

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 31, 2016
Denver, Colorado

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert J. Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Arthur I. Harris
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Jill Michaux, Esquire
Thomas Moers Mayer, Esquire
Professor Edward R. Morrison

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and
Procedure (Standing Committee)
Professor Daniel Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee
Officer
Bankruptcy Judge Martin Isgur
Bankruptcy Judge Eugene R. Wedoff
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for
U.S. Trustee
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Michael T. Bates, Lindquist & Venum, LLP, Minneapolis, Minnesota
Edward Boltz, Law Offices of John T. Orcutt, National Association of Consumer
Bankruptcy Attorneys
Michael Delmonico, Ford Motor Credit Company
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia

Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees
Alice Whitten, Wells Fargo

Discussion Agenda

1. Greetings.

Judge Sandra Ikuta opened the meeting by welcoming everyone to Denver. Participants and visitors introduced themselves. Judge Ikuta noted that Consent Agenda Item 3A had been moved from the consent agenda to the discussion agenda and would be addressed after Discussion Agenda Item 6C.

2. Approval of the minutes from the Fall 2015 Meeting.

The minutes were approved with one edit.

3. Oral reports on meetings of other committees:

(A) January 7, 2016 meeting of the Committee on Rules of Practice and Procedure (Standing Committee).

Professor Michelle Harner provided this report to the Committee. For bankruptcy, the proposed rule amendments following the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011) (the *Stern* amendments) were approved. There was a report on private information in court documents based on a study conducted by the Federal Judicial Center (FJC); the study suggested, among other things, that bankruptcy had improved its record of preventing disclosure of private information in documents. Also, there was a discussion regarding coordination of efforts regarding similar rules among the rules committees, and the use of parallel language where possible.

Judge Ikuta stated that the Committee will discuss coordination efforts regarding rule changes at the meeting. Judge Jeffrey Sutton added that the Judicial Conference approved the Committee's requests for retroactive approval of technical form changes.

(B) November 5, 2015 meeting of the Advisory Committee on Civil Rules.

Judge Arthur Harris reported that there are several amendments under consideration by the Civil Rules Committee that may impact the Committee. Two examples are the amendments to Rule 5 and the class action rules. There are several pilot projects under consideration that may have some impact on bankruptcy. There may be some bankruptcy districts included as part of the pilot projects, although this is yet to be decided.

(C) December 10-11, 2015 meeting of the Committee on the Administration

of the Bankruptcy System (the Bankruptcy Committee).

Judge Erithe Smith reported on the issues considered by the Bankruptcy Committee that could impact the work of the Committee. The Bankruptcy Committee considered fees related to searches for records held by the National Archives and Records Administration (NARA). The suggested fee for a record search is \$10, with an additional fee for actual document retrieval. The Bankruptcy Committee supports this fee as it allows for a more focused document search and an overall better cost for the consumer.

Cost containment is still being discussed by the Bankruptcy Committee, in particular, the consolidation of bankruptcy courts. The concept is to pair bankruptcy courts for a three-year term as a pilot project for study to determine whether there are enough similarities among the courts to permit them to work together on a more permanent basis. The program will be studied by the FJC.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

- (A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Tab 4A: Memo of March 3, 2016 by Professor Gibson.
-Proposed Rule 9037(h).

This suggestion is from the Court Administration and Case Management Committee (CACM), and is an effort to solve a problem with personally identifiable information on court dockets. Judge Harris noted that although there are solutions to this problem, the bigger issue is preventing the information from getting on the dockets in the first place. As noted, the FJC study was presented to the Standing Committee at its January meeting regarding documents with personally identifiable information.

The subcommittee's discussions focused on potentially adding a new subdivision (h) to Rule 9037. It determined, however, that any amendment to the bankruptcy privacy rule should be coordinated with possible amendments to the appellate, civil, and criminal versions of the privacy rule and that it may make sense for the Committee to wait to publish until other rules committees have had a chance to consider possible amendments. Professor Elizabeth Gibson suggested that the Committee hold its recommended amendment at the Committee level until such time that the other rules committees are ready with any amendments, and Judge Sutton agreed with this proposal.

Judge Harris detailed the proposed amendments as set forth in the agenda book. A suggestion was made to remove the "under seal" language because the CM/ECF system automatically restricts these types of motions from the public, making the proposed language redundant. The group discussed this issue, and the language "motion to redact" as a replacement

for “under seal” was accepted as an amendment. A motion was passed to approve the proposed amendment, including the revised language, and to hold the amendment until the issue has been considered by the other rules committees. Professor Gibson advised the Committee about several stylistic suggestions from the reporter for the Civil Rules Committee, and the Committee agreed that the language approved at this meeting is subject to change as the other rules committees move forward in their discussions, and that it will be discussed at the Committee’s fall meeting.

- (B) Suggestion 15-BK-E to amend or eliminate Rule 4003(c), which currently allocates the burden of proof in exemption litigation.

Tab 4 B: Memo of March 4, 2016 by Professor Harner.
-Supplemental Memorandum of February 11, 2016.

Judge Harris introduced Suggestion 15-BK-E, noting that the Committee had discussed this matter on a preliminary basis at its fall 2015 meeting. Professor Harner then explained the structure of Rule 4003(c), which allocates the burden of proof to the objecting party in exemption litigation, and the general issues raised by Suggestion 15-BK-E. The primary issue posed by the suggestion is whether the federal bankruptcy rules or the law governing the rule of decision controls the burden of proof in exemption litigation. Under the Supreme Court’s holding in *Hanna v. Plumer*, 380 U.S. 460 (1965), a federal rule promulgated under the Rules Enabling Act is valid so long as it is within Congress’s Article I power and is within the scope of the Rules Enabling Act. Considering the parameters of the Rules Enabling Act, and because several states characterize the burden of proof as being procedural, Rule 4003(c) meets the Rules Enabling Act test. The basic test for whether a rule is within the scope of the Rules Enabling Act is whether the rule “really regulates procedure.” Because there is a strong argument that Rule 4003(c) does really regulate procedure, the subcommittee concluded that there is no need to amend Rule 4003(c) at this time. Although the recommendation is to take no action, the issue deserves monitoring as more case law develops.

The Committee discussed this suggestion and adopted the subcommittee’s recommendation to take no action at this time, but to continue to monitor the matter.

5. Report by the Subcommittee on Forms.

- (A) Discussion regarding proposed chapter 13 plan form (Official Form 113), and related proposed amendments to certain bankruptcy rules.

Tab 5A: Memo of March 7, 2016 by Professor Gibson.
-Proposed Rules 3015 and 3015.1.

Judge Dow provided a brief history of the Chapter 13 plan project. Following the two rounds of publication, a compromise regarding the plan was reached involving an opt-out procedure for the official plan form. In evaluating and implementing the compromise, the subcommittee gathered informal input from relevant chapter 13 constituencies. The opt-out

proposal would require the use of a national form for chapter 13 plans unless a district promulgated its own form that met the requirements specified in a new rule. At the fall 2015 meeting, the Committee approved proposed Official Form 113 and the related amendments to Rules 2002, 3002, 3007,¹ 3012, 4003, 5009, 7001, and 9009, but agreed to defer submitting those items to the Standing Committee. The deferral was to allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication.

The subcommittee considered these issues and reached out to the relevant groups regarding the proposed amendments to Rule 3015 and new Rule 3015.1, as well as the republication issue. Several groups supported publication of the rules implementing the opt-out proposal. Based on its review, the subcommittee recommended that the Committee approve the publication of the amendment to Rule 3015 and new Rule 3015.1. The rules will implement the opt-out proposal. The subcommittee also recommended the approval of a shortened comment period that would permit for an effective date of December 2017 for the chapter 13 plan form and all related rules. Judge Isgur spoke briefly regarding his support (and his knowledge of general support among his colleagues) for this proposal.

A motion was made to approve the recommendation to publish Rules 3015 and 3015.1 on a shortened comment period, starting in July 2016, with one public hearing, and a proposed effective date of December 2017. The motion was approved.

- (B) Report regarding suggestion for Notice of Change of Address Form (Suggestion 15-BK-D) submitted by Russell C. Simon, Chapter 13 Standing Trustee, on behalf of National Association of Chapter 13 Trustees.

Tab 5B: Memo of March 3, 2016 by Professor Harner.
-Appendices A and B.

Professor Harner advised that the subcommittee recommends no action at this time. Based on research completed by Professor Harner and Jim Waldron, there is no indication of need for this rule change. Mr. Waldron surveyed the clerks of court, and Professor Harner examined the issue of unclaimed funds. Although unclaimed funds are an issue for the courts, it is not necessarily something for the Committee to resolve through the rule-making process. Also, many courts have local forms for changes of address, and it wasn't clear that the existence the local forms impacted the unclaimed funds problem. A suggestion was made to refer the issue to the Bankruptcy Committee.

6. Report by the Subcommittee on Business Issues.

- (A) Recommendation regarding proposed amendments to Official Forms 25A, 25B, 25C, and 26 (including renumbering the forms as 425A, 425B, 425C, and 426).

¹ At the fall meeting, the Committee approved the amendments to Rule 3007 subject to further review by the Subcommittee on Business Issues. As discussed at item 6D, the Business Subcommittee recommends the approval of the published version of the amended rule.

Tab 6A: Memo of March 3, 2016 regarding Official Forms 425A, 425B, and 425C by Professor Harner.
Memo of March 3, 2016 regarding Official Form 426 by Professor Harner.
-Proposed Official Forms 425A, 425B, 425C, and 426.

Forms 425A, 425B, and 425C (formerly Forms 25A, 25B, and 25C) are used in small business cases. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) of the Bankruptcy Code. The forms were revised to match the style of the forms modernization project, along with several substantive changes the subcommittee identified several places where Official Forms 425A, 425B, and 425C were inconsistent with the Bankruptcy Code, required additional information to explain fully the debtor's disclosure obligations, or contained duplicative questions. The subcommittee's working group received significant input on Form 425C from the Executive Office of the U.S. Trustee.

Form 426 (formerly Form 26) is used by chapter 11 debtors to disclose certain information regarding entities in which the debtors hold substantial or controlling interests, as mandated by Rule 2015.3. The subcommittee's working group updated the form to match the format used by the forms modernization project, clarified some of the questions, and revised the required exhibits.

The subcommittee recommended that the Committee approve Official Forms 425A, 425B, 425C, and 426 for publication with two minor edits, and a motion to approve the recommendation was passed.

- (B) Suggestion 12-BK-H regarding a new rule allowing a district court to treat a bankruptcy court judgment as proposed findings of fact and conclusions of law.

Tab 6B: Memo of March 4, 2016 with proposed Rule 8018.1 by Professor Gibson.

The subcommittee is proposing a simplified version of the original proposed amendment to Rule 9033, now new Rule 8018.1. The original proposal was considered at the fall 2015 meeting and returned to the subcommittee for further discussion. The rule was changed from an amendment to Rule 9033 to new Rule 8018.1 based on a suggestion at the fall meeting to place the rule within the bankruptcy appellate rules (the Part VIII Rules). The case citation to *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) was retained in the committee note to explain the basis for the rule. The revised amendment is recommended for publication.

An issue was raised as to whether the rule was necessary, given that it repeats the holding in *Arkison*. Several members commented that the rule is helpful. Professor Gibson noted that the citation to *Arkison* is a reminder to future committee members that if the case is overruled,

the rule must be re-visited. An issue was raised whether the rule should also address circuit court bankruptcy appeals as well.

A motion was made to approve the rule as presented for publication and the motion was approved.

- (C) Report on preliminary research on noticing issues in bankruptcy cases.

Tab 6C: Memo of March 4, 2016 by Professor Harner including consideration of Suggestions 12-BK-M, 12-BK-B, 15-BK-H, and Comment BK-2014 0001-0062 (includes Appendices A, B, and C).
-Appendix D (Memo to reporters and attachment).

Professor Harner completed preliminary research on various noticing issues, and provided a chart of all bankruptcy rule noticing provisions. Unlike other rules, the bankruptcy rules are fairly onerous in terms of noticing responsibilities. Several specific suggestions regarding noticing have been submitted. The subcommittee considered whether to complete a review of all noticing in the bankruptcy rules. The general view was that the burdens and costs often associated with noticing under the current rules may be reduced by the continued use of electronic noticing. The rules committees in general are considering changing electronic noticing as a coordinated effort, and it makes sense to wait to see these changes prior to making any changes to the rules regarding noticing in bankruptcy. The subcommittee will continue to monitor the work of the other committees, and any changes in technology that impact noticing. In addition, the subcommittee indicated that it will review the specific suggestions and comments received to date concerning noticing issues in bankruptcy cases and report back to the full Committee with any specific recommendations.

- (D) Recommendation to remove a previously approved amendment to Rule 3007(a) from the chapter-13-plan-form package of rule amendments and that it be reconsidered in connection with the Advisory Committee's noticing project.

This issue was moved from the consent agenda to the discussion agenda. The subcommittee recommends approving Rule 3007(a)(2) with subparagraph (b) deleted (as originally proposed prior to the fall 2015 meeting), and to leave any remaining issues with the rule for consideration as part of the noticing project.

A motion was made to approve the recommendation to include the originally published version of Rule 3007(a) as part of the chapter 13 package, and the motion was approved.

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

- (A) Recommendation concerning pending amendments to the Federal Rules of Appellate Procedure and whether to publish similar amendments to the Federal Rules of Bankruptcy Procedure.

Tab 7A: Memo of March 7, 2016 by Professor Gibson.

- Proposed Rules 8002, 8011, 8013, 8015, 8016, 8017, 8022.
- Appendix to Part VIII Rules length limits.
- Proposed Official Form 417A (Notice of Appeal).
- Proposed Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements and Type-Style Requirements).
- Proposed Director's Form 4170 (Inmate Filer's Declaration).

Several amendments were needed to parallel the amended Federal Rules of Appellate Procedure that will likely go into effect in December 2016. When the Committee revised the Part VIII rules, the decision was made to maintain consistency with the Appellate Rules. The proposed amendments to Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022 are necessary to maintain the same language. The proposed amendments include the length limits adopted by the Appellate Rules Committee.

In addition, the subcommittee recommends the publication of amendments to Official Forms 417A and 417C and a new appendix to the Part VIII rules that sets out all of the Part VIII document-length limits. Finally, it proposes a Director's form for an inmate filer's declaration, to be promulgated when the other rule and form amendments go into effect (likely December 2018).

Professor Gibson noted several small edits to the proposed amended rules. Also, the proposed amendments to Rule 8017 are meant to go forward on the same publication schedule as the proposed amended Appellate Rules, however, the Appellate Committee is reconsidering the language of the amendment. The subcommittee's recommendation is to track the Appellate Committee's language when it is finalized. Once the changes are adopted by the Appellate Committee, this Committee can decide whether to adopt the proposed language.

Professor Gibson also explained that two amendments to the Appellate Rules were approved for publication by the Appellate Rules Committee but the subcommittee recommends that the Committee not adopt them. The first is a rule for staying the mandate, which is inapplicable to the Part VIII rules. The second was the timing for reply briefs, and the Part VIII rules already deviate from the Appellate Rules in this respect.

A motion was made to approve the recommendation to publish the Part VIII rules, along with the amended Official Forms, and proposed Director's Form. The motion was approved.

8. Report by the Subcommittee on Technology and Cross Border Insolvency.

- (A) Status report on proposed amendment to Rule 5005(a)(2) to address proposed amendments to Civil Rule 5(d).

The Civil Rules Committee will consider amendments to Civil Rule 5(d) at its meeting this spring. Professor Harner noted that the Criminal and Appellate Rules Committees also were considering amendments to their respective companion rules on electronic filing and service. The Committee would continue to monitor developments with respect to these companion rules.

Professor Gibson explained that the Committee previously approved amendments to Rule 5005(a)(2) that would track the current proposed amendments to Civil Rule 5(d). The Committee discussed the potential value to submitting the amendments to Rule 5005(a)(2) to the Standing Committee for publication on the same schedule as that pursued by the Civil Rules Committee for Civil Rule 5(d) and authorized Professor Gibson to do so with any necessary non-substantive conforming changes.

9. Coordination with Other Committees.

Judge Ikuta advised that the topic is on the agenda to promote more coordination and communication between the five advisory committees, as well as the Standing Committee, regarding potential rule amendments. There should be a heavy presumption in favor of parallel language. An example is the current electronic service rule provisions, for which the Criminal Rules Committee is going a different course for specific reasons. Professor Gibson stated that generally, one committee should lead the way on each issue. She noted the amendments regarding redaction as a good example of the need for coordination. Professor Harner created a chart with rule amendment cross-references for bankruptcy. Rebecca Womeldorf commented on the role of the Rules Committee Support Office (RCSO) in terms of coordination. The RCSO could provide alerts when a suggestion or possible rule amendment seems to impact more than one of the advisory committees, including other Judicial Conference committees.

Information Items

10. Future meetings: Fall 2016 in Washington D.C.

The Committee members will consider the list of hub cities for the spring 2017 meetings, and make a decision regarding location.

11. Deferred Recommendations.

The following previously approved recommendations will be included in the report of this meeting and submitted to the Standing Committee at its next meeting:

- Recommendation to publish amendment to line 8 of Official Form 309F. *Approved at fall 2015 Advisory Committee meeting.*

-Recommendation to publish amendments to Rules 8002 (Time for Filing Notice of Appeal), 8006 (Certifying a Direct Appeal to the Court of Appeal), and 8023 (Voluntary Dismissal). *All approved at fall 2015 Advisory Committee meeting.*

The following recommendations for final approval, all approved at the fall 2015 Advisory Committee meeting, will be bundled with the proposed amendments to Rules 3015 and 3015.1 at Discussion Agenda 5 and submitted to the Standing Committee in the future.

-Chapter 13 Plan Form (Official Form 113) and associated Rules 2002, 3002, 3012, 4003,

5009, 7001, and 9009.

12. New business.

There is one new suggestion regarding Form 101, and the matter was referred to the Forms Subcommittee.

13. Adjourn.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. Other than item 3A, none of the matters were moved to the Discussion Agenda. On motion, the items on the Consent Agenda were approved.

1. Subcommittee on Consumer Issues.

(A) Recommendation of no action regarding Suggestion 14-BK-G to remove Social Security Number from mailed or electronically distributed 341 notices.

Tab Consent 1A: Memo of March 7, 2016 by Professor Gibson.

(B) Report on comments concerning proposed amendment to Rule 1006(b) (payment of filing fees in installments) and recommendation to approve the amendment.

Tab Consent 1B: Memo regarding Rules 1001 and 1006(b) of March 3, 2016 by Professors Gibson and Harner.
-Proposed Rule 1006(b).

2. Subcommittee on Forms.

(A) Recommendation to approve technical changes to Official Bankruptcy Forms 106E/F, 119, 201, 206 Summary, 206E/F, 309A, 309I, 423, and 424.

Tab Consent 2A: Memo of February 29, 2016 by Ms. Healy and Mr. Myers.

(B) Recommendation of no action regarding suggestion 15-BK-J (seeking clarification of proposed amendments to Rule 9009).

Tab Consent 2B: Memo of March 2, 2016 by Professor Gibson.

(C) Recommendation of no action regarding suggestion 16-BK-A concerning NAICS code on Official Form 201.

Tab Consent 2C: Memo of March 2, 2016 by Professor Gibson.

3. Subcommittee on Business Issues.

(A) Recommendation to remove a previously approved amendment to Rule 3007(a) from the chapter-13-plan-form package of rule amendments and that it be reconsidered in connection with the Advisory Committee's noticing project.

Tab Consent 3A: Memo of March 3, 2016 by Professor Gibson.

(B) Report on comments and recommendation concerning proposed amendment to Rule 1001(scope of rules and forms) and recommendation to approve the amendment.

Consent Tab 3B: Memo regarding Rules 1001 and 1006(b) of March 3, 2016 by Professors Gibson and Harner.
-Proposed Rule 1001.