# Tab 6

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# Tab 6A

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON RESTYLING

SUBJECT: RESTYLING OF FEDERAL RULES OF BANKRUPTCY PROCEDURE

DATE: AUG. 22, 2018

At the last meeting of the Advisory Committee on Bankruptcy Rules, the Committee approved the process proposed by the Restyling Subcommittee to solicit feedback on the proposed restyling project. Pursuant to that authorization, the Associate Reporter and Dr. Molly T. Johnson of the Federal Judicial Center (FJC) prepared a cover memo and survey to obtain comments on the restyling project. After incorporating suggestions from the Advisory Committee, the FJC sent the cover memo and survey, together with a restyled version of Federal Rule of Bankruptcy Procedure 4001(a), to all bankruptcy judges and clerks of court, as well as leaders of 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. The cover memo and survey link were also posted on the Rules website as an Invitation for Comments. The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks of court, 19 respondents to the organization survey, and 109 respondents to the website survey. A report from Molly Johnson summarizing the results, as well as a full copy of all comments, is separately submitted.

At the same time, the Associate Reporter communicated with the restyling consultants to ask their views about how we might embark upon a restyling project, if the Advisory Committee and the Standing Committee concluded that we should proceed. The response of the restyling experts is described in the memorandum from the Associate Reporter attached as Exhibit A.

As Molly Johnson describes in her report, more than two-thirds of all respondents in every category supported the idea of restyling the bankruptcy rules. Given the strong support voiced by survey respondents for the restyling project, the Subcommittee recommends that the Advisory Committee recommend to the Standing Committee that the restyling project be authorized, but with one important qualification.

The Subcommittee believes it is important that the restyled Rules remain consistent with the statutory language of the Code or terms of art used in bankruptcy practice, even when that language or terminology does not comport with the restyling consultants' views of best stylistic practices. For example, in restyling Fed. R. Bankr. P. 4001, the restyling consultants wished to

hyphenate the phrase “debtor-in-possession” although Section 1101(1) of the Bankruptcy Code defines the phrase as “debtor in possession” (without hyphens). The restyling consultants also suggested replacing the term “property of the estate” (what they explained uses the “of-genitive” which is disfavored) with the term “estate’s property.” Section 541 of the Bankruptcy Code, however, is called “Property of the estate,” and the Subcommittee views that as a term of art.

The Federal Rules of Bankruptcy Procedure have not been restyled before because all parties recognized that bankruptcy is unique, particularly rule and statute driven and subject to generally-understood terms, concepts and procedures. It is a highly technical area and the rules often track statutory language that itself is not restyled. The greatest concern expressed by those who responded to the survey is that any stylistic changes not create confusion. To ensure consistency and clarity in the revised rules, the Subcommittee believes that it is important to retain this linkage between the Code and the Rules, even if it may sometime be at the expense of restyling principles. Therefore, it is the unanimous view of the Subcommittee that it cannot recommend embarking on a long-term restyling project without agreement from the Standing Committee and the restyling consultants that the final decision on whether to recommend any stylistic modification to the bankruptcy rules rests with the Advisory Committee. With that qualification, the Subcommittee recommends that the Advisory Committee recommend to the Standing Committee that the Standing Committee authorize the Rules Committee to begin restyling the Federal Rules of Bankruptcy Procedure.

## EXHIBIT A

### MEMORANDUM

TO: RESTYLING SUBCOMMITTEE

FROM: LAURA BARTELL, ASSOCIATE REPORTER

SUBJECT: RESTYLING OF FEDERAL RULES OF BANKRUPTCY PROCEDURE

DATE: AUG. 2, 2018

You have all received Molly Johnson’s superb summary of the responses we received to our questionnaire about the advisability of restyling the Federal Rules of Bankruptcy Procedure.

In order to assist in making a recommendation to the Rules Committee on whether to proceed with this project, I asked the style consultants for their views on the appropriate approach to the restyling project, were it to be launched. I received a response from Joe Kimble (Bryan Garner being otherwise engaged on a family emergency) that reads as follows:

You asked about the process for restyling, if we all do decide to go ahead.

We think it would be best to do the rules in three big batches. That way, after we finish a batch, the Advisory Committee can start working through our versions, returning them to us. It's important to realize that this is an iterative process: the style consultants stay involved at each step. It's not as if we revise and then just send the rules on to the Committee, which then decides to proceed as it wishes. If there's a meeting of the Committee, or one of its subcommittees, to consider further edits, ordinarily the style consultants would be present for that as each stylistic decision is made. That way, we create a style sheet for these rules in addition to my Guidelines for Drafting and Editing Court Rules. Also, many style decisions require explanation and occasionally debate.

To begin, though, we would need to work out the seven ground rules discussed in our January 25 cover memo for the pilot project. On the third item specifically, we need to decide what constitutes a “term of art”—not just any phrase that happens to occur in the Bankruptcy Code, which (as we’ve discussed) is replete with unnecessary *of*-genetives.

It’s exciting to think that all of [sic] could significantly aid in the comprehension of the Bankruptcy Rules for some time to come.

To refresh your recollection on the “seven ground rules discussed in our January 25 cover memo for the pilot project,” they are attached as Exhibit A. As those ground rules and Mr. Kimble’s e-mail emphasize, we are likely to confront tension between style principles and “terms of art” in the Bankruptcy Code. As Judge Ikuta made clear in the introduction to the questionnaire, “The Advisory Committee will retain terms and phrases that have special meaning in bankruptcy practice notwithstanding the restyling guidelines.” I have suggested to Mr. Kimble that the decision of whether something is a “term of art” is one for the Committee, not for the style consultants, but that we will certainly include the style consultants in all discussions if the project goes forward.



## Exhibit A

To: Judge Sandra Segal Ikuta and the Bankruptcy Rules Advisory Committee  
From: Bryan A. Garner, Joseph Kimble, and Joseph F. Spaniol Jr.  
Re: Bankruptcy Rules Restyling  
Date: January 25, 2018

### General Approach

We thought it might be helpful to outline our ideas about guidelines for the possible Bankruptcy Rules restyling. Our experience in restyling projects has shown the desirability of having a solid understanding about the process before we begin. We do this, of course, with the goal of achieving the best possible result.

First, it's good to recognize what we're doing: trying to put the Bankruptcy Rules into the best possible form as reflected in the literature on rule-drafting and legal drafting generally. Simplifying the style as much as possible without sacrificing meaning takes both skill and experience, as well as lawyerly judgment. We'll need all the help we can get from Advisory Committee members. But especially we'll need the Committee members to embrace the mindset that readability can coexist with accuracy—and needs to. It's best to approach restyling with a sense of shared goals and not with a paranoid view that the slightest changes might prove catastrophic.

Second, as with the other projects, established style conventions should prevail on matters of pure style, even if the Advisory Committee disagrees with them. We don't expect this to happen often, if at all, and we will of course weigh heavily the Committee's views, but the principle of “style prevails on style” has been followed in all the other projects. This may mean that the Bankruptcy Advisory Committee's own style subcommittee may need to adjust some conventions.

Given that the Advisory Committee has its own separate style subcommittee, we expect to work closely with it. Indeed, that subcommittee will doubtless have lots of good suggestions for improving our drafts. But again, in rare cases of disagreement, the style consultants' call should prevail.

Third, we think that it will be crucial not to be constrained much by infelicitous statutory language—to the extent that the infelicity can be cured. Otherwise, the project would be severely hampered. We understand that bankruptcy, like evidence and civil procedure, has its terms of art (or sacred phrases). But we are against copying stretches of statutory text or clumsy phrasing—especially involving *of*-genitives that can readily be tightened. For example, in the Appellate Rules, we changed the clumsy *clerk of the court of appeals* to *circuit clerk*, thereby streamlining the syntax in many passages.

Fourth, although we don't propose changing the main rule numbers, we'll need the flexibility to change some subpart designations and even to reorganize subparts. For instance, if (c)(2) is long and tangled, perhaps it should be converted to (c)(2) and (3), with an existing (c)(3) moving to (c)(4), and so on. You'll see instances in our pilot project for Rule 4001.

Fifth, we would like the Advisory Committee to be open to innovating. We're not sure exactly what forms this would take, but there may be places in the rules where a chart or an example might help clarify. Modern-day drafting is increasingly using such visual aids. We would like the Bankruptcy Rules to be exemplars for the future.

Sixth, we should adopt Bryan Garner's guides as the final arbiters on questions of usage, grammar, and drafting. We need not, for example, waste time discussing whether to write *attorney's fees* or *attorneys' fees* or *attorney fees*.

Finally, we should not adopt a rigid schedule for completing the project. A tentative schedule is fine. We don't propose to dawdle, but we'll need to have some flexibility given the challenges ahead. We believe the Bankruptcy Rules to be the most difficult of all because they consistently depart most radically from the style conventions we've developed over the past 26 years.

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**THE FEDERAL JUDICIAL CENTER**  
**THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING**  
**ONE COLUMBUS CIRCLE, N.E.**  
**WASHINGTON, DC 20002-8003**

MOLLY T. JOHNSON  
RESEARCH DIVISION

TEL.: 315-824-4945  
FAX: 202-502-4199  
EMAIL: mjohnson@fjc.gov

August 24, 2018

## Memorandum

**To:** Members of Restyling Subcommittee of Advisory Committee on Rules of Bankruptcy Procedure

**Subject:** Results from Surveys to Members of Bankruptcy Community About Their Views on Restyling of the Bankruptcy Rules

### Introduction

At the request of the Advisory Committee on Bankruptcy Rules, we used online questionnaires to survey various members of the bankruptcy community about their views of whether the Bankruptcy Rules should be restyled, as other federal rules of procedure have been.<sup>1</sup> The purpose of restyling is to make the rules simpler and easier to read and understand. With the exception of the rules in Part 8, the Bankruptcy Rules have not been restyled, partly because they are closely tied to provisions of the Bankruptcy Code, which could limit the extent that the language of the rules could be changed.

This report presents the results, as of July 9, 2018, from questionnaires completed by bankruptcy judges, bankruptcy clerks of court, members of bankruptcy-related organizations,<sup>2</sup> and individuals who followed a link to the questionnaire from the AO Rules and Policies webpage, 60% of whom identified themselves as bankruptcy practitioners. The response rate of completed questionnaires was 40% for judges and 43% for clerks;<sup>3</sup> response rates for the other surveys cannot be calculated because those links were not sent to specific individuals. We received completed questionnaires from 142

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1. Appendix A contains the survey questions and a brief description of the methodology used to survey the different groups.

2. It appears that most of the bankruptcy-related organizations to which we sent the survey link asked their members to respond individually, either to the link we provided in our invitation email or to a link provided on the Rules and Policies webpage of the Administrative Office of the U.S. Courts (AO). The cover email to the organizations' leaders gave them the option to provide an official response on behalf of the organization or send the link to individual members, so they could respond directly. We received only two responses that were identified as being an official response on behalf of an organization and that provided the organization's name.

3. About 58% of judges and 66% of clerks accessed the survey, but the results and percentages reported here are based only on those who answered at least one question. It is possible that those who chose not to respond do not have strong feelings either way about whether the rules should be restyled, but we do not have specific data on this.

bankruptcy judges, 40 bankruptcy clerks of court, 19 respondents from bankruptcy-related organizations, and 106 respondents from the website survey, for a total of 307 respondents. Highlights of the results include the following:

- Overall, a solid majority of those to whom we directly sent a link to the questionnaire (69% of judges and 82% of clerks) said they support the idea of restyling the Bankruptcy Rules. A similar pattern occurred with both the organization survey and the website survey, with 74% of those responding to the organization survey and 67% of those responding to the website survey supporting the idea of restyling the rules.
- When respondents were asked about the potential benefits of restyling, by far their most frequent response was that restyling could make the rules clearer and easier to understand, particularly by breaking down long sentences and paragraphs into more manageable components. Many respondents specifically noted that the sample restyled rule provided with the survey was much clearer than the current rule. Other benefits respondents cited included making the rules easier to understand specifically for pro se parties and attorneys who don't normally practice bankruptcy; reducing errors and increasing compliance with the rules; and providing greater consistency with other federal rules of procedure that have already undergone restyling.
- In identifying potential drawbacks of restyling, respondents most frequently cited the potential for unintended consequences, particularly altering the substance of rules while attempting to make only stylistic changes. Other potential drawbacks noted included time and resources that would have to go into such an effort; the need for practitioners and judges to adapt to the changes; the extra work it would create for courts and clerks' offices, in part because the local rules would need to be made consistent with changed federal rules; and the possibility that restyling the rules would spark litigation calling existing case law into question based on the rule changes.
- Regardless of whether they supported restyling, 90% of judges, 79% of clerks, 76% of organization survey respondents, and 77% of website survey respondents believed that any restyling effort should include all of the rules, rather than a subset.

Although most respondents in all groups supported the idea of restyling, support was by no means universal. In open-ended questions, survey respondents were asked to explain what they saw as the benefits and drawbacks of restyling, their reasons for supporting or not supporting a restyling effort, considerations that they would want the committee to keep in mind when deciding when and how to restyle, and specific stylistic concerns they had about the current rules. All of the survey comments are compiled in Appendix B, so that subcommittee members can see the full range of views expressed by respondents. The following sections discuss overall results to forced-

choice questions (e.g., yes/no), and summarize trends in the responses to open-ended questions.

## Perceived Benefits and Drawbacks of Restyling

Before asking about their overall opinions on restyling, we asked respondents to identify any benefits and drawbacks they thought restyling could provide. By far the benefit most commonly noted (roughly 180 respondents, or 60%) was that restyling would make the rules clearer and easier to read and understand. A number of respondents who cited this benefit made specific reference to the sample restyled rule provided in the survey, saying that its structure and wording made it much easier to understand than the current version. Others noted stylistic problems with the current rules that could be corrected with restyling, such as long sentences and paragraphs and cross-references that are difficult to follow. Illustrative comments include the following:

*“Rules could be made easier to understand by breaking out the components of particular Rules into numbered or lettered subparagraphs. Some Rules contain lengthy statements that could be better understood (and therefore followed) if they were broken out into subparagraphs.”*

*“Restyling could assist in providing clarity—simply by the style in which the information is presented. When looking at the restyled provisions, they are much easier to read and written in a clearer format.”*

*“The restyled Rule 4001 is written using more plain language and the formatting makes the rule much easier to read and, therefore, understand. The changes would also help guide the reader to the appropriate section of a rule, making it much more user friendly.”*

*“Restyling in the manner provided in the example would be beneficial because it is easier to scan through the rule looking for topics (because of the bolding) and scan through rules that include a number of provisions or requirements currently written in paragraph style.”*

*“Restyling could provide greater readability and clarity. As the Rules are currently written, it can be difficult to follow the long meandering sentences.”*

The next most frequently cited benefit, identified by 21 respondents (7%), was that restyling would make the rules more understandable for pro se parties. As one judge noted

*“The current rules, either intentionally or subliminally, create a bit of a barrier for unrepresented individuals. This is a group whose filings have significantly increased in recent years. ‘Plainspeak’ would be good for them . . . as well as for us judges and lawyers.”*

A few respondents, however, disagreed with the notion that the rules should be made more understandable for pro se parties, as illustrated by the following comments:

*“Some pro se litigants may believe that the system is easier to negotiate due to restyling. This is not necessarily true.” [from a clerk]*

*“The easier the practice of bankruptcy becomes the more likely those of us that [sic] our law practice is substantially bankruptcy will lose out and our business will suffer.”* [from a respondent to the website survey]

This disagreement over the extent to which the rules should take pro se filers into account is similar to arguments made during the forms modernization process, which pointed out the need for a balance between acknowledging the reality that there will always be a certain percentage of debtors filing pro se, and not wanting to encourage more pro se filings by making the bankruptcy process appear less complicated than it actually is.

Other benefits respondents noted included greater uniformity within the bankruptcy rules and consistency with other rules (19 respondents); reducing inconsistent readings and misinterpretations (16 respondents); making the bankruptcy rules more understandable for practitioners who don't normally practice bankruptcy (11 respondents); and the likelihood of increased compliance with the rules (6 respondents). There were 30 respondents who said they did not think that restyling would have any benefits.

The drawback that respondents most frequently identified (cited by 60 respondents) was the potential for restyling to have unintended consequences, particularly that the substance of a rule could be altered unintentionally in the restyling process or that case law based on interpretation of the original language of the rule would be called into question. Representative comments include the following:

*“Unintended consequences are always a concern in this type of effort. It is always possible to create more problems than are solved unless it is done extremely well with appropriate input from all affected parties.”*

*“The goal of not altering substance is difficult to achieve. As substantive amendments are subsequently made, it may be difficult to determine which changes were meant to be only stylistic.”*

*“My concern is the risk that style changes could result in an inadvertent change to the content. In addition, I don't know the impact on cases that had interpreted the rules as originally stated.”*

*“The only drawback I can think of is the risk of a restyling affecting the meaning or intent of the Rule. Even though the purpose of restyling is to not make substantive changes, great care would have to be taken to ensure that is avoided.”*

The next most frequently noted potential drawback, cited by about 30 respondents (10%), was the sheer quantity of resources (time, work, and expense) that could be involved in the rules restyling process. Clerks of court in particular (about 25%) noted the additional burden that would be placed on courts and clerks' offices because of the need to revise local rules and procedures to make them consistent with restyled rules. Other potential drawbacks named by respondents were that those already familiar with the existing rules would have to spend time familiarizing themselves with the restyled rules; that restyling would create confusion; that the rules would become longer; that, if structure, headings, and numbering of rules changed, this could have an adverse impact on the ability to do legal research on a rule; and that, because the rules are



related to the Bankruptcy Code, there are terms of art in the rules that would need to be preserved in any restyling process.<sup>4</sup> There were 55 respondents (18%) who said they could not identify any potential drawbacks of restyling.

## **Overall Support for Restyling and Reasons for Supporting or Not Supporting**

After identifying potential benefits and drawbacks of restyling, respondents were asked whether they believed any benefits of restyling would outweigh any drawbacks. Majorities of all groups (66% of judges, 82% of clerks, 68% of organization survey respondents, and 73% of website survey respondents) said that they believed the benefits would outweigh any drawbacks. Not surprisingly, these percentages are very close to the proportion of respondents (69% of judges, 82% of clerks, 74% of organization survey respondents, and 67% of website survey respondents) who answered “yes” to the question of whether, overall, they supported restyling the bankruptcy rules.

### *Reasons for Supporting or Not Supporting Restyling*

When those who supported the idea of restyling were asked to explain why, the most frequently cited reasons had to do with the assumption that restyling would make the rules clearer and easier to understand. This is consistent with responses about the benefits of restyling. Some noted that this increased clarity would bring about greater compliance with the rules because they will be easier to follow. Others supported restyling based on the idea that it would make the bankruptcy rules consistent with the other rules that have been restyled.

For those who did not support restyling, the most frequent reason given (by 20 respondents, or just under 25% of those not supporting restyling) was that there is no need because the current rules are working well. In line with the question about drawbacks, seven respondents mentioned that the risk of unintended consequences from restyling was too great, while the same number noted that the drawbacks outweighed the benefits. A few said that such an effort could pull resources from other large-scale projects that are looming in the bankruptcy courts, or that they did not support restyling because it is too soon after other major changes have been made (forms modernization, Chapter 13 plan).

## **Process for Restyling**

Respondents were asked whether, if the committee does decide to move forward with a restyling effort, this should be done for all of the rules or only a subset. As mentioned earlier, the vast majority of all groups, particularly judges (90% of judges, 79% of clerks, 76% of respondents to the organization survey, and 77% of respondents to the website survey), believed that all the rules should be restyled as part of the same effort. Those who thought only a subset should be restyled most frequently suggested focusing on longer rules with multiple subparts. Some respondents suggested restyling the rules in

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4. Eight respondents mentioned this concern, which was also identified by the committee prior to soliciting input.

stages, giving courts time to adjust and conform local rules and practices before moving on to the next set.

## Considerations for Committee in Determining Whether to Restyle

We asked respondents if there was anything specific they wanted the committee to consider when making its decision about whether to undertake restyling. A relatively small proportion of each group (20% of judges, 14% of clerks, 16% of organization survey respondents, and 34% of website survey respondents) answered “yes” to this question. Some merely reiterated their opposition to the restyling process, but the most frequent substantive suggestion was that if the committee undertakes restyling, it should seek many different constituents who work directly with the rules to be involved in the effort. Illustrative comments include the following:

*“Even though I support it, I would say don’t go down this path unless you are comfortable that you can get serious involvement from a broad cross-section of the bench and bar. You don’t want to end up with subtle changes that make the rules more biased toward debtors vs. creditors, consumers vs. businesses, etc. The focus should be on making them more concise and readable—and not allowing various constituencies to sneak in changes to address their particular client concerns.”*

*“I strongly advise against this project. Focus on substantive rule changes when that becomes necessary. Changing the wording of rules and the sub-part numbering will sow confusion and create doubt about existing decisions interpreting the rules without achieving any real benefit to anyone.”*

*“Please make sure that judges and lawyers who work with the rules every day are involved in the restyling. Without a substantive knowledge of bankruptcy law and how these work from the bench and the lawyers’ perspective, the rules cannot be restyled properly.”*

*“... [I] just want the committee to consider the downstream impact of this workload on the local courts and all the information and content that we manage in multiple forms and formats (public resources for attorneys and pro se, website content, local rules and local forms) that will need reviewing, updating, changing, re-linking, re-training of the bar, etc. due to restyling of federal rules. This needs to be a multi-year effort to spread out this impact.”*

## **Conclusion**

Contrary to expectations discussed at the spring 2018 committee meeting, most survey respondents from all groups are supportive of the idea of restyling. Many respondents said that it was very beneficial to have been able to view a sample restyled rule. While there is a good deal of support for restyling, those who are opposed to the idea are quite strong in their opposition and have provided important considerations for the Committee to keep in mind as it determines whether and how to move forward. It seems clear that if such an effort is undertaken, it will be important to involve a broad cross-section of the bankruptcy community.

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# Appendix A

## Restyling Questionnaire and Survey Methodology

The FJC worked with the Restyling Subcommittee to determine how best to reach members of the bankruptcy community who might want to share their views about whether the committee should undertake a restyling effort. Three groups—bankruptcy judges, bankruptcy clerks of court, and leaders of twelve bankruptcy-related organizations<sup>5</sup>—received a cover email sent out under the names of the current and incoming chairs of the Bankruptcy Rules Committee, inviting them to participate. The email included a link to the online questionnaire. Organization leaders who received the email were given the option to either submit one response to the questionnaire on behalf of the entire organization or share a link that would allow individual members of the organization to take the survey. In addition to targeting these groups, the committee placed an invitation for comment, along with a link to the questionnaire, on the Rules and Policies webpage of the Administrative Office of the U.S. Courts (AO).

The questionnaire started with an introduction explaining the purpose of the survey and the rationale for restyling the rules. The introduction also included a link to the guidelines used for restyling prior sets of rules and a link to a sample restyled rule (Rule 4001(a)) that the style consultants of the Committee on Rules of Practice and Procedure (Standing Committee) produced at the request of the Advisory Committee, to provide context for those responding (both documents appeared in separate windows when a respondent clicked on the relevant link).

The targeted groups (judges and clerks of court) were given a deadline of roughly a month after the survey invitation was sent, and those who did not respond by that time received an email reminding them to complete the survey. Organizations whose leaders received the survey invitation, along with individuals who accessed the link from the AO website, were given roughly two months to respond. We cut off data collection as of July 9, 2018, and the response rates in the main document are as of that date.

The questionnaires for all four groups were basically identical, except that the questionnaire sent to the organization leaders and the questionnaire linked to on the AO website included an initial question that asked the respondent to identify the capacity/role in which he or she was responding. This question was omitted from the questionnaires sent to judges and clerks of court, since their roles were known.

The 106 respondents to the AO website questionnaire self-identified as follows: bankruptcy practitioner (64); bankruptcy trustee (8); official representative of a bankruptcy-related organization (4); bankruptcy judge (4); clerk (3); multiple capacities (8); and “Other” (15).

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5. The following organizations’ leaders received the survey invitation: American Bankruptcy Institute; ABA, Business Law Section, Business Bankruptcy Committee; ABA, Business Law Section, Consumer Bankruptcy Committee; American College of Bankruptcy; Association of American Law Schools, Section on Creditors’ and Debtors’ Rights; International Women’s Insolvency & Restructuring Confederation; National Association of Bankruptcy Trustees; National Association of Chapter 13 Trustees; National Association of Consumer Bankruptcy Attorneys; National Bankruptcy Conference; National Conference of Bankruptcy Judges; and Commercial Law League of America.

All responses to open-ended questions were reviewed and coded into categories by the author of this report.

The full text of the introduction and questionnaire begins on the next page.



## INTRODUCTION TO RESTYLING QUESTIONNAIRES

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 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. The restyling process is not intended to make changes to the substance of the rules. The Advisory Committee will retain terms and phrases that have special meaning in bankruptcy practice notwithstanding the restyling guidelines.

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(a). 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. The Advisory Committee is not requesting any substantive comments on the restyled version of the rule.

To access the survey, please click on this link:

[link here]

## Pilot for Bankruptcy Rules Restyling

### Rule 4001

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|--|---|
| <p><b>Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements</b></p>   | <p><b>Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements</b></p>  |
| <p>(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.</p> <p>(1) <i>Motion.</i> 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.</p> | <p>(a) <b>Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property.</b></p> <p>(1) <i>Motion.</i> 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) must comply with Rule 9014 and must be served on:</p> <p>(A) the following, as appropriate:</p> <ul style="list-style-type: none"> <li>(i) a committee elected under § 705 or appointed under § 1102;</li> <li>(ii) such a committee’s authorized agent; or</li> <li>(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</li> </ul> <p>(B) any other entity that the court directs.</p> |

| ORIGINAL  | REVISION   |
|---|--|
| <p>(2) <i>Ex Parte Relief.</i> 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.</p> | <p>(2) <b><i>Ex Parte Relief.</i></b> Relief from a stay under § 362(a)—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:</p> <p>(A) specific facts—shown by either affidavit or a verified motion—clearly demonstrate 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</p> <p>(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.</p> <p>(3) <b><i>Notice of Relief; Motion for Reinstatement or Reconsideration.</i></b> 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—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 from the stay without notice—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 the motion.</p> |
| <p>(3) <i>Stay of Order.</i> 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.</p>  | <p>(4) <b><i>Stay of Order.</i></b> 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.</p>  |

## QUESTIONS ON RESTYLING QUESTIONNAIRES

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
- 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. If the Advisory Committee decides to move forward with restyling the rules, do you think it should restyle all of the Federal Rules of Bankruptcy Procedure, or only a subset of rules that could benefit the most from restyling?

- If the Committee undertakes a restyling effort, it should include all of the Bankruptcy Rules.
- If the Committee undertakes a restyling effort, it should restyle only a subset of rules → Please indicate the specific rules that you think could benefit the most from restyling: [open-ended text response]

7. 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:

8. 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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## Appendix B

### Responses to Open-Ended Survey Questions

#### Benefits of Restyling

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

#### *Responses from Judges*

Not sure. I have come to understand how to navigate and read them over the years, and restyling may be more complicated (at least for me).

Greater stylistic consistency should reduce inconsistent readings. Language changes, and rules should eventually catch up.

The will be much easier to read and understand and result in less misunderstanding by lawyers and misinterpretation by judges.

Clarity, reduction in ambiguity, effective usage and understanding.

the main benefit is clarity, which, in turn, may make it slightly more likely that practitioners will consult and try to comply with the rules

Restyling could make the rules easier to read and to focus on pertinent subdivisions of the rules.

The rules are overall difficult to read and sometimes confusing. Many of the rules could at least be written in a more concise and readable manner.

Rules could be made easier to understand by breaking out the components of particular Rules into numbered or lettered subparagraphs. Some Rules contain lengthy statements that could be better understood (and therefore followed) if they were broken out into subparagraphs.

easier to read

It would make it easier and clearer to the reader what the different requirements are to comply with the rule.

Easier to navigate.

Reorganization as it is like a house that has been added onto too many times

The main benefit is that the rule will be easier to understand for the person reading it.

Reduced ambiguity.

Greater consistency with modern guidelines for legal writing—especially the notion that legal writing needn't be turgid to be accurate.

Greater consistency with other federal court rules.

The current rules, either intentionally or subliminally, create a bit of a barrier for unrepresented individuals. This is a group whose filings have significantly increased in recent years. “Plainspeak “ would be good for them . . . as well as for us judges and lawyers.

Many of these rules have looked the same for decades. Undoubtedly, some could benefit from clearer, more modern language, style, and usage. Others would benefit from substantive clarification—service on credit unions under 7004, for instance.

Restyled rules are clearer. They require a sequence of steps (a party who wants an order shall, and then, and then) that is much easier to follow. They avoid the use of shall as a substitute for may or must. Also, steps that are alternatives (do this, OR that), or cumulative (do this, AND that) are much clearer. Also, the indentations simplify reading. I also like the way time and deadlines are expressed (after 2 days' notice) etc.

clarity and uniformity

A restyling of rules should provide clarity of interpretation to those who do not practice constantly in bankruptcy.

Restyling could create uniformity and better clarity.

None. But I am thoroughly versed in the Rules and find them very easy to use.

I think it is easier to read and identify the requirements of the rule.

There are an increasing number of pro-se litigants, who would benefit if the rules were re-written in a simpler style—not written by lawyers for lawyers.

It might clarify ambiguous language and incorporate judicial decisions.

I do not have strong opinions on the subject and have little to say.

Clarity and simplicity.

Restyling will make reading more clear.

We see far too much paper in bankruptcy court, and the rules are very hard to follow. Any process that helps the visual folks read rules easier is welcome. Make the rules easier to understand and internally consistent, and generally improve them

I suspect the only benefit would be clarification of rules with identifiable problems.

It would facilitate practitioners being more willing to practice in a field where the Code and Rules are currently very obaque. Avoid misunderstanding. Much easier reading and comprehension.

Confusion.

To provide more clarity, and to ease application of a rule to a given situation.

If written properly, restyled rules could aid the general public; unrepresented parties in particular.

Restyling may make the rules more understandable.

The Bankruptcy Rules should as much as possible conform to the restyled FRCP

The text would be easier to follow and not be so dense to work through to determine when and how the rule(s) should be applied.

Would make them consistent in that regard with the other federal rules. Restyling can make the text clearer, more elegant, more parsimonious, and easier to read.

None

Making them clearer and easier to understand.

clarity; the listing of the requirements down the page as opposed to in a single paragraph makes what needs to be done or conditions met much clearer to the eye.

Making things clearer and easier to understand benefits everyone.

Easier to read, easier to identify the parts of the rule

Restyling will make the Bankruptcy Rules easier to read and understand, which should improve attorney practice and the quality of judicial decision-making

Language can be made more clear to reflect how the rules have actually been interpreted in prevailing case law.

Make it easier for those who do not regularly practice bankruptcy to read and understand the many unique aspects of the bankruptcy practice. Regular practitioners are likely comfortable with the current style of the Rules and can readily find the information they are seeking.

Improve ability to read quickly and pick up the essential points; i.e. deadlines.

rules should be easier to understand

Restyling may make some difficult syntax and run on sentences in the rules more “user friendly” for judges and practitioners alike.

The sample restyled rule is easier to follow.

Restyling could make the rules easier to understand and follow

Clarity and fewer errors of parties and the court in applying the rules.

Ease of use.

Restyling is a great idea.

Clarity, and ease of reading.

I think the restyled Rule 4001 is much easier to read and follow.

Easier to read, lawyers will make fewer mistakes.

It will make them easier to read.

It could make the rules easier to read and understand.

The rules as restyled are generally easier to read and understand without re-reading.

None.

Just based on the example provided, it appears that restyling will make the rules easier to read and understand.

none

The rules would be clearer and easier to read.

The restyling process would modernize the language of the rule, which likely would simplify the rules and make them easier to understand.

The example demonstrates restyling does make review and consideration of the rule easier.

Easier to follow and to reference in opinions.

None. They're not difficult to read now.

Make it easier to follow subsections.

It appears the rules are easier to read and understand.

More straight forward, easier to read, comprehend and apply. Further, it might be easier for a pro se litigant as well as new or inexperienced attorneys.

Clarification for ease of compliance, especially by breaking the rule out as shown in (a)(2) of the revision to 4001, contrasted with the blocking of paragraph (2) in the current rule, as well as simpler language.

I think that adding clarity is always a worthy goal, and am certainly in favor of that.

I think that restyling would make the Bankruptcy Rules easier to access due to (1) the aesthetic benefits arising from use of bold typeface for subheadings and (2) use of clearer language.

Far easier to read

Clarity and ease of reference for certain rules that are written as long sentences interlineated with subparts.

The rule is easier to read and interpret.

I do not have any idea of any benefits that would result from restyling. Put differently, I am not aware of any problems that restyling is needed to address.

The restyling would make the rules more user friendly and accessible. As currently arranged they are intimidating. Modern styling, such as in Power point, is expected.

Looks like great readability advantages

(1) Clarity, (2) ease of use, (3) saving time, (4) subtly encouraging practitioners and the courts to use simpler, clearer language.

Restyling should improve compliance by making them easier for all involved to understand.

Support restyle

Easier for practitioners to follow rules.

Simplification of the rules, especially on the consumer side, would be helpful.

Restyling could assist in providing clarity—simply by the style in which the information is presented. When looking at the restyled provisions, they are much easier to read and written in a clearer format.

It makes the rules easier to read.

Restyling would make the Rules clearer and therefore easier to apply.

When I first started practicing law in the mid-1980s, I was big fan of the book *Plain English for Lawyers* written by Richard C. Wydick in 1979. I am also a fan of Bryan A. Garner and several of his books concerning English usage and style. I believe restyling the Bankruptcy Rules using the same principles suggested by Mr. Wydick and Mr. Gardner will be very beneficial to the bar and bench by improving the intent and application of the Bankruptcy Rules.

None.

Simple is always good. And to the extent that pro se debtors use the rules it would be helpful for them.

I believe that those that take the time to read the rules will appreciate the restructuring of paragraphs (making it easier to follow) as well as, for those who are not attorneys, the use, when appropriate, of English rather than legalese.

I believe the proposed restyling will make it easier for everyone to read and understand the Bankruptcy Rules applicable to a particular matter, which should result in a more uniform understanding and interpretation of the Bankruptcy Rules.

They might make the rules easier for everyone to understand, especially those without legal training (i.e. pro se litigants).

The restyled Rule 4001 is written using more plain language and the formatting makes the rule much easier to read and, therefore, understand. The changes would also help guide the reader to the appropriate section of a rule making it much more user friendly.

Much more clarity be carefully parsing the sentences and by the presentation differences that segregate concepts.

Could make it easier to parse some rules, though most of them are not hard to understand

Clarity

Better organized rules are easier to follow.

I am unable to think of any such benefits.

The inconsistencies also feed the curious mentality of bankruptcy practitioners to cite only bankruptcy decisions and to ignore nonbankruptcy precedents even though the law of the respective circuit may be well established in nonbankruptcy cases construing the same rule.

Restyling to conform the language of FRBankrP to FRCivP to the maximum extent feasible (there are bankruptcy terms of art that have achieved substantive status in a fashion not susceptible of restyling).

It could make the rules easier to understand for lawyers and litigants.

Greater comprehension of rules with resulting improvement in compliance.

Enhanced clarity and precision. Greater comprehension by self represented parties and unfamiliar practitioners.

Anything that will make the rules less cumbersome and easier to understand is a terrific objective

Anything which makes them more user friendly would be welcome.

If done properly, the most obvious benefit would be ease of reading and clarity. This could result in fewer mistakes by practitioners.

It is easier to read.

Very little

None.

The rules are a mess to read and understand. Anything that can be done to make them more user friendly is encouraged.

The new version could set forth the substance in clear, easily understood English. Hopefully, it would eliminate (or at least reduce) the necessity of cross-referencing other rules. The new format would allow for an easier comprehension of what the rule actually requires.

Format is easier to follow

Clarity for practitioners and court users.

Accelerate comprehension by non-bankruptcy lawyers.

I am not certain that the rules need to be restyled, but anything that would make their organization more logical to the reader would be helpful.

A high percentage of lawyers who practice in this bankruptcy court have substandard skills. Anything that improves the comprehension gap will produce significant benefits for the justice system. Likewise, restyling would hopefully make it easier for all to reach an honest consensus as to what a rule provides. Finally, our pro se filings continue to increase. To the extent a non-lawyer citizen attempts to interpret a rule, language that is easier to comprehend will hopefully improve their access to justice.

I see no real benefit.

It will make the rules easier to understand and apply.

Make it easier for lawyers if not pro ses

I do not see any benefits.

Easier to read

Restyled rules could provide much clearer instruction to litigants and courts regarding what must be alleged to obtain relief and to whom motions and notices must be served.

I hope that the rules will be more succinct and understandable.

Some clarity. Easier location of rules.

Improve clarity and readability

None

Increase likelihood that pro se filers will follow rules successfully.

Clarity and ease of interpretation

Not sure

clarify the procedure to be followed in plain English.

### *Responses from Clerks*

Easier to read

I think the general direction of plainer English, making things easier for lay (and lawyers!) people to understand, is a positive step. We might end up with less arguing about the meaning of Rule phrasing—a good thing.

Clarity, due to both wording and format. Consistency with restyled civil rules.



## Clarity and brevity

### Clarity

Rules would be easier to understand for practitioners which may decrease errors.

The format of the sample restyled rule appears to be much easier to read, less tiring on the eyes and more useful for citation purposes. If this format is used throughout the bankruptcy rules, the benefits would include more uniformity, easier interpretation, easier identification of a rule or subpart, and more efficient use of the rules by the reader.

If there are reoccurring issues clearly identifiable that can be “cleaned up” but the rule not substantively changed, way not take this opportunity to “restyle” the empirically demonstratable troublesome rules.

### Improved “readability” and clarity

Clarity and restyling would encourage all users to refresh their understanding of the requirements of the rules.

I think restyling would be beneficial because when a rule is easier to read, it’s easier to understand and comply with! Less errors would be made, resulting in savings of time, money and aggravation. The run on sentences and solid paragraphs of some of the rules, make your eyes glaze over.

After reading Bryan Garner’s Guide, it is clear that restyling will provide a great benefit to users of the rules. Just the application of hanging indents alone would be a tremendous step forward in the right direction. The use of plain language will also benefit users by eliminating extraneous (and sometimes archaic) words and phrases.

Restyling could remove ambiguities and update the language to reflect the trend towards a cleaner, plain-English approach to writing. In addition, it would also bring consistency with other rules that have been going restyled, or are going through the process.

Bring the Court Units more in line with each other when interpreting and enforcing the Bankruptcy Rules and in writing local rules.

Easier reading through the more concise and direct formatting.

Many staff members in clerks’ offices who are tasked with reviewing the Rules are not attorneys. The restyling would allow them to better understand the Rules. The same could be said for pro se debtors.

As an attorney, I found the restyled version easier to read simply because of the ability to better able follow numbered requirements as they were set out as separate indented paragraphs.

Restyling in the manner provided in the example would be beneficial because it is easier to scan through the rule looking for topics (because of the bolding) and scan through rules that include a number of provisions or requirements currently written in paragraph style. I often go through and enumerate items in a paragraph when presenting or discussing a related topic within my local court.

Improving clarity and brevity.

The restyling would assist pro se debtors, the general public and staff in the judiciary to have better understanding of the rules.

Easier to locate and research rules.

I suppose restyling the rules could make them easier to read.

Quick clarification of the Rules without having to re-read

Many benefits—primarily the outline form.

Quicker and better understanding of the rules.

I could make them easier to understand for pro se parties, and for attorneys who do not practice before the bankruptcy court on a regular basis.

make them look cleaner

make them easier to read and follow

I cannot say that I know what is meant by “restyling”. Does it mean rewording, reorganization, etc.? I do not think rewording the titles of the rules will be of much benefit. I do not offer an opinion as to whether reorganizing the rules would help but consideration and review of the organization would be worth the time even if the rules are not restyled. Depending on how the rules are organized, the restyling could lead to an ease of use and understanding. The benefits may include a decrease in time and work spent trying to use the rules. As to the question below, “Do you believe any benefits of restyling would outweigh any drawbacks?”, I cannot offer any answer until at least a draft of the proposed restyling is offered for review and comment.

Improve readability and comprehension

Clarity: much simpler language and structure.

To better convey what the Rule intends, so that intention does not get lost in a “wall of words” that renders the Rule unnecessarily difficult to relate back to the topic sentence of the Rule. Sub-parts set-off and notated by capital and lower case letters, numbers, various Roman numerals, etc., assist in accomplishing this, but that technique can be overused resulting in marginal improvement. As an

example of extensive sub-parting not yielding improvement, refer to current Rule 4001(c)(1)(B).

Sometimes, adding a new paragraph with a bold type face heading to address a distinct sub-topic is best, as was done in the re-styled 4001(a) by adding a new paragraph 3.

Based on the limited examples provided, it appears that more lengthly, convoluted rules would be clearer and more easy to understand.

### ***Responses from Organization Survey Respondents***

Simplicity. Consistency with Civil Rules and Appellate Rules

A bit more uniformity.

No material benefits

clarity; ease of reading and enhanced compliance

Consistency with other rules

It would give people on the rules committee something to do. It would also make it easier for non-bankruptcy lawyers and judges to understand the rules.

Easier to read; easier to remember

More clarity and definitiveness.

clear up confusion of interpretation

Easier to find the rule, read the rule, and understand the rule. The visual difference alone is worth the endeavor.

The restyled rules are much, MUCH, easier to read, understand, and work with. Though they wouldn't guarantee that practitioners would no longer make mistakes, or fail to comply with the Rules, they'd tend to reduce error—dramatically, in my view—and at the worst, wouldn't hurt.

They could be more clear, easier to read, and easier to apply, particularly for pro se parties.

Easier comprehension, particularly for attorneys who do not practice Bankruptcy regularly and for pro se parties, especially creditors.

Eliminates confusion, allows for quicker review of rules, and provides emphasis, or de-emphasis, of components of a rule that get missed in old format.

I like sub headings and lists. They are easier to follow

Plainer language

Restyling could provide greater readability and clarity. As the Rules are written currently, it can be difficult to follow the long meandering sentences.

Easier to read and understand.

Easier to understand and apply them.

### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

Very little.

From the sample provided, it appears to make the rules easier to navigate. As a practitioner, I typically highlight portions of the rules in my rulebook to make them easier to find and navigate.

Consistency so that procedures and processes are the same regardless of the Judge or Trustee overseeing each case.

It breaks out the rules so that they are easier to read.

None

Easier to understand and interpret intent. Easier for pro pers and others who do not regularly practice before the bankruptcy courts.

Bankruptcy's rules are numerous and very hard to understand for an attorney who does not regularly practice bankruptcy law. I believe restyling the rules would allow non-bankruptcy practitioners to more easily understand the rules.

Restyling the Bankruptcy Rules will bring the style of the Rules in line with the other Federal Rules. Additionally, restyling the Bankruptcy Rules may help clarify any unintended ambiguities that can be found in the current version of the Bankruptcy Rules.

More clarity and simplicity.

Clarity and simplicity.

All rules and codes should be re-styled into plain English. This is a good initiative, and should be done.

Avoid misunderstandings, simplify otherwise use of legalese, facilitates general public reading, clearly divide and subdivide the different items encompassed in the rule.

Eliminate unnecessary work by most lawyers, who either don't understand or lack confidence in their ability to understand rules. In my experience, most lawyers overcompensate for their lack of confidence in understanding rules by taking unnecessary extra procedural steps and writing unnecessary wording into their papers.

The references in the styling guide to "user-friendly", "outline format", and "brevity" caught my attention. Often, I refer to the Bankruptcy Rules and want to quickly find a topic, and once found, I find it phrased in three sentences when it can be one. This may be useful for a learning tool, but as a reference once someone is familiar with the Rules, the extra words add clutter.

There is always a benefit to making rules more readable and better organized.

Easier to understand and based on the sample revision, the new subparagraphs would be easier to cite.

Cutting cost

A clearer process

Allow the Federal Appellate Courts to properly clarify you are right. When cross-referencing any Federal Bankruptcy Rules that are parallel in meaning to the Federal District Courts local rules. For any timely filed Appellate Court petition that would apply in the same manner as the Federal Rules of Civil Procedure. Since, all parties are entitled to a Federal Constitutional right to their day in court.

NONE.

Clarity.

Enhanced clarity & simplicity

The main benefit would be clarity and to increase the ability of individuals to understand the rules.

Substantial benefits. Not having to flip backwards and forwards in the rules and code to see what is referred to—the proposed example lays it right out what you would find with a flipping exercise. Time saved and error reduction due to misinterpretation of rules is most likely.

Perhaps making them more easy to read thereby making them more comprehensible.

Very little.

Will provide more clarity, eliminate ambiguity, make easier to read, and be consistent with the revisions to the other federal rules.

I agree that some restyling the rules, if done properly and conservatively, would make the rules easier to understand.

I suppose that they may (emphasis on may) enhance clarity, but this is never a give - practitioners are familiar with the existing rules, and they generally know what they mean.

Some bankruptcy rules cover the same subject as existing civil rules but with different language. This would be an opportunity to use similar language to the extent possible.

The restyled exemplar is easier to read. The use of vertical lists instead of paragraph form makes it less likely that list items will be overlooked.

Quicker understanding and analysis of rule and which, if any of it, governs a particular situation, rather than having to wade through a lot of dense text that one would unpack mentally in the same way as restyling might.

Consistency with other Rules

None

Save litigants time and money spent deciphering and then arguing about badly drafted rules.

Much easier to read and understand what is expected under the rules. Also easier to explain to clients what is required.

Ease of reading, clarity in framing arguments, creation of more specific/readily identifiable relevant precedent

clarity and better ease of use

Clarity, consistency and brevity.

The restyling of the Federal Rules of Bankruptcy Procedure will benefit practitioners, the public, and the judiciary because the rules will be easier to quickly review and understand, hopefully reducing procedural errors that can be time and cost prohibitive. This is particularly true in Bankruptcy Courts where there is a high number of pro se debtors and participants. Additionally, restyling will also provide for clarifications to rules that have been affected by amendments, and keep the FRBP consistent with the Federal Rules, of which many are mirrored in in the FRBP.

Restyling may be helpful to pro se litigants.

Restyling, in my opinion, would make it easier to read the Rules.

If there can be a simplification, it would make it easier on attorneys that are not regular bankruptcy practitioners to understand the rules and to practice before the courts.

Restyling could clarify some ambiguous rules and would make the rules easier to read and apply to a case or proceeding.

None whatsoever.

It may help State law judges be able to read the rules and understand their applications. Specifically domestic judges, they do not understand exceptions to Automatic Stay and tend to just believe every bankruptcy stops domestic actions.

provide more certain clarity

Avoid practitioners unnecessary puzzle work

Based on the example of restyled Bankruptcy Rule 4001(a), restyling appears to bring more clarity and precision to the Rule. That additional precision may help to identify aspects of the Rule that need additional development.

Clarity of drafting. Ease of interpretation, particularly for non-lawyer parties involved in the bankruptcy process.

None. Would only provide profit-making seminar businesses with another opportunity.

none

I think we could get some consistency across the courts and simplification of the process.

None. Nothing is broken here.

Rules, and certain Code sections, may have been written over a period of time by many different authors and many different drafting styles. Restyling under a common writing approach and style, might be of benefit. Particularly, when dealing with the interplay of multiple rules.

Obviously, the rules as currently written are difficult to understand leaving them open to interpretation and misinterpretation. We should make some effort to make the rules easily understandable.

Making the rules simpler is a major benefit.

Restyling the Bankruptcy Rules will result in improved readability and make them easier to understand by all bankruptcy participants.

Increased readability and understanding of the rules.

The principal benefit, based on the example, is that long paragraphs might be broken up making them visually easier to read.

none

Any efforts to streamline and provide clarity are a movement in the right direction. Even restructuring the text from mass paragraphs to bullets or outline as in the 4001 example make the text more accessible.

Quick, readable access to the rules, especially when I am on the bench and in need of an on-the-spot understanding of a given rule

Much easier to read and hence understand.

It could help clarify conditions under which particular rules are applicable.

I would hope restyling the rules would provide greater clarity in the rule's requirements as well as a more organized composition of the rules in their entirety. Sometimes it is difficult to find the rule you are looking for, you know it is in there but the order of some of the rules does not make sense.

Make them clearer.

As with any set of rules and regulations they need to be reviewed and updated on a regular basis. We have had some major changes in the bankruptcy arena and our rules need to reflect these changes. There will be rules that are antiquated and rules that need to be amended or added. Restyling the rules will allow those helping with this task to research rules from other jurisdictions that might serve our court as well.

Also, it will encourage us all to reread the rules when they are restyled.

Make rules more understandable and conform to modern verbage.

For those new to the bankruptcy rules, it would make the rules clearer and easier to understand.

Make the rule easier to read.

More clarity, ease of reading and understanding. Expecially eliminating long & convoluted sentences, eliminating double negatives (a favorite it seems in the BK world), reducing need to reference other rules to understand the meaning of a rule.

Clarifying confusion and using more user-friendly language, particularly for self-represented litigants in bankruptcy court.



It makes it easier to read the re-styled version

Some Rules are long and difficult to parse. Restyling those Rules to make the Rule clearer, easier to understand and quote in pleadings would be advantageous.

None

Restyling will make them hopefully more readily able to be read and understood by persons of normal intelligence

none

Ease of reference.

Clarity

restyling of rules should benefit both the consumer and the creditor without adding excessive work on the part of the consumer's attorney and the consumer's creditor

Clarity.

Rewording certain sections could provide clarity for electronic filings and service requirements for example.

It will make the institutional interests that pursue restyling content. An ephemeral uniformity of the language style between rules will be achieved for those with a need to read the federal rules as works of literature and not as the operational manual for a genuinely complex system.

More clarity in the rule requirements and easier use of the rules.

They may look better or read better.

Where 15% or more of the litigants are Pro Se, restyling the rules would make it easier for these litigants to understand what is going on, and what they can or cannot do.

Based upon the samples provided, it appears that the benefits of restyling would be negligible.

Easier to locate certain information

## Drawbacks of Restyling

Question: Regardless of your overall opinion on restyling, what drawbacks, if any, do you think restyling the Bankruptcy Rules could provide?

### *Responses from Judges*

Just change and we know that we all hate change.

None.

there is an obvious danger of unintentionally altering substance; but aside from the immense amount of work involved and the need to devote resources to the project that perhaps are better spent elsewhere, I see no other drawbacks

None that I can think of.

Unintended consequences are always a concern in this type of effort. It is always possible to create more problems than are solved unless it is done extremely well with appropriate input from all affected parties.

Unlike the Federal Rules, many of the Bankruptcy Rules are specifically related to substantive provisions of the Bankruptcy Code. Terms of art are used throughout the Rules and care must be taken to maintain continuity between the Code and Rules even if the restyling gurus find the terms of art undesirable. Using generic terms or less cumbersome sentence structures is part of restyling but that will be helpful only if terms of art and references to substantive law are respected.

none

Parties would have to become familiar with the restyling and format changes, but on balance I do not think this is much of a substantive drawback.

Loss of familiarity. Cost of redoing LBR's.

Everything the committee has touched has turned into a disaster...not sure why, but it looks like maybe an unwillingness to make choices, thus disappointing some, and instead just adding and adding. The new schedules are unbelievably bad and the form plan is something that only a committee could accept. The schedules are truly the worst. Information was previously easy to locate and scan. Now it is poorly organized dots of information scattered in a sea of print. If you can't stop yourselves, I suggest giving the entire task to one highly skilled person, perhaps even a professor, then working off of that draft while allowing him or her to comment on the "improvements."

We have to be very careful that the restyling does not produce changes in substance.

I would foresee at least two problems: First, any restyling would create the possibility of an unintentional change in substance. Second, the restyling would force regular practitioners to reexamine rules that are tested and fully understood.

Restyling would be a laborious and tedious process that could result in accidental substantive or procedural changes. Furthermore, restyling may make it more difficult to utilize precedent based upon the current wording of the Rules.

It would create another learning curve for users to navigate. I don't believe in fixing something unless you can convince me that it is broken or obsolete.

I don't see any drawbacks.

Rules are written by lawyer, for lawyers and that works—the primary audience understands the them. Re-writing the rules for a broader audience will have unintended consequences.

Some uncertainty may be introduced into Rules that were thought clear.

I do not have strong opinions on the subject and have little to say.

Attorneys and Judges would have to learn new Rules. And much caselaw on existing Rules would be thrown into question. Also, it might require Districts to overhaul their Local Rules to match new Rules.

I see no downsides to restyling.

You could unwittingly change the meaning of the rule by tinkering with language. After all, we assume that Congress used particular words for a good reason. So restyling should not be used where it might alter the statutory interpretation of a provision.

This will add a fair amount of work to Clerks of Court, who will have to coordinate changes with local rules and administrative orders.

I think this is a solution looking for a problem. For the most part, the rules work just fine. We all have a general understanding of their application and symbiotic relationship to the code. Identify rule sections that are problematic; then make changes. Not the other way around.

Potentially, the “dinosaurs” in our field of practice will resist and resent change. Change is usually difficult for most folks. There is the very obvious concern that a restyling could affect the interpretation and application of the Rules, unintentionally.

The page length of the Rules will presumably grow.

If not carefully drafted, they could change the intent and meaning of the current rules.

Possible waste of time and resources. “If it aint broke—don’t fix it”

Perhaps some confusion at the beginning before all attorneys and Judges become accustomed to the changes

Lots of work and will make the rules text longer

There may a danger of inadvertent substantive changes as a result of restyling. And the apparent novelty of the revised text may be disconcerting for some.

Lawyers and judges will look for substantive chnges, even if not intended.

A lot of case outcomes could have been determined by interpretation of the current rules. Re-styling the rules could mean that those issues would have to be litigated all over again if the language of the re-styled rule could be construed differently.

they may be somewhat longer

none

Users are accustomed to the existing rules, so any change presents challenges.

I can’t think of any drawbacks

No matter the goal, any redrafting is likely to raise unforeseen questions that will result in additional litigation.

It will be a lot of work by a lot of smart, busy people for little substantive benefit. Perhaps there is a more important task for such a group.

changes in rule text could lead to unintended consequences

Simplification has a tendency to open up interpretive litigation and may result in some ambiguity. This can lead to inconsistent application of the rules. But, we have that now anyway, in some cases. The best English does not necessarily equate to precision that the law sometimes requires.

I cannot think of any.

The time needed to be spend to restyle, review, and implement the changes  
When and how the changes would be implemented and how the changes would be communicated to the bar and the public  
The need for Courts to amend their Local Rules if changes are made

Time and effort.

Change requires accommodation and accommodation can take more time, initially.

The burdensome task of doing it correctly. Otherwise it is an idea whose implementation is long overdue.

None come to mind.

None come to mind.

None

None

It would require every court in the country with local rules to review them in detail to determine if they contain references to sections in the national rules which are renumbered or deteted.

Any rewrite of rules adds the possiblity of unintended substantive changes. This is especially problematic with rules for which there already exists significant appellate interpretation.

Create confusion due to needless rule changes and renumbering of subparts.

I can't really think of any drawbacks.

The goal of not altering substance is difficult to achieve. As substantive amendments are subsequently made, it may be difficult to determine which changes were meant to by only stylistic.

I see two primary drawbacks. First, many of the bankruptcy rules relate directly to sections of the Bankruptcy Code, and those rules likely should track the language of the Code rather than any stylistic rules applicable to the federal rules generally. Second, the bankruptcy bar is very familiar with the rules as written, and it likely will be quite a transition for the bar to get comfortable with the rules in a new form.

Potentially expensive exercise, the benefits of which are hard to justify in present environment.

Harder to understand when being quoted/cited during a hearing.

Intentionally or not, the restyling may result in unintended substantive changes.

Make it harder for “old timers” to get used to. (Which really isn’t a drawback.)

I don’t see any other than the time and effort involved.

Big changes always cause some difficulties but if no substantive change, there should be little or small impact.

Attorneys regularly fail to obtain current copies of rules and thus, regularly fail to comply with rules that are amended. Many attorneys who practice in bankruptcy on shoestring office budgets will not purchase the updated rules, especially if they are only restyled without substantive changes. (Thus, any restyling would be better if done when there are also numerous substantive revisions.)

I am concerned that in the pursuit of this worthy goal will somehow create confusion and unnecessary litigation if parties attempt to use the intended non-substantive stylistic word change into a substantive one. I am also concerned that undertaking this effort may distract from the even more worthy goal of addressing any actual inconsistencies, ambiguities or deficiencies in the Rules. For example, although I know you are not soliciting substantive comments, I always thought Rule 4001(a) should include in the list of parties to serve “any entity that asserts an interest in the subject property.” Again by way of example, I think that type of substantive change would be more beneficial than the non-substantive stylistic changes.

I don’t see any drawbacks.

Did not see any based on the samples I looked at

It may not be worth the effort.

None.

The drawbacks would be that users of the rules will need to become familiar with the restyled rules. If it isn’t broken don’t fix it.

None

None

Because many local rules and forms cross reference the national rule, If the current rule numbers are not maintained, there will be an extended period of confusion. Keep the reordering to the subdivision level

(1) When provisions are re-numbered there is a potential for confusion. (2) Restyling sometimes results in unintended changes in meaning. (3) The bar,

public, and courts can get overwhelmed by too many changes to the rules. All of that said, I strongly believe the advantages outweigh the drawbacks.

Offhand, other than the effort involved in preparing and publishing them, I cannot think of a drawback.

None

It would be a time consuming task

Rules modification, like the most recent forms modernization can be a mixed blessing.

Contrary to what I've written regarding the benefits, restyling could also create confusion since the prior numbers/subsections are not directly aligned in all provisions.

People will think the substance of the rules has changed and be confused. There may be cases interpreting specific phrases in the rules which could be called into question by a change in the wording of the rule.

The work of restyling would be enormous and there is always the risk of subtly making a change of substance rather than form.

It will be a long project that could lead to unanticipated ambiguity and inconsistency.

Many of the Bankruptcy Rules (and essentially all of the Part VII Rules) incorporate the Federal Rules of Civil Procedure and therefore already have the benefit of restyling. The remaining Bankruptcy Rules are generally well-crafted and are not confusing. The Rules Committee does a good job of updating and fixing the exceptions. Therefore, to engage in a comprehensive restyling program runs the serious risk of (a) detracting from any needed pinpoint reforms, (b) wasting a lot of time and effort and (b) muddying what already works in a relatively arcane area (bankruptcy procedure) as people debate whether something is a substantive as opposed to a stylistic change.

Each overhaul of the Rules (whatever the purpose) is terribly expensive to implement. Systems like Cm-Ecf need to be reprogrammed. Forms used in lawyers' offices need to be rewritten. Publishers have to supplement books in print. Etc.

Just the time and effort of doing it.

None other than the time it will take to go through the process. Obviously there may be some case law that seeks to interpret a rule that arguably will be impacted by the restyling, and perhaps those cases must be considered to assure that, where there is a "split" in interpretation, efforts are made to either (a) leave the

ambiguity untouched (!?!?) OR BETTER (b) fix the ambiguity and make sure the procedure for approval of a rule CHANGE (if treated as such) is followed.

One potential drawback might be a misunderstanding that restyling a particular rule indicates a desire to change the interpretation and implementation of that rule.

The meaning of rules might be inadvertently changed

The drafters would have to be very careful in how they restyle the rule to avoid changing the meaning of any of the rules. There is plenty of case law interpreting the rules in their current form and restyling the rules will make some of that case law obsolete.

Any changes in style could lead to unintended interpretive differences.

Any re-writing will raise the possibility of inadvertent error, or of ambiguities that later are interpreted in unfortunate ways.

If not extremely careful, errors can creep in.

No drawbacks.

Any such changes involves administrative costs.

It will be a Herculean task because of the importance of certain bankruptcy terms of art—seasoned bankruptcy expertise will need to be at the table at every step of the process.

My concern is the risk that the style changes could result in an inadvertent change to the content. In addition, I don't know the impact on cases that had interpreted the rules as originally stated.

The bar sometimes takes too long to adjust to rule changes and changes seem to prompt litigation and conflict.

Application of existing precedent to revised rules can be a difficult chore for judges.

As with any project of this scope, it is important to maintain internal consistency, make the rules neutral, and refrain from providing, even by implication, legal advice.

Most lawyers and judges hate change.

Unintended consequences or confusion resulting from mistakes in restyling.

None that I can think of.



I think it would be a great deal of work for very little benefit.

Inadvertent substantive changes despite the avowed intent not to. They always occur. Expensive re-education of court staff, bench and bar. Question about the viability of precedent interpreting prior versions of the rules that are allegedly the same but are not.

This will be a very time consuming process and I fear that the project could fail to simplify the style of the rules unless very thoughtful and knowledgeable people who both understand bankruptcy and are extremely effective writers do the work.

The time, energy, & overall effort to be expended in getting to the ultimate objective.

The time it would require to become accustomed to the new version.

Do not see any drawbacks

Lawyers and courts are familiar with the existing rules.

That, despite the provisos, some will argue a change in substance.

Time required for bankruptcy practitioners to familiarize themselves with the new format.

The rules have been in effect for a long time and there may be some confusion about them if they were restyled.

As long as the mandate of a particular rule is unchanged and expressed clearly and definitively, I don't see how restyling can produce a bad result. But I am sure there is some hidden danger that I cannot see at this time.

Unnecessary confusion as to the rules applicable to the vast majority of routine matters that come before the Courts. Restyling the official forms, particularly schedules and statements, should be a cautionary tale.

None. More clarity can on help.

Concern that they are missing a change

The current link between the current rules and the Code is very functional. Local rules are drafted to match the Federal Rules. If the Federal Rules are restyled, the Local Rules will need amendment. I do not support the restyling.

Opportunity for error, unintended consequences, changing substance

Restyling the rules, which seem to be working, seems to be a solution in search of a problem. The amount of time and effort that will be spent is not likely to be worth the actual benefit to any stylistic changes.

There could be unintended ambiguities or changes in meaning.

Anytime you change wording, you call prior interpretations into question and raise new issue.

Probable confusion as parties and judges seek to find changes in the stylistic changes that were not required. Some extra work for legal authors who will need to update their works.

Adds another new layer of confusion into the practice. We have had a considerable upheaval as a result of the new form plan and rules changes—the system needs a break for awhile

More confusion, less clarity, more inconsistency.

Change is always difficult

Not sure

Getting use to the restyling as outlined when researching something quickly.

### *Responses from Clerks*

Change, like math, is hard. There's an entire system set up to understand the current rules. Anything that changes the system is a challenge.

Change typically results in some short-lived confusion.

absolutely none

Unintended consequences could potentially lead to more confusion, rather than greater clarity.

This would be a very large project that would impact the courts/clerks offices in the midst of other large scale projects that will be implemented over the next few years (i.e. Next Gen, Microsoft Office and Mail, Internet Security/Scorecard). The large projects have created a burden on clerks' offices that have been reduced in size due to budget cuts.

It will be a very time consuming project that will also have trickle down impact on every local bankruptcy court as they will need to map the new format and citation changes to their local rules, requiring the restyling or proper re-citing to maintain accuracy. In addition, all public related resources (attorney manuals, electronic filing manuals, pro se manuals, etc.) and court websites will need to be reviewed and updated to conform with changes to rule citations for accuracy and correct linkages. This will be a major undertaking for every bankruptcy court in the nation to complete.

There will be a domino effect that may require modifications to Local Rules and various modules within CM/ECF. It would be a challenge to confine the “restyling” work to merely the Rules. Also, to use a (double) cliché, perfection is the enemy of the good so unless it’s broken, why fix it?

Shifting of content—either within a rule or between rules—could cause confusion

May require substantial revisions to many courts’ local rules.

I think the only drawbacks may be the time and expense needed to restyle. I think it would be well worth it.

As is the case with any change, it will take time for some users to adapt. Additionally, some users may question whether the stylistic changes impact the legal meaning of a rule, especially when traditional (and in my view archaic) phrases are rewritten using plain language.

The drawback is the inadvertent substantive change, or the interpretation by some that the changes are substantive.

Messing up the intent of the rule. Surely there will be disagreements in interpretation; who makes the final decision?

The only drawback I can think of is the risk of a restyling affecting the meaning or intent of the Rule. Even though the purpose of restyling is to not make substantive changes, great care would have to be taken to ensure that is avoided.

1. would take time for those used to old text to get used to finding reorganized, relocated text.
2. would actually make rules longer (page wise and print wise)
3. local courts would have to eventually conform rules, forms, websites, e filing programs etc to reorganized rules, staff would have to devote extra time.
4. Haven’t verified with examples, but there may be Bankruptcy Code sections that are affected due to rule reorganization (regarding moved citations or text differences)
5. Assuming Official Forms and Director’s Forms & CM/ECF events with cites, etc might be affected so that could cause some public confusion and extra work for attorneys to update & learn
6. The Kibitzer Effect: For those currently practicing bankruptcy law, a restyling may be seen as unwanted and meddlesome. The benefits of familiarity should not be dismissed or trivialized. Rules benefit from stability.
7. Restyling Guidelines are not Necessarily Meritorious: “Shall” is a known and acceptable word. Why “must” it be skewered? “Should” the word “shall” be replaced with “must?” Perhaps restyling will change the “United States of America” to “America’s United States.” Sometimes restyling seems silly.
8. Strained Interpretations: Because a restyling project starts with the proposition that no substantive change is intended, a court construing the restyled rule may

find it necessary to adopt what would otherwise be a strained interpretation of the rule to conform its meaning to the predecessor rule.

9. Disruption: Any restyling change will create losses of efficiency as courts and attorneys may no longer be able to rely on institutional knowledge to locate and recite the language of the rules.

Some will like to old because it is familiar and I suspect any printed versions may be longer as a result.

Restyling the rules will likely require a wholesale review of the court,Äôs local rules for conformity to the national rules. If there are no or few substantive changes, this review could be conducted over time and in smaller pieces, but it is still a daunting task for local practice committees, clerk, judges, and circuit councils that review proposed local rule changes.

Some pro se litigants may believe that the system is easier to negotiate due to the restyling. This is not necessarily true.

The benefits may not warrant the time involved with completing this project. Because we already tailor our local rules to follow the federal rules, it would then require our local rules to be rewritten.

Those used to the current style will have to adapt to a new “version” of the rules.

This would have a significant negative impact on our court’s local rules, requiring a significant re-write of our rules if references are changed.

I see none

In restyling the Bankruptcy Rules, I do not see any drawbacks

None

Inadvertent change in the substance of a rule.

The length of time required for a restyling. Possible unintended consequences, because several of the rules are drafted in parallel with language in Bankruptcy Code provisions, so that subtle changes may lead to differing interpretations of the rule.

none

Depending on how the rules are organized, the restyling could lead to confusion, frustration, and a lack of clarity and understanding. The drawbacks may include an increase in time and work spent trying to use the rules. As to the question below, “Do you believe any benefits of restyling would outweigh any drawbacks?”, I cannot offer any answer until at least a draft of the proposed restyling is offered for review and comment.

### More complex citations

Any modification, regardless of how well-intentioned, brings risk of modifying the substance of a rule. It is inevitable that some amount of litigation will result from rule changes because someone will argue that the new language applies differently than the old language. In the law, ambiguity begets variety. Therefore, if the new language is more precise then the array of interpretations may become narrower, creating the likelihood that some amount of old precedential or persuasive case law will have to be overruled.

Initial confusion and need to adjust to changes, will subside in time.

As with any change, I'm sure there will be some inconveniences, especially where subsections are added. Restyling may require time-consuming revisions of several local documents (e.g., rules, standing orders, forms, etc.)

## *Responses from Organization Survey Respondents*

It will give older lawyers more things to complain about, and make them feel further removed from the realities or practice.

A significant chance of changing substantive law and creating new issues where the law is now settled.

Unlike other federal procedural rules, many of the Bankruptcy Rules are tied to complex substantive provisions of the Bankruptcy Code. Restyling would require addressing many issues, if only to be certain that substance was not being affected. In addition, there have been a number of controversial amendments (such as 2019 disclosures) that involved carefully drafted compromises. Restyling could reopen complicated and time consuming debates. The restyled rules themselves may lead to future uncertainty and litigation (e.g., “why did the Rule change from X to Y”? “Was that merely style?”)

transitioning to new renumbering (in certain situations)

Interpretation disputes and switching costs that could consume time of judiciary, and stress resources of debtors that already are financially distressed.

Losing carefully chosen drafting terminology from prior members of rules committee and prior reporters.

Consuming time of rules committee when there may be more meaningful projects to undertake—even if they are not apparent at this time.

It will inevitably make substantive changes. for example, your restyled rule 4001 says that service is to be made “as appropriate” which could lead to no service, whereas the existing rule would require it.

The rules are working well and there is no need to restyle them. Existing precedents interpreting the current rules will lose their force and there will be more litigation over the restyled rules.

Unintended substantive changes or ambiguities that creep into the restyled rules.

None.

minimal, if any, drawbacks

Unless the numbering changes, and I don't think that it will, I see no drawbacks.

I can't think of any. Many of us, even in the bankruptcy community, have worked with the restyled Civil Rules—especially in connection with adversary proceedings—and I'm aware of no problems or other drawbacks that have resulted from the restyled Civil Rules. I have no reason to believe that restyling the Bankruptcy Rules would be any different.

Depending on the extent of the restyling it could affect or call into question existing caselaw arising out of the prior rules.

Changes something that is, by and large, working.

Unless done extremely carefully, it could wrongly emphasize portions/components of a rule.

With anything new there is always the possibility of creating ambiguity where there is a history of interpretation on the prior language

Just hope that any restyling ACTUALLY SIMPLIFIES things, unlike the form changes, which have made schedules unwieldy.

If the restyling changes too much of the language from the analogous provisions of the Bankruptcy Code, it may be difficult to determine the applicability of the Rules to certain Code provisions.

More pages in the book that I purchase with the Code and Rules! Kidding (somewhat).

Parties might try and argue that the restyling effected a change in process or procedure when it would not.

### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

Significant drawbacks. The rules as is have been litigated for years. Deciding to re-write them in simpler language (a.k.a., “dumbing down”) will just be an invitation to trying to more confusion and subsequent litigation.

None, as long as, there are absolutely no changes, in grammar, commas, etc.

Having to relearn and file amendments over the short-term.

It depends on how well it is done.

Down time in having to relearn rules. Even though it is proposed that the rules content will not change, I don't see any good reason to change them.

Over simplification in the language could lead to inconsistent application or rule interpretation.

None—as long as the restyling does not actually make any aspect of the rules more confusing.

Restyling the Bankruptcy Rules may inadvertently change the substance of a Rule. Practitioners will also have to familiarize themselves with the new Rules to properly cite them in pleadings and oral argument.

We will have to become more familiar with the restyled rules. Restyling may result in arguments that some substantive change some rules was effected.

None.

None.

See none

None

Nothing is coming to mind right now. I reviewed the original and revised examples, and do not see any drawbacks. Possibly a brief adjustment period once implemented, but no long term drawbacks.

Those of us relatively familiar with the rules will need to relearn them. It is always hard for an old dog to learn a new trick.

Concern that the restyling would result in different interpretations of the same rule

More case load

The lower court judges would be compelled to check for any current advisory committee amendment before making a final ruling on the behalf of all Federal laws guarantee by the United States Constitution. Proving you have a rights to be heard in any Federal court of law.

Create more confusion and work for debtors, trustees and judges. Why fix it if it aint broke.

Changing the wording of a rule always risks a belief that the rule now means something different when it does not.

One person's clarity is another person's confusion.

Uncertainty.

None other than restyling might inadvertently change the substance of a rule, but I am aware that care will be taken to prevent that.

Some individuals may feel more comfortable with the original version of the rules.

May I invite the drafters to consider two things? 1) prepare the draft in "word" format and 2) obtain and have the "wordrake" program review with suggested edits to help clarify.

If we're going to have more hanging sentences as found in the code that could mean several things, revision is pointless.

Inadvertent changes to the rules.

Adding interpretations that may not be uniform throughout the case law.

Keeping styles current as new substantive changes are made.

Increased litigation over the new language. No matter how incomprehensible the old language, its meaning may have already been determined by a court.

Confusion about meaning.

The revisions could be interpreted by some as intending substantive changes, even though none are intended.

Overly aggressive restyling can make the rules harder to read. In the example provided (i.e., Restyled Rule 4001), I believe breaking out a new sub (a) and sub (b) in 4001(a)(1)(A)(iii) is a clear example of overly aggressive restyling and makes new sub (iii) harder to read as the new "(a)" and "(b)" add nothing to facilitate understanding but, rather, get in the way of a quick and clear read of that new subsection.

The drawbacks have the potential be very large. This is a classic example of a solution in search of a problem. Anytime you change a rule's language, you have the potential to change its meaning, even if it is unwittingly. Basically, anywhere the current rules are quoted, including in opinions, there will be a question of whether the reworded rules still mean the same thing. People also reference the rules throughout numerous publications, websites, etc. Everyone will need to go back and correct all of these references. To the extent that any particular rule is considered unclear, then that rule can always be amended. Aside from that, a wholesale re-styling is unnecessary and counter-productive.



It seems likely that rephrasing existing court reviewed language as “plain language” will result in opportunities for new litigation as bankruptcy parties test the meaning of the new language. The style consultants and even advisory committee members will likely uncover uncertainties in existing language that have not been subject to litigation in the past, but may result in litigation as a result of rephrasing.

The risk that restyling will unintentionally lose or change some of the meaning of a rule. It will also take some getting used to for those of us who have practiced a long time, but that is a price worth our paying for the benefit of the practice generally and will be less of a problem, if any at all, for newer practitioners. May also create some drag on and confusion in applying older cases that apply the rule for a while.

Concerns that substantive changes will be made that will have to be litigated when no change was intended.

dumbing down the bankruptcy rules and integrity

I can't think of any.

I don't see any.

Minor confusion in searching for relevant precedent, to the extent restyling changes the numbering of sections and subsections

litigation over whether changes intended to be non-substantive actually have substantive effect

Create ambiguity especially vis-a-vis case law interpreting existing language.

The main drawback to restyling the FRBP appears to be the overall time and effort to actually rewrite the rules in the new style. New verbiage of some rules could also cause confusion on rules if they appear to change the rule/process due to new language, even if that is not occurring, causing new issues or work to clarify the rule in controversy.

Attorneys who are familiar with the rules may need to become reacquainted.

A drawback would be a learning curve on those experienced practitioners who already have a good grasp and understanding of the Rules.

The biggest drawback would be litigation over whether a restyled rule is ambiguous and leaves room for a party to argue that it changed procedural practice, but if done with care, and correctly this can be avoided. To the extent the rules derive from statutory language, care must be taken to insure the substance is not changed.

There have been numerous changes to the bankruptcy laws and forms over the last ten years. The primary drawback is that we need to have a period of time to utilize and fully understand the changes that have already been made before incorporating more changes.

Many local bankruptcy rules restate federal rules and/or reference the federal rules. There may be a period of time when the local bankruptcy rules do not align with the federal rules and this may cause confusion.

We have come to rely on the language of the Federal Rules of Bankruptcy Procedure. For the most part, they work pretty well. To the extent substantive changes might be needed, they should be discussed on their merits. Leave well enough alone.

Bankruptcy is already an area where many unskilled attorneys dabble in, and we already have a lot pro-se debtors. The easier the practice of bankruptcy becomes the more likely those of us that our law practice is substantially bankruptcy will lose out and our business will suffer.

possibility of introducing confusion

None

It is possible that, as the Rules become more clear and precise, they may also become more inflexible.

Potential inconsistency with substantive Bankruptcy Code provisions. Potential redrafting that unintentionally alters meaning or creates problems with how particular rules have been interpreted in the existing case law.

Additional headaches for busy practitioners who want to stay current on substantive issues.

causing everyone to completely have to re learn everything that they already know

It will take time.

Bankruptcy law, and the rules which implement it, is complex, and nearly 39 years of case law have developed since the effective date of the 1978 Code. Legal terms contained within the Code and the Rules are defined in a number of places in the Code, and it is almost inevitable that these nuances will be completely overlooked or misunderstood by a consultant. Furthermore, legal research is based on word or phrase searches of case law databases. If restyled rules change certain legal phrases in the hopes of making them more understandable (as was done in the example provided by the consultant), legal research will be made extremely challenging, if not nearly impossible.

it is always possible that a restyling causes Courts and the bar to consider issues in a different light than previously judicially decided

Consistency with the other federal rules of procedure; for example, shall should be removed from all rules, such as Fed. Bankr. R. 9006(d).

Even though there will be no substantive changes to the Bankruptcy Rules, practitioners will have to study and re-learn the rules.

Reluctance to change from 'tried-and-tested' wording that 'everyone understands'

These Rules are highly specific and related to various Code sections. They have been in place for extended periods of time and are familiar to judges and practitioners. In other words, "if it ain't broke, don't fix it!"

increased confusion by changing language with a settled/commonly understood meaning

My only concern would be a loss of content or if restyling somehow changed the interpretation or substance of the rule.

None

None

It will nevertheless lead to arguments that the substance has changed. Also, changing rule subsections will complicate legal research, which we often conduct by searching for the particular citation.

In the event that some rule numbers change, I would be concerned that finding the restyled version may be difficult at first. I would hate to see a simple rule become more cumbersome in restyling. I would also be concerned with any changes in restyling that inadvertently change the substance of the rule if that is not the intention.

Might effect substantive changes.

There are no drawback. Anyone would be honored to help with this task. And, it will provide the opportunity for everyone to reread these rules after they are restyled.

Possible loss of full scope of content.

I would be concerned about an inadvertent change to the substance of the rules during the restyling process. When the bankruptcy forms recently went through a modernization project they were touted as being easier, etc. But for those of us who work with the forms everyday, we find them more difficult to use, I have not heard one positive comment about the new forms, and I fear that restyling the

rules will have a similar effect. Those of use who have used the rules for many years have come to enjoy the consistency and comfort found in the current language.

I don't see any drawbacks in restyling.

Brevity is great, however, sometimes, that leaves unclarity. One of the examples of restyling included "as appropriate" in a restyled rule, but didn't explain those circumstances. That creates a gap, leaves unclarity, and fails to fulfill the goal. Careful drafting should avoid this problem.

A lengthy process, disputes over interpretation of rules and how they should be rewritten

I don't see any drawbacks

The restyling could substantively modify the Rule, additionally those of us who have memorized certain sections to cite same would have to re-learn the wording and citation.

It could cause confusion to those of us that have been practicing under the current rules for years.

It could create new ambiguities and cause unnecessary litigation.

Its not possible for them to be worse, so none.

1. Everyone would need to learn the changes.
2. Several years of transition with mixed authority for past and present.
3. Any change in wording will require new litigation on what had been settled matters.

Confusion (theoretically) from more-experienced practitioners who are accustomed to the current style.

seems dangerous to "simplify" technical language. It almost certainly will become an interpretation of the language used. we'll wind up with significant committee notes telling us what they intended & why the change. This may also amount to an unintended substantive amendment of a rule. These rules are typically read & applied by those trained to do so. They are not susceptible to reduction or "simplification."

None.

should not be any drawbacks if common sense business logic is applied to the rules, again in fairness to both consumer and creditor

Confusion with existing case law.

Sometimes being concise is a great benefit and sometime being concise adds great confusion.

None, as long as there are no substantive changes.

Cost and time—anytime a rule is changed or updated or restyled there are hidden costs. Plus why do they need to be restyled? Please do not do them like the restyled bankruptcy forms.

Changes to the rules will lead to increased litigation over the new rule even if the meaning of the old rule was well settled.

Having to learn a new system

## Specific Stylistic Concerns with Current Rules

**Question:** Do you have any specific stylistic concerns (not proposed substantive changes) with the current Bankruptcy Rules? [If yes:] Please specify the concerns you have.

### *Responses from Judges*

mainly, that some of the rules were drafted in an era in which the accepted style was to write long, turgid sentences with many dependent clauses; it is far better for the rules to be broken down into subsections that make it easier to follow the hierarchy of requirements and exceptions; one other concern is that there may be times when the rules appropriately use terms and phrases from the Code itself and that may be proper because to do otherwise will create issues of interpretation, even though the rule does not follow the general rules of style in the restyled rules

Quite a few rules make reference to other rules or Code provisions without indicating what subject matter is involved in the cross-referenced rule or Code section. It sometimes results in wasted time finding the cross-reference when it clearly has no applicability. For example, the claim priority provisions of Sec. 507 indicate that the third priority is a claim “allowed under section 502(f) of this title.” Unless you know off the top of your head that 502(f) involves involuntary bankruptcies, you have to stop and look up that Code section to be sure it doesn’t apply to your case. It would be helpful if the third priority made reference to “allowed claims in involuntary cases under section 502(f) of this title.”

Many Rules have long paragraphs with multiple requirements set forth in different sentences. For example Rule 2014 regarding employment of professional persons contains several requirements for employment but they are not numbered, lettered, or otherwise identified as distinct requirements. Rule would be bettered if it was more in an outline form.

They are cumbersome and some of the lengthy ones can be difficult to follow

The rules aren’t totally intuitive, but are workable. It’s a mixed bag, but not too bad.

Where “shall” is intended to be mandatory, it should be replaced with “must”; “shall” introduces ambiguity.

There currently are some references to “serve” or “service” that, from context, probably weren’t meant to mean refer to service as that term is used in Rule 7004 or FRCP 5(b). Where neither of the latter two types of service are intended, consideration should be given to changing “serve” or “service” to “notice.”

I would much prefer an “outline” format rather than the current setup which at time appears “rambling.”

Many of the current Rules are overly lengthy and convoluted.

They are hard to read and follow.

### *Responses from Clerks*

Use of hanging indents, more enumeration or bullets would aid in clarifying substance.

archaic prose, at the opposite end of the spectrum from plain English

Can the “Hanging Paragraph” be resolved stylistically?

If possible, it would be very helpful to the local bankruptcy courts if this restyling could be done in stages or sections (several parts of FRBP each year) rather than all at once to give the courts enough time to make all the corresponding changes to their local rules, websites and public resources over a period of time rather than having to do the entire set of rules in one year. That is a herculean task for the local court, especially the smaller courts which many bankruptcy courts are..

Some inconsistent formatting although recent changes have attempted to address.

Difficulty in reading some of the extensive subsections of rules.

Bryan Garner’s Guide presented many examples of long paragraphs full of directions being split out into ordered lists arranged using hanging indents. This type of treatment is sorely needed in regard to the bankruptcy rules in places where lists are set out in line with the paragraph and, as a result, are more difficult to read.

The Bankruptcy Rules have been through many amendments and in some instances the readability and accuracy has been impacted because of those amendments. The restyling would help alleviate the issue and bring clarity back to the rules.

As mentioned above, the Rules are often difficult to follow because of the setting forth of several requirements within one paragraph as opposed to being broken out into separate indented paragraphs.

Current Rules are not always user friendly to follow as drafted or formatted.

Long detailed paragraphs are more difficult to comprehend and it is very easy for one’s eyes to get lost in that style and perhaps miss a key point.

Run on sentences are harder to read. Subordinate clauses that interrupt a given thought can be confusing. Lists in the same sentence are more difficult to follow than lists that are broken into subsections, especially when a rule needs to include exceptions. Language in the existing rules tends to be less accessible. Restyling appears to include tools to remedy these problems, at least in part.

### ***Responses from Organization Survey Respondents***

They are too long. More delineation—like editors did to the FRCP—would help a lot.

The clarity of 9014, and 4001 (insofar as the latter deals with use of cash collateral and DIP financing) would benefit from restyling

I would have to go thru rule by rule but they are sometimes laden with long sentences which combine many issues

Not so much stylistic as all the inconsistent cross-references.

Overuse of the passive voice. Lengthy sentences with many subparts.

They are clumsy and often must be read 2–3 times to get a clear understanding of them

### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

Any changes in the placement of any punctuation or grammar.

Long blocks of text that are written in an unnecessarily confusing manner.

Not in plain English, could be made simpler.

The same style concerns reflected in Mr. Garner’s Guidelines (an outstanding accomplishment, though there are two or three guidelines that I disagree with).

Consistency.

Perhaps have a “civilian” non-attorney english expert review to see if the intended meaning is expressed—such that a man on the street looking at it with no bankruptcy experience could figure out what the rule means. Brevity is the key as well.

A lot of paragraphs could be better understood by breaking them down into numbered sub-paragraphs.



Just by way of example, the sample revision provided shows how much clearer the language can be.

Do not have time to go over the rules, but recall some occasions where the rule is not clear or its application is uncertain because of what it says or does not say.

many of the rules are wordy and somewhat impenetrable, e.g., section 365

Restyling will greatly improve clarity and readability. An example is replacing “may not” with “must not” or “cannot” to avoid confusion. Also, using consistent terminology (no reductions) throughout a rule will help to eliminate vagueness—such as in the draft Rule 4001 example, “Automatic Stay,” as provided in the title of the rule, should never be reduced to only “stay” such as in subsection (a). Lists will also be helpful to improve clarity and readability.

Restyled rules must avoid using passive voice.

As the example shows, some of the Rules are long, wordy and unclear. Restyling would hopefully alleviate those issues.

difficult to read and understand as they are presently presented

post petition debts that the creditor does not have the opportunity to file a claim by the bar date.

Some courts are open to these claims being added, others apply hard line regardless of the dates.

We know that consumers often do not follow the rules of obtaining permission from the court before obtaining additional obligations. I understand this is often hard to do time wise as well as cost wise.

However, if the claim is justified, the creditor should not be penalized by not adding their claim to the consumer’s bankruptcy. Of course in ch 7 cases, if the service was prior to the discharge date, the claim would be included in the discharge.

They are difficult to plod through to determine their meaning.

Do not follow the style with bankruptcy forms. Do not make them hard to read or follow.

## Subset of Rules Most in Need of Restyling

Question: [For those who indicated that they think only a subset of the rules should be restyled:] Please indicate the specific rules that you think could benefit the most from restyling.

### *Responses from Judges*

Rules that are lengthy or have multiple parts covering different subjects; those should be reformatted to separate the different subject areas

I can identify no such specific rules.

This is a loaded question. It assumes I support restyling the Bankruptcy Rules. I do not.

I don't know of any.

I don't have a specific suggestion, but restyling everything is a monumental task and may not provide a benefit. Restyling seems to be most helpful in the longer rules where multiple topics have been lumped together.

The project could ignore the incorporated Federal Rules of Civil Procedures, which already have been restyled.

Generally changing "shalls" to "musts" except, for example, Rule 5001.

9000 series.

I don't have specific ones in minds but the fewer the better.

None

### *Responses from Clerks*

Start with as prioritized subset then move on to the next priority. Not all rules will need to be restyled, but there should be a conscious decision made whether to restyle a rule or not.

There are some very short rules that do not need the reformatting. The committee's time would be wasted on reformatting short and simple rules.

Perhaps the committee could restyle only 1 or 2 chapters at a time, to allow courts to conduct their work in similar, more manageable segments.

The subset that would cause the least disruption to our local rules. Perhaps the 8000 series.

I am not familiar enough with the rules to have an opinion on that.

I do not have a list of specific rules to propose. Instead, I propose that it would be best to restyle only those rules that need it. If a rule is clear and well-structured as it is, do not restyle it just to be comprehensive.

Only those that are lengthy, convoluted and may be confusing.

### ***Responses from Organization Survey Respondents***

I would do it as a pilot—select a set of rules least likely to affect consumer cases, for example, and assess the impact on the committee and then on the system participants if the restyled rules are put into effect.

### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

I don't think any need restyling

CFC

The 8000 (appellate) rules were re-styled, but to the extent necessary to make them match the FRAP, that might make sense. Also, the 7000 rules could possibly be restyled to match the FRCivP, except that where they match, they generally incorporate them anyway.

None. However, if any particular rules are identified as being problematic, only those rules should be re-styled. Numbering must absolutely not change.

1001

None.

Rules related to Automatic Stay and exceptions to the automatic stay. Rule 362. Specifically re-written for State judges to be able to apply.

Rule 2002

The 2000 rules with deadlines. I think it is a good idea to start with a subset in general, give it some time to work, and if successful, then consider doing more.

2002, 2014, 4001, 5003, 7004, 8009

None

None—but the fewer that are restyled, the less damage will be done.

Those that are being amended for other reasons, as they are amended.

I don't believe ANY of the Rules could benefit from the ministrations of a stylist. But if damage must be inflicted on the system in order to appease the demands of style, then I would suggest the committee focus on rules relating to Chapter 15 proceedings.

I recommend that Chapter because the multinational businesses and law firms involved with those proceedings may be able to afford to regularly attend such proceedings and fight to minimize the harm and uncertainty that will result.

## Reasons for Not Supporting Restyling

**Question:** [For those who indicated they do not support the idea of restyling the rules:] Please explain why you do not support the idea of restyling the Federal Rules of Bankruptcy Procedure.

### *Responses from Judges*

No need.

See my comments above. By analogy, the changes in the past have been like taking down Monet's Water Lilies and putting up a photograph of Home Depot's home and garden section. It's more, right?

I think the Rules work as they are...having just weathered my Bar's adjustment to the forms, I'd give them a little breather on the rules, making such substantive changes as appear to be needed.

Please see my response to your question about drawbacks of restyling. In my view, any restyling will impose an unnecessary burden on careful practitioners, who will feel obliged to examine the rule changes.

See prior answers.

You will be trading one set of problems for a different set of problems.

I do not have strong opinions on the subject and have little to say.

The drawbacks outweigh the benefits.

Again, this is a solution looking for a problem. I think the predicate should be the identification of specific rules that have proven to be unclear, confusing, contentious, or problematic. If identified, address those rules. Leave the rest alone.

They work fine as is. Changing them would just cause confusion.

If something is not broken it should not be fixed.

The rules are reasonably straight forward. I believe the detriment of restyling is that it may introduce uncertainties in how the rules are interpreted and that risk is greater than any benefit that may be obtained by rewriting the rules.

## *Responses from Clerks*

The time is not right because of other large mandatory projects that are scheduled for bankruptcy courts in the next few years.

I have never seen a “restyling” that eventually does not overreach. If you are in for the penny, be in for the pound. Amend them or leave them, but don’t pretty them up. Admittedly, I did not read through the guidelines for “restyling” and I am sure the guidelines define the parameters of such an endeavor, but human nature being what it is, I have my doubts. The Articles of Confederation were merely to be “restyled” at what eventually become the Constitutional Convention of 1787, so be careful what you wish for.

Again, the time required outweighs the benefit of this exercise.

The bankruptcy community is still feeling the impact of the December 2016 form changes and the December 2017 Chapter 13 Plan changes. Please do not change the Federal Rules. They work just fine as they are.

I don’t think that there is really an issue with the current styling of the Rules. I find the the current version easy to read and follow. However, I am not against the restyling of the Rules, I am sure that the restyling will make reading and interpreting the rules easier. I am sure that there will be value added to the Federal Rules of Bankruptcy Procedure if the Advisory Committee decides to move forward with restyling.

I have not seen evidence of a large percentage of errors made due to problems interpreting the rules.

## *Responses from Organization Survey Respondents*

If it ain’t broke, don’t fix it. Danger of creating new issues outweighs any limited benefits.

I don’t believe there is a material problem with the existing rules as a whole. Restyling would be a difficult project that could open/reopen various cans of worms for both the Rules Committee and the bar. Restyling also could lead to uncertainty and litigation as parties debate whether a restyled rule materially changed an existing practice.

Because the costs outweigh the benefits and I believe bankruptcy rules have come to play a more substantive role in the system that will heighten their potentially disruptive impact. There does not seem to be a justice-promoting purpose in restyling.

See the drawbacks above. Restyling will cause substantive changes. Restyling will cause increased litigation, uncertainty and cost. Restyling is a waste of legal and judicial resources.

I don't think the benefits exceed the detriments

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### **Comments of the National Consumer Bankruptcy Rights Center on Proposed Restyling of the Bankruptcy Rules<sup>6</sup>**

The National Consumer Bankruptcy Rights Center appreciates the opportunity to comment on whether the Federal Rules of Bankruptcy Procedure should be restyled. Our view is that a wholesale restyling of the rules would be a mistake.

Five of our board members are current or past members of the Advisory Committee on Bankruptcy Rules and some of us recall the same issue being raised in the past, going back to when the restyling project first began. When the issue of restyling the bankruptcy rules was raised there were serious concerns that a complete restyling could inadvertently change the meaning of some of the rules. None of the other sets of federal rules is so closely tied to a comprehensive statutory scheme. The Bankruptcy Code contains numerous definitions and terms of art, and those definitions and terms are defined and construed in the same way in the Bankruptcy Rules under Rule 9001. These include such terms and words as “Notice and a hearing”, “includes”, “claim”, “debtor”, “person”, “or”, “United States trustee”, “petition”, and literally dozens of others, many of which appear in the rules. Still other terms not included in sections 101 and 102, like “property of the estate”, have particular meanings in bankruptcy. In addition, many of the bankruptcy rules closely track parts of the statute, such as the filing requirements in Rule 1007 that track Code section 521.

We believe it remains true that the potential costs of restyling outweigh any benefits, which in our view would be minimal. Any possible gains in clarity would be more than lost in view of new uncertainties about whether the established meanings of various rules have been changed. The possibility of unintended changes in results is significant. Legal research based on the wording of particular rules, or the terms of art within them, would also be frustrated if that wording is changed.

Many of the bankruptcy rules have had stylistic improvements made as they were amended over the past twenty years. We think considering a stylistic change in one rule in conjunction with a detailed discussion of that particular rule and its purpose is a better course of action than attempting to revise all of the rules at

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6. This response was submitted via the website survey, but is included here because it is identified as the response of an organization.

once. While it may take longer for all of the rules to eventually be improved, we believe that slight cost is well worth paying.

Submitted by Henry J. Sommer, President

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### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

Why fix what isn't broken?

Again, if it aint broke, dont fix it.

The BK rules have too much substantive meaning and extensive case law, and any restyling risks unintentionally changing that meaning and creating ambiguities.

For the reasons set forth in response to other questions in this survey, I do not support it. Most importantly, this is a solution in search of a problem that will create far more work and headaches than it is worth. It also has the potential for unintended consequences.

This would be a massive project that would result in minimal benefit. There may be some value in using similar language to say similar things across the rule sets, but that value seems primarily to be academic. In practice one generally only deals with the bankruptcy rules while in bankruptcy court, and the case law that interprets bankruptcy rules focuses on the actual language of the rule being analyzed to determine meaning, rather than referring to related civil or appellate rules that seem to say the same thing using different words.

We are dumbing down the integrity of the bankruptcy system by dumbing down the rules.

There is too great a risk of unintended consequences and the time and cost of the project will exceed any benefit.

At this time bankruptcy practitioners need to adjust to the recent changes in the rules—everything from actual changes in the Rules to the use of a “national” form plan. The vast majority of the practitioners know and understand the rules as they are currently drafted. To restyle the rules now would accomplish no discernible purpose.

I think the risks of creating interpretative issues outweigh the benefits of simplifying style. The committee would need to be very careful not to alter meaning of any of the existing rules. That game does not seem worth the candle.

No real-world practitioner has expressed a desire for a change. We've assimilated the rules, and have only struggled with and cursed the so-called streamlining of



the appellate rules. Aside from academics, only people with nothing else to do could have asked for a change. With everything else going on in the world, including local bankruptcy rules and their mind-corroding regular amendments, enough is enough.

Because they are not broken, we have extensive law laid out on what the words in the rules mean and frankly this committee should stop trying to fix things that are not broken. The new forms are an utter train wreck and i would not support a decision to break more things.

I firmly believe that this would be a “fool’s errand.” I strongly believe that making the Bankruptcy Code and Rules “easier to understand” for laypersons is an inappropriate goal for the Committee. It is nearly impossible for pro se debtors to navigate the morass of seemingly conflicting Code sections, particularly after the 2005 Act. To attempt to make that easier for pro se debtors - or other casual observers—to understand is ill-advised, and reflects a superficial knowledge of the depth and complexity of the provisions of the Code and Rules.

My experience has been that the Bar has a clear understanding of the Federal Rules of Bankruptcy and that published decisions have clarified any confusion.

The majority of the Rules are tied to procedural requirements for specific provisions of the Code. The relationship is generally clear.

it is an unnecessary exercise, with no good upside and much potential for mischief

I am unaware of any issues of rule interpretation that are generated by the current style. The Advisory Committee should narrowly approach restyling to address rules where there is confusion based on the style. A wholesale change will lead to potential disputes as to its effect on the meaning of every single rule. It is not correct to say that changing style will leave interpretation unaffected. If there is no problem with interpretation, there is no need to change the style.

While intentions may be good, they will, without a doubt have unintended consequences. I would rather deal with the devil I know than the devil I don’t.

While certain Rules would certainly benefit from restyling, most Rules do not need modifications. If they Rules are working as needed and there is not issue, the time and effort to restyle and make sure the Rule was not substantively changed is greater than the benefit that would be received.

I see no benefits to restyling the federal rules of bankruptcy procedure. This is a pointless endeavor that can only create new problems. There is no problem that this would fix.

This is a solution in search of a problem. We know where to find things now, and there is no general complaint about the structure.

It took me 38 years to figure out what they say and where they are. This would be a huge productivity hit.

In my previous response, I outlined the significant dangers of an attempted restyling.

I don't see the need or justified reasons. The bankruptcy forms did not need to be restyled. updated -yes.

I like the idea of formatting the text in a way that is easier to read. I do not support expunging certain simple easily understood words from common usage because a vocal minority finds them to be troublesome.

The model form changes were a disaster and forced practitioners to suffer through new forms that were needlessly redone. I don't want the same thing to happen to the rules.

## Reasons for Supporting Restyling

Question: [For those who indicated they support the idea of restyling the rules:] Please explain why you support the idea of restyling the Federal Rules of Bankruptcy Procedure.

### *Responses from Judges*

The language of the rules should be brought up to date to keep up with changes in language generally.

They need it. See my first answer.

Restyling will improve clarity and assist our large number of unrepresented parties involved in the bankruptcy process, both creditors and debtors.

Advancement of style not only will develop further clarity (and should be done regularly); the process will certainly uncover any previously unobserved deficiencies in substantive law/rules that may carry over to further improvements of the rules, to be considered at a later date. When restyling occurs, the active participants should not disregard these inadvertent but important observations, and make and pass along detailed notes.

unless the resources could be put to better use, restyled rules will be easier to use and practitioners will be more likely to consult and follow them

I believe it will make the rules easier to follow.

Even though I know it would be time-consuming and there is the potential for adverse unintended consequences, I think the benefit of making the rules more concise and readable would pay off over time. Generally, the rules are simply too long, too convoluted and not structured in a way to make them easy to read and understand. I think it would be worth the effort—as long as it is possible to get good input from all segments of the bench and bar.

We should give it a try. But Bankruptcy judges and attorneys need to play a significant role—more so than in the restyling of other rules. We will have serious problems if the people with expertise in grammar and punctuation but limited knowledge of substantive bankruptcy law get control. The effort will be wasted if the Rules end up being rejected on that basis.

Restyling would make the Rules easier to read especially were the Rules contain sub-parts/elements to consider

It's better to have rules that are easier to understand than rules that are more difficult to understand.

See my prior comments re the improvements that restyling could bring to the FRBPs.

It takes little effort to find sentences 6–9 lines long in the rules, separated by commas, semicolons and the like. If a brief was submitted in this style, I would be “disappointed.”

Noted above. The terminology shifts a bit (can, may, shall, must). They are impossible for pro se parties to follow. I can't think of a good reason not to revise them.

Generally, I am in favor of cleaner, less formal writing. And it only stands to reason that the bankruptcy rules of procedure should be restyled, since the other rules have been. It is time for the word “shall” to be removed from our rule books.

Since the Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure have been restyled, consistency demands that the Federal Rules of Bankruptcy Procedure also be restyled.

I think it makes the rules easier to read and identify the requirements for each rule.

Rules of Procedure are designed to assist courts and counsel in the smooth prosecution of bankruptcy. The clearer the directives the better. As time goes by judicial decisions may interpret provisions that are not consistent with the original intent.

The current rules have much text and breaking them down into subsets will help clarify their requirements.

It would help us do our jobs better and assist counsel and litigants with understanding the requirements.

The improvements mentioned above

Because of the benefits of clarity.

To make them easier to use.

Like the Code, the Rules are complex. Practitioners, not to mention pro se litigants, regularly get lost in the rules, or fail to grasp the import of a rule once located. Anything that improves readability, and ease of use, is a net gain.

I would support anything that makes the rules easier to read and follow.

I support clarity in all its forms.

It will make them easier to read.

Rules should be drafted to communicate clearly. Stylistic changes should improve readability.

The rules, like the code, can be difficult to follow. The procedures in the rules are often not difficult but the way the rules are written, i.e. long single spaced paragraphs that contain extremely long sentences, make figuring out what needs to be done harder and more time consuming than it needs to be.

I support efforts to improve clarity and ease of use. My preference for restyling, however, is slight.

I think breaking down longer rules into smaller parts will help with understanding the rule

It will make it easier to find different sections.

The restyled rules appear easier to read.

After reading the sample change, I think the rules look better with the update and refresh. Also, the rules are easier to read.

The Rules as currently written are not easily understood because of the way they are written and if restyling makes them more consistent, easier to read and to understand, that will be helpful to all.

See response to #1 about benefits. Also, if we want lawyers to communicate (orally and in writing) with less “legaleze,” restyling the rules to use simpler language and structure, while retaining and improving clarity, would model the better communication style.

Easier to read, less requirements missed as a result

For the reasons stated in my response to the general question above. We are aware of modern styling techniques and we should employ them.

Readability

For the same reasons the other Rules were restyled.

The lawyers would be more likely to comply with the rules.

If it is possible to create a version of the Rules that provides an easier method for understanding, then we should do it. Restyling generally leads to a better understanding of the writing. Restyling is a conscious effort to improve the

existing work. When the focus is on improving the work rather than creating the work, the chances are that it will lead to a better quality document. There does not seem to be a real downside to the restyling except for the need to learn new subsections.

Any effort to make things easier to follow is a good idea. Leaving the rules cumbersome and hard to follow only benefits the insiders and makes it hard for the non-bankruptcy lawyer or pro se to follow the rules.

As previously noted, I believe restyling the Bankruptcy Rules using the principles suggested by Mr. Gardner will be very beneficial to the bar and bench. Restyling the Bankruptcy Rules will enhance the bar's overall knowledge, understanding and application of the Bankruptcy Rules.

As indicated above, simple is always good.

I have always advocated for plain English. I believe restyling may provide clarity to some rules that may be confusing as structured, but in any event, will make the rules more accessible for those that do not converse in legalese.

In my eight months on the bench, I have already encountered several instances where attorneys mis-read one or more rules because they were in a "run-on paragraph" format that caused the attorneys to miss one or more requirements. Restyling should help avoid these mistakes.

I also think it will make it easier for us to review a Rule more quickly and thoroughly while on the bench and cut down on the need to take a recess to review a rule that is cited for the first time during a hearing.

Because all of the other litigation related rules have been done, and because they could use some cleaning up in the clarity department.

The restyling will make the rules easier to read and apply.

Anything that will make them easier to read and clearer to understand would be a benefit. Restyling does this since long involved paragraphs are eliminated.

The closer the match between the language of FRBankrP and FRCivP, the more apparent it will be that bankruptcy litigation practice is merely a not-very-different subset of federal civil practice.

I think there is a benefit to stating the rules in plain English.

Although I have concerns about the fall out from any rule change in terms of litigation I think improved drafting would promote compliance through improved presentation of key concepts and understanding.

I think the rules need to be updated so they are more user freindly in the modern environment.

To make them more user friendly.

Restyling could allow the rules to better reflect important case law interpreting them. This would make them easier to use and reduce mistakes.

They are so bad and so hard to follow, attempting to fix them is a great idea.

The current set of rules needs a comprehensive “overhaul.” There are too many cross-references to other rules, making it difficult & time-consuming to ascertain what is actually required by any given rule.

The restyling makes it easier to follow what is required in different situations. The new style makes it easier to follow if there are options ( ie a or b) , or when both are required ( ie a and b)

The benefit to the bar and court users outweighs any burdens.

For the reasons already given. I don’t think of it as a “dumbing down” process but as a clarification and demystifying process that can close the comprehension gap for both lawyers and non-lawyers.

The example of a potential revision of Rule 4001 provided with this survey illustrates the benefit. Language that was convoluted or difficult to follow was made much more direct with the use of dashes, consistent language, numbered lists, etc. Consistent phrasing and approaches will make interpretation easier. The ambiguous word “shall” will be hopefully be replaced with “may” or “must,” providing more clarity. Really, the question should be why not restyle the bankruptcy rules when all the other sets of federal rules have been improved through this process.

Improve clarity and readability.

I am optimistic that greater clarity and simplicity will be achieved.

I think the rules will be clearer, easier to read and interpret.

The rules are in need of parsing and removal of double negatives.

### *Responses from Clerks*

Plain is better. Shorter and more to the point is better. It’s often harder, but it makes understanding so much better.

The rules themselves are cumbersome enough—any steps to make them more understandable would be an improvement, both for practitioners and the public.

Improved clarity and brevity

Greater clarity would be welcome.

I support the idea of restyling because it will lead to a better end product for the reader, the researcher, the legal writer with citation references, the judge interpreter, however I do not think it should be done all at one time. My response above was that I believe all of the rules should be included for consistency and uniformity, but the question did not give the ability to include statement that this does not mean that the restyling should be done all in same year. The work should be spread out over several years to make it more manageable for the local courts to implement the changes and updating that will automatically be created by the restyled rules to our local rules, forms, attorney and public resources and websites.

Uniformity across the entire rules set. We're striving for same in our local rules and support that occurring with the national rules.

I think there is always room for enhanced clarity. The proposed restyling example provided a more readable format with the subsection break outs.

I think some of the rules desperately need restyling. Restyling the rules to make them easier to read, parse through and understand would make them more useful and used!

I support any effort that improves a user's ability to read and understand the rules. Based on the contents of the style guide and the examples provided, this effort appears to meet that goal.

The Rules have been in existence for a long period of time and have gone through many amendments. A restyling of all the rules would bring much needed updating and consistency to the rules.

Some rules are open to interpretation. I would prefer a clear meaning for each rule.

Although a major undertaking and, probably, will not be popular for current users during the transition, the Bankruptcy Rules are here for the long run and future users will benefit from restyling as long as the restyling is done with adequate guidelines and review oversight as the preface to this survey sets forth.

I believe the restyling will make it easier for the reader and may help those who must follow the rules more easily understand the rule and see detail that may be lost in long paragraphs that list multiple requirements.

If the Rules are clearer due to the restyling, this leaves less to interpretation.

I find the current style difficult to read and find what I am looking for. If the goal is to make them easier to reference then I think restyling is a good idea.

Streamlined, clean, clear



Anytime we can make the rules simpler, more understandable, and easier to use—I am in favor of.

Easier to read and understand.

To increase readability, comprehension, and ability to locate pertinent rules

Long-term clarity outweighs the short-term inconvenience of improving the rules.

To improve for clarity. All BK Rules. Re-styling only a subset of Rules may potentially create uncertainty when relating a re-styled Rule to one that is not yet re-styled.

I do in the sense that if there are concerns about this issue, there is no reason NOT to do it if it will improve the rules. I personally don't feel strongly about whether they are restyled or not. I have so many different tasks to complete locally (facility issues, NextGen, Office 365 etc.) even with filings down that I haven't given a lot of thought to it. I do feel very strongly that if it is going to be done, it needs to be done for ALL the BR, not just a subset.

### *Responses from Organization Survey Respondents*

All rules—Criminal, Civil, Appellate, Evidence and others—should have the same look and feel.

The benefits outweigh the downsides. It is best when laws are written with clarity so everyone can understand them. Although I was at first skeptical of this project, my concerns were allayed when I saw the examples. Restyling the rules to follow best practices for clear writing seems like a “no brainer” to me.

Like any set of rules, the bankruptcy rules need a periodic comprehensive review and restyling

Because I've seen what restyling can do. The FRCP are much easier to read and understand now. I'm sure that it wasn't cheap having Bryan Garner involved. But it was well worth it in my opinion. Garner would not necessarily need to be involved again. The groundwork is done. Please restyle them!

See above. I suspect that restyling all of the Bankruptcy Rules could involve a great deal of time and effort. But because of the considerable formalities associated with the Rules Revision process, and the need for publications like Collier to be updated to advise the bench and bar of Rules Amendments, it probably is undesirable to do the job piecemeal.

Because it would make bankruptcy practice more consistent with general civil practice in the federal courts.

Restyled version is much, much easier to use, looks more modern and lends itself to the use of electronic devices when reviewing the rules much better than the existing format.

Clarity and simplicity

Any effort to simplify language (and hopefully organization) of the rules should be helpful. Again, so long as “simplification” does not actually make things more complicated (as it did with the new forms, schedules, etc., which are a wreck).

If the restyling makes the Rules easier to digest, I wholly support it.

The restyling will make the rules easier to read and understand. Thank you for your efforts!

It should provide clearer meaning and reduce disputes of application of the Rules.

### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

For a practitioner, it is easier to navigate rules, especially in a courtroom setting where speed is essential.

Ease of reading and interpreting. It would be nice to only have to read a rule once to understand (i.e., “decode” it).

They are among the most confusing rules that I have encountered as a lawyer. There is no reason that they cannot be made clearer and simpler.

With the exception of specific changes here and there, there has not been a major overhaul of the Bankruptcy Rules in quite some time. It is beneficial to review and update the style of the Rules after having the benefit of seeing the existing Rules in action. We have the benefit of hindsight to see what works and what could be clarified or simplified.

The sample restyled rule was clearer and simpler than the current rule. It will improve the rules by enhancing clarity and simplicity.

Clarity and simplicity.

Rules and codes are not written in plain English, which makes them difficult even for lawyers. Transparency demands clear rules.

The Federal Rules of Bankruptcy Procedures are public. In my opinion, the Rules are written in the style of an attorney. If a consumer/debtor were to read these, I am not sure they can follow. I am a manager for a compliance department at a Bank, with primary responsibility of ensuring we adhere to the Rules. I have many

years of bankruptcy experience, and find I sometimes have to consult with our internal Law Division to ensure I interpret the current Rules correctly. Although the content and requirements are not changing, I feel the restyling and reformatting of the Rules will make it more clear and concise for non-attorney's to comprehend.

New lawyers are entering this field every year. If the restyled rules are more readable and better organized, bankruptcy practice for THEM, and, ultimately all practitioners will improve.

Ever changing Laws

The Federal Rules of Bankruptcy are a portion of Federally protected laws guaranteed by the United States Constitution.

Rules should clarify rather than confuse. If I have to read a rule more than once, it does not serve its purpose.

Again: for clarity and simplicity

I think any measures that can be taken to make the rules more user-friendly by minimizing legal jargon and bulky paragraphs would be helpful.

Making it more user friendly as it were—as with the example spelling out all the subsets etc instead of sending the reader on a goose chase through the code and rules.

The rules currently contain a lot of quite long paragraphs that could be better served by breaking those paragraphs into sub paragraphs.

They were written years ago and legal writing has improved substantially since then. The restyled rules would be much easier to read and apply.

If it's done right, it will make the rules more clear and their application less controversial or confusing. But must be done right so that result is clear and unambiguous (but that is true any rule, new, old or revised) and does not change rule's meaning without intending to (and without calling practitioners' attention to the change (which would, in effect, be a revision)).

It will bring consistency to all the Rules which in the long run will make the Rules easier to understand and interpret.

As written, they are ambiguous and hard to interpret.

Compliance with the rules is the goal. If it is easier for a practioner to know what is required there will be better drafting and processing of the issues before the court.

I think the above described benefits outweigh the potential drawbacks and would make practice smoother and easier

The restyling of the Federal Rules of Bankruptcy Procedure will benefit practitioners, the public, and the judiciary because the rules will be easier to quickly review and understand, hopefully reducing procedural errors that can be time and cost prohibitive. This is particularly true in Bankruptcy Courts where there is a high number of pro se debtors and participants. Additionally, restyling will also provide for clarifications to rules that have been affected by amendments, and keep the FRBP consistent with the Federal Rules, of which many are mirrored in in the FRBP.

I believe that it would make them easier to read.

Clarity, ease of understanding and use. Common sense. Shorter sentences and breaking parts into separate paragraphs will aid all.

Benefit is for peace in work is very important in future profession work

Many of the rules are clear and concise but some are unclear, unwieldy and/or imprecise. Restyling would provide the opportunity to clarify ambiguous rules and make them easier to follow.

I think if it is done mindfully, but not just done to make it easier for pro-se people to file. I think there are situations where someone needs to file without an attorney but I think the more they believe they understand the rules the more obsolete they believe attorneys are.

for the same reasons the other federal rules have been restyled

Avoid piecemeal construction

On the whole, making the Rules more clear and precise should make them easier to use.

I think it is time.

All the federal rules of procedure should use the same style manual so that all rules are consistent with each other, i.e., must in one set of rules, shall in another.

Improving the clarity and readability of the Bankruptcy Rules will allow laypersons (pro se debtors and creditors) to better understand bankruptcy procedure.

Too often the wording of the rules does not result in compliance. Bankruptcy Rules addressing the same topic as a related Civil Rule should use the same wording to the greatest extent possible.

There is a strong movement in business toward a structured writing approach that focuses less on blocks of text and more on an outlined, lean format that allows information to be isolated and retrieved quicker. I don't know the last time the FRBPs were stylistically revised but they could use a fresh face to make them more readable accessible to the bar and the public. This is a Herculean task; in response to the question above, while I think that the rules as a whole should be restyled, I would recommend starting with those most in need of restyling first.

Restyling will make the rules more readable and understandable for judges, lawyers and pro se litigants

Model is much clearer and easier to read.

The bankruptcy rules should be a living breathing reflection of our practice. The laws and forms change and the rules should reflect that. Perhaps those counties that have laws making it illegal to educate your dog (Hartford Conn.) or publicly adjust your stockings if you are a woman (Bristol Tenn.) wish they had done a little restyling years ago.

Make them clearer to read.

Make the rules easier to understand and apply.

I think generally any attempt to make rules, forms, laws more user-friendly is a worthwhile effort. I think that effort needs to benefit the system as a whole, and not just a particular group of people. So long as the restyling process includes input from a variety of different users, I think it absolutely is worthwhile.

It is easier to read, therefore, making it easier to understand

because they are confusing

Clarity

I believe in makes good business sense to review laws that are in place to make sure they still protect both consumers and creditors in today's world. Some laws in place were good at the time but they are no longer fair today.

Ultimately, improving clarity will be reflected in new case law. Initially, the process may increase confusion and litigation.

Providing plain language in certain areas will be very helpful for example service of process rules.

Clarity and ease of use is desirable.

To simplify the process and give the applicant a second chance  
Isolating the rules from change forces local courts to fill any gap created,  
producing results that differ based on location, which is not fair to litigants.

## Considerations for Committee

**Question:** Is there anything specific you would like to the Advisory Committee to consider when making its decision about whether to move forward with restyling? [If yes:] Please specify.

### *Responses from Judges*

I am not a fan of the em dashes.

Even though I support it, I would say don't go down this path unless you are comfortable that you can get serious involvement from a broad cross-section of the bench and bar. You don't want to end up with subtle changes that make the rules more biased toward debtors vs. creditors, consumers vs. businesses, etc. The focus should be on making them more concise and more readable—and not allowing various constituencies to sneak in changes to address their particular client concerns.

Consider who should be involved and make sure that the restyling experts are on board with the notion that the Bankruptcy Rules are different than other rules because of how they are intertwined with substantive law. If a Rule contains a term of art—that term of art may need to stay regardless of what the stylists think.

It's ok to not do something if you realize it's not going to be an improvement even if you've started. The Chinese say the problem is that once a person starts up a hill they won't come back down.

I suggest that before adoption (or the next major step in that process), the proposed rule restylings be circulated to bankruptcy judges for suggestions and comments. I was very impressed with the restyling of Rule 4001(a). Whoever wrote this up did a very good job in my opinion. Restyled Rule 4001(a) is much clearer and easier to read and understand than the un-restyled version.

Be careful that you don't end up adding more words in the interest of clarity. The new bankruptcy forms are so wordy and cumbersome that the benefit of having the questions more understandable is now outweighed by overall fatigue caused by the verbosity and length of the forms

Please keep in mind the cost to practitioners of needing to reexamine changes that are intended not to have any substantive impact.

If is not broken or obsolete, don't fix it.

Frankly, I think this is another example of creating problems when none exist. If you want to change the rules, first identify for me the specific rules you think are a

problem. Otherwise, thank the restyling committee and declare its mission accomplished. Regards.

Please leave them alone. We've had enough changes in the last several years.

To undertake a concerted effort to use regular language and simple construction where possible.

If the committee decides not to go forward, please think hard about why. What's so different about bankruptcy law and practice as to obviate the need for restyling?

This more likely applies to publishers, but the Committee should look for every opportunity to insert more functionality to the Rules such as hyper-links to references within the Bk Rules, to other federal rules, or to the forms. More broadly, the Committee should consider how the form of the Rules will or may be used over the next 20 years, so that this task need not be repeated between now and then.

Look closely at FRBP 1007, 2002, 2004, 2014, 2016, 3002.1, 3018, 4001, 7004. These seem problematic for practitioners.

What I have noticed with the Rules Advisory Committee is that certain members have sought to make changes that they in good faith thought would be beneficial to certain constituencies, particularly in the consumer rules, but in reality just complicated the process, reduced efficiency and increased cost. Simple pictures are best. While restyling might follow that prescription, I know that at least in terms of review of local rules after restyling, it will not simplify.

I strongly advise against this project. Focus on substantive rule changes when that becomes necessary. Changing the wording of rules and the sub-part numbering will sow confusion and create doubt about existing decisions interpreting the rules without achieving any real benefit to anyone.

The bankruptcy forms recently went through significant changes. While the intentions were good, I did not think changes were needed and think the old forms were easier to use and better. The forms changes were a lot of work, but struck me as a solution in search of a problem. I have some concern restyling the rules might also be a solution in search of a problem. While the rules could be improved through restyling, they work well in their current form. On balance, however, I support restyling the rules.

Care should be given not to allow a styling change appear to alter the application or interpretation of the rules as currently styled. This can be accomplished with a



Committee note. also avoid a partial restyling because that could be seen as an indication of a change in emphasis or interpretation.

Please make sure you include experienced bankruptcy practitioners and Courts, as well as non bankruptcy federal practitioners to ensure consistency with the Federal Rules of Civil Procedure. Deadlines should be generous and flexible. The focus should be on getting it right, rather than getting it done quickly.

Please make sure that judges and lawyers who work with the rules every day are involved in the restyling. Without a substantive knowledge of bankruptcy law and how these work from the bench and the lawyers perspective, the rules cannot be restyled properly. This is not a job for bureaucrats or first year lawyers.

The vast difference in comprehension between those who have been to law school and those who haven't, the availability of false and misleading information on the internet and the seeming trend in some law schools to turn out marketers and salespeople as opposed to scholars and professionals.

I would ask that they test this job by asking whether they would make time to do this if case loads were double what they are now. The committee's objective is laudatory but I have a general concern that in an attempt to make the practice clearer and more accessible we have created a process that overwhelms individuals and small businesses.

See responses to prior questions (re the need to clarify service rules, and motions for reconsideration)

## *Responses from Clerks*

Consider the improvements made to other bodies of federal rules and procedures.

Already stated previously, but just want the committee to consider the downstream impact of this workload on the local courts and all the information and content that we manage in multiple forms and formats (public resources for attorneys and pro se, website content, local rules and local forms) that will need reviewing, updating, changing, re-linking, re-training of the bar, etc. due to the restyling of federal rules. This needs to be a multi-year efforts to spread out this impact.

1. whether it would it be required or encouraged for courts to conform local rules, local forms and other local documents to restyled format and would deadlines be imposed?
2. How to make the transition as smooth as possible. Including creating as much awareness of the project in advance and providing ongoing status and opportunity for those within and outside of court who are nterested to have opportunity to review and suggest comments or edits to final drafts before implemented.

If the goal is to minimize the substantive changes during this exercise then it would be safest to research whether a rule has been interpreted in disparate ways. If a rule is especially controversial then it may be best to amend it as part of a separate, substantive review rather than as part of a restyling review. That way the substantive amendments can be presented for public comment on their own merits. It would also help to protect the restyling project from being accused of slipping in substantive changes under the guise of a stylistic review.

### ***Responses from Organization Survey Respondents***

Don't listen to efforts to keep "sacred cow" language just on the basis that "everyone understands" what it means. New practitioners are born every minute, and pro se litigants could use simpler language.

Please be mindful that the vast majority of the people who use the rules are familiar with them, and they work. Also be mindful that the most sincere stylistic changes will have unintended substantive consequences and will inevitably lead to increased litigation over the rules.

It seems implicit in the Committee's examples, but the rule numbers do not need to change.

### ***Responses from Website Survey Respondents (mostly bankruptcy practitioners and trustees)***

If the Committee does go forward, it should be extremely careful not to alter meaning with what may seem to be harmless changes. There should absolutely not be any large-scale renumbering. This would cause a lot more confusion and work for everyone.

Also address the forms.

Including bankruptcy practitioners on the restyling committee as how the rules are used in practice may impact any particular change.

yeah i would like them to consider taking a vacation and stop doing things

The law of unanticipated consequences.

Some "rules" for writing more clearly do not always work well. Please apply rules of reason, over all.

The longer the delay in restyling, the greater the need will become. Language is dynamic, and the rules should address topics using terminology and phraseology that is understood by the majority of contemporary users. Lawyers have (mostly)

gotten away from 18th century forms of pleading and writing. The rules should not perpetuate outdated usage and styles.

As already stated, word-rake the draft then have an english professor or other expert who is not a bankruptcy attorney, review to make sure what the revision says is what's intended.

Whatever you do, please DO NOT do it with pro se parties in mind. Rules are meant for lawyers, and if you dumb them down to make them understandable to those without legal training, you will not make them understandable, you will just make people think they can do this without a lawyer.

Do not use the same old people. Try to get some diversity.

Aren't there better ways to spend time? If no one is complaining and there are no problems with the rules, why change them??

Please include Bryan Garner in the process to the extent he is willing to do so, as he did with respect to the Civil Procedure rules.

One of my primary concerns with the Code and Rules is that they are behind current technology in terms of electronic filing and service. I would support substantive efforts to bring both into step with current practice and would put those efforts ahead of restyling.

The United States Constitution.

It is more than style. There is a real due process problem that only Banks (not credit unions or other creditors) have to be served by certified mail, to an officer, when their assets or rights are being taken away in a bankruptcy. (Rule 7004(h).) The requirements in 7004(h) should apply in any adversary or contestable matter to all creditors.

Restyling ultimately means an interpretive or translation process. We already have the intended language. If that is changed, the thought behind the original word choices will be obscured. This process might very well lead to significant confusion.

Don't do anything to any rule unless really needed. Often, when reform is the project, people feel the need to make changes just because reform is for change, rather than because a particular reform really helps.

Really, what is the point?

Be careful not to make substantive changes and for those working on the restyling to understand case law and other authorities that have interpreted the rule.

A review of the Local Rules of bankruptcy courts around the country, which ostensibly follow a recommended numbering system devised by a national office, reveals that there are great inconsistencies in the placement of topics, many of which fall outside the scope of any of the federal rules. How the local bankruptcy courts choose to assign numbers may be a clue to the misplacement of some rules in the FRBP. On the other hand, moving rules around at this point (some of them derive from the old pre-Code numbering) may just cause everlasting confusion.

They should be written in plain English. Use “Guidelines for Drafting and Editing Court Rules” by Bryan Garner as a style guide.

Recognize that the Rules are written for the bench and the bar, not for pro ses. Please do not try to “dumb down” the Rules so as to make them easier for pro ses to understand.

The many Court decisions interpreting the various rules and the underlying Code provisions to ensure that any changes to the language won’t change the interpretation unless that is the intent of the new language.

As mentioned before, the perspective of all users, from judges, to chambers staff, to clerk’s office, to trustees, to practitioners, to self-represented litigants—all need to be able to understand and benefit from a restyling.

This could also be helpful to pro se litigants and new attorneys.

It probably goes without saying, but to the extent there are substantive revisions in the pipeline, those substantive changes need to take priority over the efforts made to restyle. The style guide should be followed in any future substantive changes so that all efforts are toward a restyled format.

One of my primary concerns with the Code and Rules is that they are behind current technology in terms of electronic filing and service. I would support substantive efforts to bring both into step with current practice and would put those efforts ahead of restyling.

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# Tab 7A

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: BUSINESS SUBCOMMITTEE

SUBJECT: RULE 5005 (TRANSMITTAL TO U.S. TRUSTEE)

DATE: AUG. 22, 2018

The pending changes to Fed. R. Bankr. P. 9036 (entitled “Notice or Service Generally”) provide that whenever the bankruptcy 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.” The rule “does not apply to any complaint or motion required to be served in accordance with Rule 7004.”

Federal Rule of Bankruptcy Procedure 5005(b), entitled “Transmittal to the United States Trustee,” provides in clause (1) that “The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.”

Rule 5005(b)(2) provides that “The entity, other than the clerk, transmitting a paper to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the paper and stating the date on which it was transmitted to the United States trustee.”

Two questions have been raised with respect to Rule 5005. First, does revised Rule 9036 apply to the provisions of Rule 5005(b)(1), provided that the United States Trustee is a registered user? Second, is Rule 5005(b)(2) needed anymore?

As to the first question, the bankruptcy rules distinguish quite consistently between the concepts of providing notice, service, and transmittal. The last term is used in the rules (except in part VIII when it is used with respect to transmittals of papers from one court to another) almost exclusively when something must be transmitted to the United States Trustee after it has been filed or when it is being mailed to or served on creditors. Examples are listed below:

| Rule                       | Transmittal  |
|----------------------------|--|
| 1002(b)                    | Copy of filed bankruptcy petition  |
| 1004.2                     | Motion challenging debtor's center of main interests in chapter 15 case                  |
| 1007(l)                    | Copy of every list, schedule and statement filed   |
| 1009(d)                    | Copy of every amendment to list, schedule and statement filed                            |
| 1017(f)(3)                 | Notice of conversion of chapter 12 or 13 case  |
| 1019(5)(A) & (B)           | Final report and account after conversion  |
| 1019(D)                    | Schedule of postpetition debts   |
| 1021(B)                    | Motion to determine health care business   |
| 2006(e)                    | List of proxies  |
| 2007.1(b)(1)               | Request to convene meeting of creditors to elect ch. 11 trustee                          |
| 2007.2(e)                  | Motion to appoint patient care ombudsman   |
| 2012(b)                    | Accounting of prior administration by successor trustee                                  |
| 2014(a)                    | Application for employment of professional person  |
| 2015(a)(1)                 | Inventory of chapter 7 property  |
| 2015(a)(5)                 | Statement of disbursements   |
| 2015(a)(6)                 | Small business case monthly report   |
| 2015(b)                    | Inventory of chapter 12 property   |
| 2015(c)(1)                 | Inventory of chapter 13 property   |
| 2015(e)                    | Annual reports in chapter 11 case  |
| 2015.1(a)                  | Notice of report of patient care ombudsman   |
| 2015.1(b)                  | Motion to review patient records by patient care ombudsman                               |
| 2016(a)                    | Application for compensation   |
| 2016(b)                    | Statement of compensation received by attorney for debtor and any supplemental statement |
| 3015(e)                    | Chapter 13 plan and any modification   |
| 3015(f)                    | Objection to confirmation of chapter 13 plan   |
| 3015(g)                    | Notice of time for objections to ch. 13 plan modification and copy of any objection      |
| 3017(a) & (d) <sup>1</sup> | Notice, plan, disclosure statement and objections in chapter 11                          |
| 3017.1(c)                  | Objections to disclosure statement in small business case                                |
| 3019(b)                    | Notice of proposed modification to ch. 11 plan and copy of any objection                 |
| 3020(b)(1)                 | Objection to confirmation of chapter 11 plan   |
| 5009(c)                    | Report of foreign representative   |
| 5012                       | Motion to approve agreement to coordinate proceedings under ch. 15                       |
| 6002(a)                    | Report and accounting by custodian   |
| 6004(f)(1)                 | Report on sale not in ordinary business  |

<sup>1</sup> Rule 3017 is one of the few places where the rules contemplate "transmittal" to someone other than the U.S. trustee. It follows the language of 11 U.S.C. § 1125(b) and (c), which provide for transmittal of the disclosure statement. Another is Rule 3018, also dealing with transmittal of a plan in a chapter 9 or chapter 11 case.

|               |  |
|---------------|--|
| 6004(g)(1)    | Motion for sale of personally identifiable information     |
| 9022(a) & (b) | Copy of judgment or order                                  |
| 9034          | All filed pleadings, motions, objections or similar papers |

“Transmittal” in reference to the United States Trustee is consistent with 11 U.S.C. § 307, which provides that the United States Trustee “may raise and may appear and be heard on any issue in any case or proceeding,” save for filing a chapter 11 plan. Given the intended purpose of Rule 9036, these transmittals to the United States Trustee where the United States Trustee is a registered user appear to fall within the scope of revised Rule 9036.

In addition, Rule 2002(k) seems to equate transmittal to the United States Trustee with providing notice to the United States Trustee. It reads as follows:

(k) NOTICES TO UNITED STATES TRUSTEE. 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), (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. **Notices to the United States trustee shall be transmitted** within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules requires the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et. seq.*

Revised Rule 9036 contemplates sending notices to registered users, and Rule 7004 does not apply to these particular notices. Therefore, the notices required by Rule 2002(k) (and those required to be sent pursuant to the provisions of Rule 2002(k) under Rule 3020(c)(3) (notice of confirmation order)) would also be covered by pending Rule 9036 and could be sent to the United States Trustee electronically if the United States Trustee is a registered user.

Most, if not all, of the items mentioned above as falling within the scope of revised Rule 9036 are already transmitted to the United States Trustee electronically, notwithstanding Rule 5005(b)(1)’s references to mail or delivery. Nevertheless, because of variations in local CM/ECF rules and differing arrangements between United States Trustee field offices and local clerks for receipt of notices, it is not clear whether the United States Trustee in any given district is a “registered user” such that these offices will continue to receive information when revised Rule 9036 applies. The Executive Office for United States Trustees (EOUST) is researching this issue to determine whether to recommend any amendment to Rule 5005(b)(1) to ensure consistency with revised Rule 9036.

With respect to the second question regarding the proof of transmittal to the United States Trustee, EOUST is surveying its field offices to determine how that provision is currently being

satisfied in each jurisdiction. The results of this survey will inform EOUST as to whether to recommend any revisions to Rule 5005(b)(2).

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**Effective December 1, 2017**

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2017); approved by the JCUS and transmitted to the Supreme Court (Sept 2016)

| Rules  | Summary of Proposal   | Related or Coordinated Amendments |
|--|---|-----------------------------------|
| AP 4   | Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.   |                                   |
| BK 1001  | Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.   | CV 1                              |
| BK 1006  | Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.             |                                   |
| BK 1015  | Amendment substitutes the word "spouses" for "husband and wife."  |                                   |
| BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1 | Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms. |                                   |
| CV 4   | Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.  |                                   |
| EV 803(16)   | Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.   |                                   |
| EV 902   | Adds two new subdivisions to the rule on self-authentication that would allow certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial.   |                                   |

**Effective December 1, 2018**

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

| Rules                               | Summary of Proposal  | Related or Coordinated Amendments |
|-------------------------------------|--|-----------------------------------|
| AP 8, 11, 39                        | The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”  | CV 62, 65.1                       |
| AP 25                               | The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.] | BK 5005, CV 5, CR 45, 49          |
| AP 26                               | "Computing and Extending Time." Technical, conforming changes.   | AP 25                             |
| AP 28.1, 31                         | The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”   |                                   |
| AP 29                               | "Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”  |                                   |
| AP 41                               | "Mandate: Contents; Issuance and Effective Date; Stay"   |                                   |
| AP Form 4                           | "Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.   |                                   |
| AP Form 7                           | "Declaration of Inmate Filing." Technical, conforming change.  | AP 25                             |
| BK 3002.1                           | The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.                      |                                   |
| BK 5005 and 8011                    | The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.   | AP 25, CV 5, CR 45, 49            |
| BK 7004                             | "Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to Civil Rule 4.   | CV 4                              |
| BK 7062, 8007, 8010, 8021, and 9025 | The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”  | CV 62, 65.1                       |
| BK 8002(a)(5)                       | The proposed amendment to 8002(a) would add a provision similar to FRAP 4(a)(7) defining entry of judgment.  | FRAP 4                            |

Revised August 2018

**Effective December 1, 2018**

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

| <b>Rules</b>  | <b>Summary of Proposal</b>   | <b>Related or Coordinated Amendments</b> |
|---|--|--|
| BK 8002(b)  | The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.   | FRAP 4                                   |
| BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170 | The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing) (Official Forms approved by Judicial Conference as noted above, which is the final step in approval process for forms). | FRAP 4, 25                               |
| BK 8006   | The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.   |  |
| BK 8013, 8015, 8016, 8022, Part VIII Appendix                         | The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limits, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.   | FRAP 5, 21, 27, 35, and 40               |
| BK 8017   | The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.        | AP 29                                    |
| BK 8018.1 (new)   | The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.  |  |
| BK - Official Forms 411A and 411B                                     | The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). Approved by Standing Committee at June 2018 meeting; to be considered by Judicial Conference at September 2018 meeting.  |  |
| CV 5  | The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.   |  |

**Effective December 1, 2018**

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

| <b>Rules</b> | <b>Summary of Proposal</b>  | <b>Related or Coordinated Amendments</b> |
|--------------|---|--|
| CV 23        | "Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party. |  |
| CV 62        | Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to "supersedeas bond"; rearranges subsections.  | AP 8, 11, 39                             |
| CV 65.1      | The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).   | AP 8                                     |
| CR 12.4      | The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).   |  |
| CR 45, 49    | Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.   | AP 25, BK 5005, 8011, CV 5               |

**Effective (no earlier than) December 1, 2019**

Current Step in REA Process: submitted to the Judicial Conference for approval (Sept 2018)

REA History: approved by the Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); unless otherwise noted, published for public comment Aug 2017-Feb 2018; approved for publication (June 2017)

| Rules               | Summary of Proposal   | Related or Coordinated Amendments |
|---------------------|---|-----------------------------------|
| AP 3, 13            | Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.   |                                   |
| AP 26.1, 28, 32     | Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.  |                                   |
| AP 25(d)(1)         | Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)   |                                   |
| AP 5.21, 26, 32, 39 | Technical amendments to remove the term "proof of service." (Not published for comment.)  | AP 25                             |
| BK 9036             | The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting. |                                   |
| BK 4001             | The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.   |                                   |
| BK 6007             | The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.   |                                   |
| BK 9037             | The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.  |                                   |
| CR 16.1 (new)       | Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.                           |                                   |
| EV 807              | Residual exception to the hearsay rule and clarifying the standard of trustworthiness.  |                                   |
| 2254 R 5            | Makes clear that petitioner has an absolute right to file a reply.  |                                   |
| 2255 R 5            | Makes clear that movant has an absolute right to file a reply.  |                                   |

**Effective (no earlier than) December 1, 2020**

Current Step in REA Process: published for public comment (Aug 2018-Feb 2019)

REA History: unless otherwise noted, approved for publication (June 2018)

| Rules     | Summary of Proposal  | Related or Coordinated Amendments |
|-----------|--|-----------------------------------|
| AP 35, 40 | Proposed amendmens clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.  |                                   |
| BK 2002   | Proposed 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.   |                                   |
| BK 2004   | Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.   | CV 45                             |
| BK 8012   | Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.   | AP 26.1                           |
| CV 30     | Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.  |                                   |
| EV 404    | Proposed amendments to subdivision (b) would expand the prosecutor’s notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the “general nature” of the bad act, and (3) deleting the requirement that the defendant must request notice be deleted; the proposed amendments also replace the phrase “crimes, wrongs, or other acts” with the original “other crimes, wrongs, or acts.” |                                   |

# Tab 8B

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**SUMMARY OF THE**  
**REPORT OF THE JUDICIAL CONFERENCE**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-6
2. a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and  
  
b. Approve effective December 1, 2018 converting Director’s Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date. .... pp. 7-15
3. Approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 20-24
4. Approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 25-26

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| <p><b>NOTICE</b><br/><b>NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE</b><br/><b>UNLESS APPROVED BY THE CONFERENCE ITSELF.</b></p> |
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The remainder of this report is submitted for the record and includes the following for the information of the Judicial Conference:

- Federal Rules of Appellate Procedure ..... pp. 6-7
- Federal Rules of Bankruptcy Procedure ..... pp. 15-17
- Federal Rules of Civil Procedure ..... pp. 17-19
- Federal Rules of Criminal Procedure.....p. 24
- Federal Rules of Evidence ..... pp. 27-29
- Judiciary Strategic Planning ..... pp. 29-30

**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 12, 2018. All members were present.

Representing the advisory committees were: Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, incoming Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Rules of Evidence.

Also participating in the meeting were: Judge Jeffrey S. Sutton, former Chair of the Standing Committee; Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter; Professor Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff; Patrick Tighe, Law Clerk to the Standing Committee;

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| <p><b>NOTICE</b><br/>NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE<br/>UNLESS APPROVED BY THE CONFERENCE ITSELF.</p> |
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and Dr. Tim Reagan, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

### ***Rules Recommended for Approval and Transmission***

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

#### **Rule 25 (Filing and Service)**

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

#### Rule 5 (Appeal by Permission)

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal “be filed with the circuit clerk with proof of service.” Instead, it provides that “a party must file a petition with the circuit clerk and serve it on all other parties.”

#### Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase “with proof of service” in Rule 21(a) and (c) is deleted and replaced with the phrases “serve it” and “serving it.”

#### Rule 26 (Computing and Extending Time)

The proposed amendment to Rule 26 deletes the term “proof of service” from Rule 26(c). A stylistic change was also made to simplify the rule’s description for when three days are added to the time computation: “When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).”

#### Rule 39 (Costs)

The proposed amendment to Rule 39(d)(1) deletes the phrase “with proof of service” and replaces it with the phrase “and serve.”

#### Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3)

currently require the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words “mailing” and “mails” to “sending” and “sends,” and deletes language requiring certain forms of service. Rule 13(a)(2) currently requires that a notice of appeal from the Tax Court be filed at the clerk’s office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail. There were no public comments on the proposed amendments to Rules 3 and 13.

#### Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; new subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases. In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the

Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) to require that certain parties “must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).”

A third comment objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the committee note was required to understand it. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors into a new last sentence of 26.1(a). In addition, the phrase “wants to intervene” was changed to “seeks to intervene” in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but who may not truly “want” to intervene. Other stylistic changes were made as well.

#### Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rules 28 and 32 change the term “corporate disclosure statement” to “disclosure statement” to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such

item is “the proof of service.” To account for the frequent occasions in which there would be no such proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee’s report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

#### ***Rules Approved for Publication and Comment***

The Advisory Committee submitted proposed amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee’s request.

The proposed amendments to Rules 35 and 40 create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but not for responses to those petitions. In addition, the Advisory Committee observed that Rule 35 (which deals with en banc determinations) uses the term “response,” while Rule 40 (which deals with panel rehearing) uses the term “answer.” The proposed amendment changes the term in Rule 40 to “response.”

#### ***Information Items***

The Advisory Committee’s consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing



on the structure of Rule 21, and a subcommittee was formed to evaluate possible amendments. Another subcommittee will consider whether any amendments are appropriate following the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will also consider whether to align the rule with the statute, correcting for divergence that has occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk “may” dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word “may,” hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because litigants lack certainty, and it may result in a court issuing an advisory opinion.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

### ***Rules and Official Forms Recommended for Approval and Transmission***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 4001, 6007, 9036, 9037, and Official Forms 411A and 411B, with a recommendation that they be approved and transmitted to the Judicial Conference.

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

The proposed amendment to Rule 4001(c), which applies to obtaining credit, makes that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The Advisory Committee proposed the amendment

after concluding that the rule’s provisions are designed to address the complex postpetition financing issues particular to business debtor chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address the consumer financing issues common in chapter 13 cases, such as obtaining a loan to purchase an automobile for family use.

There were no public comments on the proposed amendment. In giving final approval to the amendment at its spring meeting, the Advisory Committee added a title to the new paragraph (4), “*Inapplicability in a Chapter 13 Case*,” and made stylistic changes to address suggestions from the style consultants.

#### Rule 6007 (Abandonment or Disposition of Property)

The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b) of the Bankruptcy Code, and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five public comments were submitted on the proposed amendments. Two comments addressed the last sentence of the proposed amendment, which stated that a court order granting a motion to compel abandonment “effects abandonment without further action by the court.” The comments stated that this would be inconsistent with § 554(b), which provides for abandonment of property by the bankruptcy trustee, not the court. In response, the Advisory Committee inserted the words “trustee’s or debtor in possession’s” immediately before the word “abandonment.” Two comments criticized as too burdensome the amendment language that requires both service and notice of the motion on all creditors. The Advisory Committee determined that ensuring all parties receive the notice of a motion to abandon property outweighed the concern of burdensomeness, and therefore made no change.

One comment noted that the 14-day period for parties to respond after *service* of a motion to compel abandonment under proposed Rule 6007(b) could be up to three days longer than the 14-day response period after a trustee voluntarily files *notice* of an intent to abandon property under Rule 6007(a). This is because of the extra time allowed for service of motions by mail. The comment suggested possible changes to Rule 6007(a) or Rule 9006(a) that would make the response periods under both subparts of Rule 6007 the same. The Advisory Committee declined to make any change at this time.

Rule 9036 (Notice by Electronic Transmission); Deferral of Action on Rule 2002(g) and Official Form 410.

Proposed amendments to Rules 2002(g), 9036, and Official Form 410 were published in 2017 as part of the Advisory Committee's ongoing study of noticing issues and were intended to expand the use of electronic noticing and service in the bankruptcy courts. Proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and a corresponding amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. Current Rule 9036 provides for electronic service and notice of certain documents by permission of the receiving party and court order. As amended, the rule 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, without the need of a court order. The proposed amendments to Rule 9036 also allowed service or noticing on any person by any electronic means consented to in writing by that person.

Four sets of comments were submitted addressing the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised implementation issues and therefore suggested a delayed

effective date of December 1, 2021 with respect to the proposed amendments to Rule 2002(g) and Official Form 410.

All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (BNC) 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 the BNC by clerk's office personnel.

Three comments expressed concerns that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed proof of claim email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions in the Bankruptcy Code and rules that allow a creditor to designate an address for notice and service. One comment suggested the following order of priorities: (a) CM/ECF email address for registered users; (b) BNC email address; and (c) proof of claim opt-in email address. This order of priorities was inconsistent, however, with the proposed committee note accompanying the amendments to Rule 2002(g), which stated 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.”

The Advisory Committee discussed the comments during its spring meeting. Members 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. The idea of approving the rule and form amendments now but delaying their effective date until 2021 provoked concern

that technological advances during that three-year period might result in better means of employing electronic service and noticing than is currently proposed.

Members were also persuaded that the comments about determining priorities among conflicting creditor email addresses show a need for further coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Therefore, the Advisory Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be deferred for now.

The comments supported immediate implementation of the proposed amendments to Rule 9036. Those amendments (a) allow both clerks and parties to serve and give notice through CM/ECF to registered users; (b) allow other means of electronic service and noticing to be used for parties that give written consent to such service and noticing; and (c) 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 amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus, the Advisory Committee recommended final approval of the amendments to Rule 9036, with minor non-substantive wording changes to clarify applicability and in response to suggestions from the Standing Committee's style consultants, and with the addition of the following sentences to the committee note:

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.

#### Rule 9037 (Privacy Protection for Filings Made with the Court)

The proposed amendment to Rule 9037 adds 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 Advisory Committee proposed the amendment in response to a suggestion submitted by the Committee on Court Administration and Case Management.

Three comments were submitted. The first suggested that the proposed amendment be expanded to allow parties to submit a redacted document as an alternative to the designation of sealed documents to be included in the record on appeal under Rule 8009(f). The Advisory Committee decided this suggestion was beyond the scope of the situation it was attempting to address with proposed Rule 9037(h), and therefore declined to make any change in response to this comment.

The second comment recommended that the amendment be revised to clarify that no fee need be collected, or replacement document filed, from a party seeking to redact his or her protected information unless it is the party who filed the previous (unredacted) document. In addition, the second comment pointed out two instances of the phrase “unless the court orders otherwise” that created ambiguity.

Judicial Conference policy already addresses the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. JCUS-SEP 14, pp. 9-10. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that “[t]he 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 Advisory Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Advisory Committee agreed that the rule was ambiguous concerning when a bankruptcy court may “order otherwise,” and revised the proposal to clarify that any part of the rule may be modified by court order.

The final comment suggested that proposed Rule 9037(h) contained an inadvertent gap because the rule did not require the filing of a redacted version of the original document as a condition of the restrictions upon public access. Under the rule as published, 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 upon filing and before the court rules on the motion. The suggestion recommended that the motion to redact not be restricted from public view until the court rules on it.

When the Advisory Committee initially considered how best to provide for the redaction of already-filed documents, it strove to avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document. Accordingly, the proposed rule requires immediate restriction of public access to the motion and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although not expressly stated, the intent and implication of the rule was that if the motion is granted, the redacted document, which was filed with the motion, would be placed on the record as a substitute for the original document that remained protected from public view. As explained in the committee note: “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 ambiguity, the Advisory Committee added language to the rule stating that “[i]f the court grants [the motion], the redacted document must be filed.” The Advisory

Committee did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

Finally, stylistic changes were made in response to suggestions from the style consultants, and the committee note was revised to reflect the changes made to the rule.

Official Form 411A (General Power of Attorney) and Official Form 411B (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 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. The Forms Modernization Project group recommended this change to allow greater flexibility in their use, in light of increased restrictions on making modifications to Official Forms under then pending amendments to Rule 9009 that became effective in 2017.

The Advisory Committee later realized, however, that using Director’s Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). That rule 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 revisiting this matter, the Advisory Committee concluded that its earlier decision to convert the forms to Director’s Forms was unnecessary. 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 to permit modifications of those forms and are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Advisory Committee’s fall 2017 meeting and is available on the AO website. 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). Accordingly, to bring the rule and forms into conformity, the Advisory Committee recommended designating the power of attorney forms as Official Forms 411A and 411B, in keeping with the new numbering system for forms, with an effective date of December 1, 2018.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

**Recommendation:** That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

***Rules Approved for Publication and Comment***

The Advisory Committee submitted proposed amendments to Rules 2002, 2004, and 8012 with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

**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)**

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee recommended publication for public comment of amendments to three of the rule's subdivisions. This package of 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.

#### Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (ESI). The Advisory Committee discussed the suggestion at its fall 2017 and spring 2018 meetings. By a close vote, the Advisory Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to ESI and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

#### Rule 8012 (Corporate Disclosure Statement)

Rule 8012 sets forth the disclosure requirements for a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel. It is modeled on Appellate Rule 26.1. The Advisory Committee on Appellate Rules has proposed amendments to Rule 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Advisory Committee on Bankruptcy Rules therefore proposed publication of conforming amendments to Rule 8012 this summer.

### ***Information Item***

The Advisory Committee has created a Restyling Subcommittee and charged it with recommending 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.

To inform its recommendation, the subcommittee is seeking input from those who would be affected by such a restyling. The subcommittee worked with the Standing Committee's style consultants to produce a draft restyled version of Rule 4001 that illustrates changes that would likely occur should the restyling project proceed.

At its spring meeting, the Advisory Committee decided to seek comment on one section of the restyled rule, Rule 4001(a), and it approved a cover memo and a set of survey questions to be distributed to interested parties, such as all bankruptcy judges and clerks and various professional bankruptcy organizations. The cover memo explains that the exemplar is not being proposed for adoption, nor is the Advisory Committee seeking substantive comments on its revisions, but rather that input is sought on the threshold issue of whether restyling should be undertaken. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules. The deadline for making comments was set at June 15, 2018. The subcommittee will analyze the responses over the summer in preparation for making a recommendation to the Advisory Committee at its September meeting.

## **FEDERAL RULES OF CIVIL PROCEDURE**

### ***Rule Approved for Publication and Comment***

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an

organization, with a request that they be published for comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Rule 30(b)(6) are the result of over two years of work by the Advisory Committee. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to the rule. By way of background, this is the third time in twelve years that Rule 30(b)(6) has been on the Advisory Committee's agenda. In the past, the Advisory Committee ultimately concluded that the problems reported by both plaintiffs' and defendants' counsel involve behavior that could not be effectively addressed by a court rule.

The initial task of the subcommittee formed in 2016 was to reconsider whether it is feasible (and useful) to address by rule amendment problems identified by bar groups. The subcommittee worked on initial drafts of more than a dozen possible amendments that might address the problems reported by practitioners and, in the summer of 2017, invited comment on a narrowed down list of six potential amendment ideas. More than 100 comments were received. In addition, members of the subcommittee participated in conferences around the country to receive input from the bar. The focus eventually narrowed on imposing a duty to confer in good faith between the parties. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule. The proposed amendment requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.

As drafted, the duty to confer requirement is meant to be iterative and recognizes that a single interaction will often not suffice to satisfy the obligation to confer in good faith. The committee note also explicitly states that "[t]he duty to confer continues if needed to fulfill the requirement of good faith." The duty to confer is also bilateral – it applies to the responding organization as well as to the noticing party.

### *Information Items*

The Advisory Committee met on April 10, 2018. Among the topics on the agenda were updates from two subcommittees tasked with long-term projects. As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules “for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).” With input and insights from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee has developed draft rules. The three draft rules are for discussion purposes only and do not represent any decision by the subcommittee to recommend adoption of these or any other rules.

Another subcommittee has been formed to consider three suggestions that the Advisory Committee develop specific rules for multidistrict litigation proceedings. Among the many proposals are early procedures to address plainly meritless cases and broadened mandatory interlocutory appellate review for important issues. This subcommittee will also consider a suggestion that initial disclosures be expanded to include third party litigation financing agreements, which are used in multidistrict litigation proceedings as well as other contexts. With assistance from the Judicial Panel on Multidistrict Litigation, the subcommittee has begun gathering information and identifying issues on which rules changes might focus. The subcommittee’s work is at a very early stage – the list of issues and topics for study is still being developed.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

#### New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol.<sup>1</sup> Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

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<sup>1</sup>The “ESI Protocol” is shorthand for the “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties’ agreement or otherwise limit the court’s discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel “should be aware of best practices” and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some

changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a



significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing “within a time fixed by the judge” as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner “may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.” The committee note states that the proposed amendment “retains the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’” The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace “may” with a phrase such as “has a right to” or “is entitled to.” The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee’s resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: “Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.” In the Advisory Committee’s view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

**Recommendation:** That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

### *Information Item*

The Advisory Committee met on April 24, 2018. At that meeting, the Advisory Committee added to its agenda two suggestions from district judges recommending that pretrial disclosure of expert testimony in Rule 16 (Discovery and Inspection) be amended to parallel Civil Rule 26. While there is consensus among members of the Advisory Committee that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed, members also agree that there is no simple solution. There are many different types of experts, and criminal proceedings are of course not parallel in all respects to civil proceedings. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded disclosure of forensic expert testimony; it will take some time for the effects of those guidelines to be fully realized. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Rules of Evidence) and also plans to hold a mini-conference.

## FEDERAL RULES OF EVIDENCE

### *Rule Recommended for Approval and Transmission*

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems addressed by the proposed amendment to Rule 807 are as follows:

1. The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.
2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.
3. The requirements in Rule 807 that the hearsay must be proof of a “material fact” and that admission of the hearsay be in “the interests of justice” and consistent with the “purpose

of the rules” have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the “particulars” of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a “near-miss” of a standard exception. A change to the text and committee note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee’s report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

### *Rule Approved for Publication and Comment*

The Advisory Committee submitted proposed amendments to Rule 404(b) (Crimes, Wrongs, or Other Acts) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The Advisory Committee has monitored significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several circuits have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1. Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.
2. Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.
3. Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Advisory Committee considered several textual changes to address these case law developments. At its April 2018 meeting the Advisory Committee decided against proposing extensive substantive amendments to Rule 404(b), based on its conclusion that such amendments would add complexity without rendering substantial improvement. The Advisory Committee did recognize that some protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose.” In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the “general nature” of the bad act should be deleted, given the prosecution’s expanded notice obligations under the Department of Justice proposal. The Advisory Committee also unanimously agreed that the requirement that the defendant must request notice be deleted, as that requirement simply leads to boilerplate requests.

Finally, the Advisory Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “other crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

### ***Information Items***

At its April 26-27, 2018 meeting, the Advisory Committee discussed the results of the symposium held at Boston College School of Law in October 2017 regarding Rule 702. The symposium consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Advisory Committee with extremely helpful insight, background, and suggestions for change.

The Advisory Committee is considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Paul Grimm submitted a suggestion that Rule 106 should be amended in two respects: 1) to provide that a completing

statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Advisory Committee continues to consider the possibility of amending Rule 606(b) to reflect the Supreme Court’s 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) barring testimony of jurors on deliberations violated the defendant’s Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant’s witnesses during deliberations. When it first considered the issue in April 2017, the Advisory Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Advisory Committee revisited the question at its April 2018 meeting and came to the same conclusion but will continue to monitor the case law applying *Pena-Rodriguez*.

The Advisory Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to cross-examine the declarant.

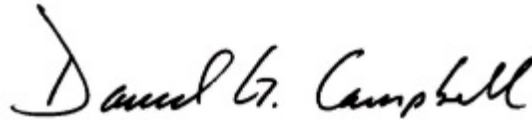
Finally, the Advisory Committee determined not to go forward with possible amendments to Rules 609(a), 611, and 801(d)(1)(A).

## **JUDICIARY STRATEGIC PLANNING**

Chief Judge Carle E. Stewart, the judiciary’s planning coordinator, asked Judicial Conference committees to provide an update on the initiatives they are pursuing to implement the strategies and goals of the *Strategic Plan for the Federal Judiciary*. The judiciary’s long-range planning officer addressed the Committee on how its feedback on the *Strategic Plan* and reporting of its long-term initiatives helps foster communication between the Executive

Committee and Judicial Conference committees. The Committee will provide an update to Chief Judge Stewart on the rules committees' progress in implementing initiatives in support of the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

|                       |                     |
|-----------------------|---------------------|
| Jesse M. Furman       | William K. Kelley   |
| Daniel C. Girard      | Carolyn B. Kuhl     |
| Robert J. Giuffra Jr. | Rod J. Rosenstein   |
| Susan P. Graber       | Amy J. St. Eve      |
| Frank M. Hull         | Srikanth Srinivasan |
| Peter D. Keisler      | Jack Zouhary        |

- Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
- Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
- Appendix C – Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings for the United States District Courts (proposed amendments and supporting report excerpt)
- Appendix D – Federal Rules of Evidence (proposed amendments and supporting report excerpt)



# Consent 1

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# Consent 1A

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: CONFORMING CHANGES TO REMOVE OR QUALIFY REFERENCES TO “PROOF OF SERVICE”

DATE: AUGUST 21, 2018

At its meeting in June, the Standing Committee gave final approval to amendments to several Federal Rules of Appellate Procedure (FRAP). The amendment to FRAP 25(d) would eliminate the requirement for proof of service for documents served through the court’s electronic-filing system. The other amendments—to FRAP 5, 21, 26, 32, and 39—would reflect this change by either eliminating or qualifying references to “proof of service” so as not to suggest that such a document is always required. Because the Part VIII Bankruptcy Rules in large part track the language of FRAP counterparts, **the Subcommittee recommends that three Bankruptcy Rules be similarly amended.**

The following table sets out the proposed language of each FRAP amendment, the relevant language of any corresponding Bankruptcy Rule, and the Subcommittee’s recommendation for whether a conforming amendment should be proposed for the Bankruptcy Rule. After the table, an additional Bankruptcy Rule is discussed. The memorandum ends with the Subcommittee’s recommendation regarding the procedure for proposing any such amendments.

| FRAP Amendment  | Parallel Bankruptcy Rule   | Recommendation  |
|---|--|---|
| <p><b>Rule 25. Filing and Service.</b><br/>* * * * *</p> <p><b>(d) Proof of Service.</b><br/>(1) A paper presented for filing must contain either of the following <u>if it was served other than through the court’s electronic filing system</u>:</p> <p>* * * * *</p> <p>(B) proof of service<br/>* * * * *</p>  | <p><b>Rule 8011. Filing and Service; Signature</b><br/>* * * * *</p> <p>(d) PROOF OF SERVICE.<br/>(1) <i>What is Required.</i> A document presented for filing must contain either <u>of the following if it was served other than through the court’s electronic-filing system</u>:</p> <p>* * * * *</p> <p>(B) proof of service<br/>* * * * *</p> <p>(version to take effect 12/1/18)</p>  | <p>No amendment is needed. Rule 8011(d)(1), as approved by the Supreme Court and sent to Congress, already uses the language in question.</p> |
| <p><b>Rule 5. Appeal by Permission</b><br/><b>(a) Petition for Permission to Appeal.</b><br/>(1) To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition <del>for permission to appeal. The petition must be filed</del> with the circuit clerk <del>with proof of service</del> <u>and serve it</u> on all other parties to the district-court action.</p> | <p><b>Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal</b><br/>(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL. To appeal from an interlocutory order or decree of the bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a). The notice must:</p> <p>* * * * *</p> <p>(3) unless served electronically using the court’s transmission equipment, include proof of service in accordance with Rule 8011(d).</p> | <p>No amendment is needed. Rule 8004(a)(3) already includes appropriate qualifying language.</p>  |
| <p><b>Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs</b></p>   | <p>There is not a parallel Bankruptcy Rule.</p>  |   |
| <p><b>Rule 26. Computing and Extending Time</b><br/>* * * * *</p> <p><b>(c) Additional Time <del>a</del>After Certain Kinds of Service.</b></p>   | <p><b>Rule 9006. Computing and Extending Time; Motion Papers</b><br/>* * * * *</p>   | <p>No amendment is needed. Rule 9006(f) does not include a reference to proof of service.</p>   |

|   |   |   |
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| <p>When a party may or must act within a specified time after being served, <u>and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service</u>, 3 days are added after the period would otherwise expire under Rule 26(a), <del>unless the paper is delivered on the date of service stated in the proof of service.</del></p> <p style="text-align: center;">* * * * *</p>  | <p>(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D) OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk) or (F) (other means consented to) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).</p>   |   |
| <p><b>Rule 32. Form of Briefs, Appendices, and Other Papers</b></p> <p style="text-align: center;">* * * * *</p> <p><b>(f) Items Excluded from Length.</b> In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:</p> <ul style="list-style-type: none"> <li>• <del>the</del> cover page;</li> <li>• a <del>corporate</del> disclosure statement;</li> <li>• a table of contents;</li> <li>• a table of citations;</li> <li>• a statement regarding oral argument;</li> <li>• an addendum containing statutes, rules, or regulations;</li> <li>• certificates of counsel;</li> <li>• <del>the</del> signature block;</li> <li>• <del>the</del> proof of service; and</li> <li>• any item specifically excluded by these rules or by local rule.</li> </ul> | <p><b>Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers</b></p> <p style="text-align: center;">* * * * *</p> <p><u>(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:</u></p> <ul style="list-style-type: none"> <li>• <u>the cover page;</u></li> <li>• <u>a corporate disclosure statement;</u></li> <li>• <u>a table of contents;</u></li> <li>• <u>a table of citations;</u></li> <li>• <u>a statement regarding oral argument;</u></li> <li>• <u>an addendum containing statutes, rules, or regulations;</u></li> <li>• <u>certificates of counsel;</u></li> <li>• <u>the signature block;</u></li> <li>• <u>the proof of service; and</u></li> <li>• <u>any item specifically excluded by these rules or by local rule.</u></li> </ul> <p>(version effective 12/1/18)</p> | <p>Rule 8015(g), as approved by the Supreme Court and sent to Congress, contains the articles—“a,” “the”— that the FRAP amendment would delete. Although the proposed amendment is very minor and may not be necessary, the Subcommittee recommends making a conforming change in order to retain consistency with FRAP 32 and, by deleting “corporate” from “disclosure statement,” reflect the pending amendment to the title of Rule 8012.</p> |

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|---|---|--|
| <p><b>Rule 39. Costs</b><br/>* * * * *</p> <p><b>(d) Bill of Costs: Objections; Insertion in Mandate.</b></p> <p>(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, <del>with proof of service,</del> <b>and serve</b> an itemized and verified bill of costs.</p> <p>* * * * *</p> | <p><b>Rule 8021. Costs</b><br/>* * * * *</p> <p>(d) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk, with proof of service, an itemized and verified bill of costs, unless the bankruptcy court extends the time.</p> | <p>To maintain consistency with FRAP 39(d), the Subcommittee recommends that a conforming amendment be proposed.</p> |
|---|---|--|

Additional Bankruptcy Rule. Rule 8013(a)(1) also refers to “proof of service.” It states that “[a] request for an order or other relief is made by filing a motion with the district or BAP clerk, with proof of service on the other parties to the appeal.” The corresponding FRAP provision (FRAP 27(a)) does not include the last phrase, so no amendment has been proposed to that rule.

To take account of situations in which proof of service is not required, the Subcommittee recommends that Rule 8013(a)(1) be amended by ending the provision with “clerk,” thereby omitting the reference to proof of service. The circumstances under which proof of service would be required would then be governed by Rule 8011(d)(1) (only required for documents served other than through the court’s electronic-filing system).

Approval Procedure

Because the proposed amendments to Rules 8013, 8015 and 8021 are minor and are being made to conform to amended Rule 8011 and the FRAP provisions, the Subcommittee recommends that the Advisory Committee seek approval of them without publication for public comment. That would allow them to go into effect on December 1, 2020.



The text and accompanying Committee Note of each of the proposed amendments follow:

**Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers**

\* \* \* \* \*

(g) ITEMS EXCLUDED FROM LENGTH. In

computing any length limit, headings, footnotes, and quotations

count toward the limit, but the following items

do not:

- ~~the~~ cover page;
- ~~a corporate~~ disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

\* \* \* \* \*

(version effective 12/1/18)

**Committee Note**

The amendment to subdivision (g) is made to reflect recent amendments to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court’s electronic-filing system. Because each item listed in Rule 8015(g) will not always be required, the initial article is deleted. The word “corporate” is deleted before “disclosure statement” to reflect a concurrent change in the title of Rule 8012.

1 **Rule 8021. Costs**

2 \* \* \* \* \*

3 (d) BILL OF COSTS; OBJECTIONS. A party who wants  
4 costs taxed must, within 14 days after entry of judgment on appeal,  
5 file with the bankruptcy clerk, ~~with proof of service,~~ and serve an  
6 itemized and verified bill of costs, unless the bankruptcy court  
7 extends the time.

**Committee Note**

Subdivision (d) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court’s electronic-filing system.

1 **Rule 8013. Motions; Intervention**

2 (a) CONTENTS OF A MOTION; RESPONSE; REPLY

3 (1) *Request for Relief.* A request for an order or  
4 other relief is made by filing a motion with the district or  
5 BAP clerk, ~~with proof of service on the other parties to the~~  
6 appeal.

\*\*\*\*\*

**Committee Note**

Subdivision (a)(1) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

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# Consent 1B

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## MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: PRIVACY, PUBLIC ACCESS AND APPEALS SUBCOMMITTEE

SUBJECT: RULE 9033 (REVIEW OF PFFCL)

DATE: AUG. 22, 2018

We have received a suggestion from Whitman L. Holt of Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles, that Rule 9033 be modified “to conform the procedural process thereunder to more closely track the appellate process under Part VIII” of the rule.

In particular, Mr. Holt notes that “Rule 9033(b) makes no provision for a reply brief by the losing party, whereas such a brief is permitted in a regular appeal under Rule 8014(c).” “In addition, Rule 9033(c) results in the maximum period of time allowed for the losing party to prepare its brief to be 35 days after the service of the bankruptcy court’s ruling, whereas in a regular appeal the default period for filing of the losing party’s opening brief is ‘30 days after the docketing of notice that the record has been transmitted or is available electronically,’ Rule 8018(a)(1), which itself could be 28 days or more after the bankruptcy court’s decision (based on a 14-day period in which to file a notice of appeal, and then another 14-day period in which to designate the record, *see* Rules 8002(a)(1) & 8009(a)(1)(B)).”

He states that “[i]t is difficult to justify this asymmetry between the two processes for challenging a bankruptcy court’s decision, especially since the supposition behind matters subject to the Rule 9033 process is that the bankruptcy court ought not finally be deciding such matters. It seems far more sensible for the two processes to be procedurally symmetrical such that the only difference between them is the standard of review applied by the district court.”

The Subcommittee disagrees with Mr. Holt’s characterization of Part VIII and Rule 9033 as “two processes for challenging a bankruptcy court’s decision.” Rule 9033 provides a mechanism for transmittal of proposed findings of fact and conclusions of law; there is no bankruptcy court decision from which an appeal is taken.

The rules of Part VIII of the Federal Rules of Bankruptcy Procedure are modeled on the Federal Rules of Appellate Procedure because they deal with appeals from the bankruptcy court but modify the appellate rules in some ways unique to bankruptcy practice. By contrast, Rule 9033 is modeled on the practice of magistrates in civil and criminal proceeding as empowered by the Federal Magistrate Act of 1979, 28 U.S.C. § 631 – 639. Under 28 U.S.C. § 636(b)(1)(C), a magistrate judge who conducts a hearing and submits proposed findings of fact and recommendations to the court, files the report and recommendation with the court and a copy gets mailed to all parties. The statute continues:

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

Implementing the statute, similar language appears in Rule 72(b) of the Federal Rules of Civil Procedure and Rule 59(b) of the Federal Rules of Criminal Procedure. A comparison of those rules with Rule 9033 appears below:

| FRBP 9033   | FRCrimP 59(b)   | FRCP 72  |
|---|---|--|
| <p><b>Rule 9033. Proposed Findings of Fact and Conclusions of Law</b></p> <p>(a) <i>Service.</i> In a proceeding in which the bankruptcy court has issued proposed findings of fact and conclusions of law, the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.</p> <p>(b) <i>Objections: Time for Filing.</i> Within 14 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 14 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription</p> | <p><b>Rule 59. Matters Before a Magistrate Judge</b><br/>***</p> <p>(b) Dispositive Matters.<br/>(1) <i>Referral to Magistrate Judge.</i> A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.<br/>(2) <i>Objections to Findings and Recommendations.</i></p> | <p><b>Rule 72. Magistrate Judges: Pretrial Order</b><br/>***</p> <p>(b) Dispositive Motions and Prisoner Petitions.<br/>(1) <i>Findings and Recommendations.</i> A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.<br/>(2) <i>Objections.</i> Within 14 days after being served with a copy of the recommended disposition, a party may serve</p> |



|  |   |  |
|--|---|--|
| <p>of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.</p> <p>(c) <i>Extension of Time.</i> The bankruptcy judge may for cause extend the time for filing objections by any party for a period not to exceed 21 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing objections must be made before the time for filing objections has expired, except that a request made no more than 21 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.</p> <p>(d) <i>Standard of Review.</i> The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.</p> | <p>Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.</p> <p>(3) <i>De Novo Review of Recommendations.</i> The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.</p> | <p>and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.</p> <p>(3) <i>Resolving Objections.</i> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.</p> |
|--|---|--|

The decision to treat decisions of bankruptcy judges on matters beyond their constitutional authority to hear and determine under *Marathon* (and *Stern v. Marshall*) was a deliberate one, intended to protect bankruptcy adjudication from attack under Article III of the

U.S. Constitution. Although the standard of review is an essential part of that protection, making the process for reviewing proposed findings of fact and conclusions of law of bankruptcy judges as similar as possible to the process for reviewing reports and recommendations of magistrate judges is also key. The Subcommittee recommends no action be taken on this suggestion.

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# Consent 2A

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## MEMORANDUM

TO: SUBCOMMITTEE ON BUSINESS ISSUES

FROM: ELIZABETH GIBSON, REPORTER

SUBJECT: MISCELLANEOUS NOTICING SUGGESTIONS

DATE: AUGUST 10, 2018

On the agenda for the Subcommittee's August 13 conference call are three suggestions regarding noticing that the Subcommittee has not yet specifically considered. Two were informally suggested by Advisory Committee members, and one was submitted by attorney Rich Levin on behalf of the National Bankruptcy Conference (NBC). This memorandum discusses each of the suggestions and presents recommendations for how the Subcommittee might handle them.

### Informal Suggestions by Jill Michaux

Ms. Michaux, a member of the Advisory Committee, made two suggestions to ease the noticing burden on consumer debtors' attorneys. Her first suggestion was that notice to creditors after the deadline for filing proofs of claim be limited to those who filed a proof of claim, and the second was that all claimants should be required to accept electronic notice through CM/ECF. The Advisory Committee has already taken favorable action on the first suggestion. It approved an amendment to Rule 2002(h) that extends to chapter 12 and 13 cases—in addition to chapter 7 cases—the authorization to dispense with sending notices required by Rule 2002(a) to creditors that hold claims for which proofs of claim have not been filed by the deadline. The Standing Committee gave final approval to this amendment in June, and the Judicial Conference will consider it at its September meeting.

Ms. Michaux's second suggestion—that all claimants be required to accept electronic noticing—has been rejected by this Subcommittee in favor of an opt-in approach. That decision rested on a conclusion that § 342(e) and (f) of the Code allow creditors in chapter 7 and 13 cases to register and insist on a physical address for receipt of notices. The proposal currently before the Subcommittee for a high-volume-notice-recipient program would go part of the way toward satisfying Ms. Michaux's suggestion.

I do not believe that the Subcommittee needs to take any further action on these suggestions.

#### Informal Suggestion by David Lander

Former Advisory Committee member David Lander suggested that direct notice to, or service on, a party be required 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. His concern was that in a case with many filings, a party needs to be more clearly informed that a filing seeks to adversely affect its interests.

The rules currently require direct notice in the form of service under Rule 7004 when a complaint initiating an adversary proceeding or a motion initiating a contested matter is filed. *See* Rules 7004, 9014(b). And the recent rule amendments accompanying the chapter 13 plan form require Rule 7004 service on an affected creditor of a plan that seeks to limit the amount of a secured claim or avoid a lien on exempt property. *See* Rules 3012(b), 4003(d).

Other recent decisions by the Advisory Committee, however, are at odds with Mr. Lander's suggestion. The goal of reducing the costs and burdens of noticing for courts and parties led the Committee to approve a greater use of electronic service and noticing when it approved the incorporation of amended Civil Rule 5(b) and similar amendments to Rules 8011



and 9036. The proposal currently before the Subcommittee to require electronic noticing on high volume notice recipients, subject to § 342, also rests on a different weighing of efficiency versus certainty of notice than Mr. Lander proposes.

Early in its deliberations on noticing issues, this Subcommittee concluded that electronic noticing could satisfy due process and that a greater use of electronic noticing should be encouraged. In light of the decisions that the Subcommittee and Advisory Committee have already taken, I recommend that no further action be taken on Mr. Lander's suggestion.

#### NBC Suggestion 14-BK-E

In its suggestion, the NBC makes three proposals for easing the burden of service and noticing in individual debtor cases. The NBC argues that service under both Rule 7004(b)(3) and 7004(h) is unnecessarily difficult because it is often hard to determine the name and location of an appropriate officer for service on a corporation, as well as whether a particular financial institution is an "insured depository institution" for purposes of Rule 7004(h). The suggestion notes that "creditors often have various corporate entities that change, and many financial institutions have subsidiary or affiliated corporations with similar names." Thus a search of the FDIC or other databases of corporate information may not provide a clear answer.

To address these difficulties, the NBC proposes the following rule amendments:

- An amendment to Rule 3001 that would require a creditor to identify on the proof of claim form the name and address of the person responsible for receiving notices. If the creditor is a corporation, the claimant would be required to list the name and address of an officer or agent for purposes of Rule 7004(b)(3). If the creditor is an insured depository institution, the amended rule would also require a creditor to state on the proof of claim the name and address of an officer of the institution for service under Rule 7004(h) and whether it waives its entitlement to service by certified mail.
- An amendment to Rule 5003(e) that would require clerks to keep a register, made accessible to registered users of the court's electronic filing system, of addresses for providing notice to entities that have registered one or more addresses under § 342(f)(1)

of the Code and the name and address of an officer of the creditor to receive service of process under Rule 7004.

- An amendment to Rule 9036 that would require creditors that file 100 or more proofs of claim within a 12-month period to file all proofs of claim and documents using CM/ECF and to accept electronic service of all documents that do not require service under Rule 7004.

The last suggestion is dealt with in a more limited way by the high-volume-notice-recipient program that is currently before the Subcommittee. And in an initial consideration of these issues, the Subcommittee previously decided not to recommend any changes to Rule 7004. But whether creditors should be required to provide information about the appropriate recipients of service under Rule 7004 is an issue that might still be considered. Recent conversations with AO staff members indicated an unwillingness to make the Bankruptcy Noticing Center database available to parties (or the ineffectiveness of doing so since it represents only an agreement to allow court noticing at those addresses). Requiring creditors to provide relevant service information in other ways, such as the proof of claim, could therefore be helpful.

The NBC suggestions were made in the context of individual debtor cases. If the Subcommittee thinks these issues should be further pursued, it may want to have them referred to the Consumer Subcommittee. If, however, it wants to pursue them itself, I suggest that we engage in further discussions with members of the AO and the Bankruptcy Noticing Working Group in order to make a recommendation to the Advisory Committee at the spring 2019 meeting.