ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Washington, D.C.
October 1-2, 2015

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 1-2
Washington D.C.

Discussion Agenda

1. Greetings. (Judge Ikuta)

   Introduction of Assistant Report Professor Michelle M. Harner

2. Approval of minutes of Pasadena meeting of April 20, 2015. (Judge Ikuta)

   Tab 2A: Draft minutes.

3. Oral reports on meetings of other committees:

   (A) May 28-29, 2015 meeting of the Committee on Rules of Practice and Procedure. (Judge Ikuta, Professor Gibson)

   Tab 3A: Draft minutes of the May 28-29, 2015 Standing Committee meeting.

   (B) June 11-12, 2015 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Bernstein, Judge Smith)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues. (Judge Harris, Professor Gibson, and Professor Harner)

   (A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases (Judge Harris, Professor Gibson)

   Tab 4A: Memo of August 29, 2015 by Professor Gibson describing the Subcommittee's survey of current local practices regarding redaction requests and further steps the Subcommittee will take in considering a national redaction procedure.

(B) Suggestion 15-BK-E to amend Rule 4003(c) to change the burden of proof where state law provides the rule of decision.

Tab 4 B: Memo of August 30, 2015 by Professor Harner with attachment.

5. Joint Report by the Subcommittees on Consumer Issues and Forms. (Judge Harris, Judge Dow, Professor Gibson, Professor Harner)

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

Tab 5A: *[The Chapter 13 Plan Form materials are assembled in a separate addendum to the Agenda Book]*

(B) Report concerning the development of forms for subsections (f) and (g) of Rule *3002.1-Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence*, and additional amendments to the rule. (Judge Harris, Professor Gibson)

Tab 5B: Memo of September 4, 2015 by Professor Gibson.
•Proposed Director's Form 4100N, *Notice of Final Cure Payment*
•Proposed Director's Form 4100R, *Response to Notice*
•Proposed Rule 3002.1(b)
•Official Form 410S2

6. Report by the Subcommittee on Forms. (Judge Dow, Professor Gibson, Professor Harner, Mr. Myers, Ms. Healy)

(A) Recommendation to request that the Judicial Conference delegate to the Advisory Committee the authority to make non-substantive, technical, conforming changes to Official Bankruptcy Forms as needed. (Professor Gibson, Mr. Myers)

Tab 6A: Memo of September 4, 2015 by Professor Gibson.

(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. (Professor Harner)

Tab 6B: Memo of August 30, 2015 by Professor Harner.
•Proposed Form [number], *Creditor Change of Address*
•Proposed revised Official Form 410, *Proof of Claim*
•Proposed revised instruction to Official Form 410

7. Report by the Subcommittee on Business Issues. (Judge Bernstein, Professor Gibson, Professor Harner)

(A) Recommendation regarding *Stern* amendments to Rules 7008, 7012, 7016, 9027, 9033, previously approved by the Judicial Conference in September 2013, but withdrawn from consideration by the Supreme Court pending decisions in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) and *Wellness International Network, Ltd. v. Sharif*, 35 S. Ct. 1932 (2015); recommendation regarding *Stern*-related Suggestions 11BK-K and 15-BK-F. (Judge Bernstein and Professor Gibson).

Tab 7A: Memo of September 7, 2015 by Professor Gibson.
•Proposed 7008, 7102, 7016, 9027, and 9033.

(B) Suggestion regarding rule amendment for district court treatment of bankruptcy court judgment as proposed findings and conclusions (Suggestion 12-BK-H). (Judge Bernstein, Professor Gibson)

Tab 7B: Memo of September 7, 2015 by Professor Gibson.

(C) Report on work plan for bankruptcy rules noticing project (Judge Bernstein and Professor Harner)

Tab 7C: Memo of September 1, 2015 by Professor Harner outlining proposed work plan for bankruptcy rules noticing project which includes consideration of Suggestions 12-BK-M, 12-BK-B, 15-BK-H, and Comment BK-2014-0001-0062.

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

(Judge Jordan, Professor Gibson, Professor Harner)

(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 8A: Memo of September 4, 2015 by Professor Gibson.

9. Report by the Subcommittee on Technology and Cross Border Insolvency. (Judge Hamilton, Professor Gibson)

(A) Proposed amendment to Rule 5005(a)(2) to address proposed amendments to Civil Rule 5(d). (Judge Hamilton, Professor Gibson).

Tab 9A: Memo of September 10, 2015 by Professor Gibson
•Memo of September 2, 2015 by Julie Wilson and Bridget Healy; attachment.

10. Report by the Subcommittee on Attorney Conduct and Health Care. (Judge Jonker and Professor Harner).

(A) Recommendation concerning the Subcommittee's consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014. (Judge Jonker and Professor Harner)

Tab 10A: Memo of August 30, 2015, by Professor Harner.

Information Items

11. Oral report on the status of bankruptcy-related legislation. (Professor Gibson, Mr. Myers).

12. Future meetings: Spring 2016 meeting, March 31-April 1, in Denver. Suggestions for possible locations and dates for the fall 2016 meeting.

13. New business.

14. Adjourn.

Proposed Consent Agenda

The Chair and Reporters have proposed the following items for study and consideration prior to the Advisory Committee's meeting, and absent any objection, for approval 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 **Thursday, September 24, 2015.**

1. Subcommittee on Consumer Issues.

(A) Suggestion 13-BK-G that Rule 1015(b) be changed to use the word "spouse"; previously approved at the spring 2014 meeting but held pending the decision in *Obergefell*.

Tab Consent 1A: Memo of August 29, 2015 by Professor Gibson recommending previously approved changes go forward without publication as a conforming amendment implementing *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

(B) Suggestion 14-BK-G regarding inclusion of the debtor's full social security number on the version of the meeting of creditor's notice that is sent to the creditors listed in the debtor's schedules.

Tab Consent 1B: Memo of August 29, 2015 by Professor Gibson recommending no action.

2. Subcommittee on Forms.

(A) Suggestion 15-BK-A by Derek S. Tarson recommending that bankruptcy schedules be made gender neutral in light of *United States v. Windsor*, 570 U.S. 12 (2013).

Tab Consent 2A: Memo of August 30, 2015 by Professor Harner recommending no action.

(B) Suggestion 15-BK-B by Bankruptcy Judge Martin Teel Jr. proposing revisions Director's Form 263, Bill of Costs.

Tab Consent 2B: Memo of August 30, 2015 by Professor Harner describing changes made by the AO as a result of the suggestion.
•Revised Director's Form 263.
•Revised Instruction for Form 263.

(C) Recommendation to renumber Official Forms 20A, Notice of Motion or Objection, and 20B, Notice of Objection to Claim.

Tab Consent 2C: Memo of September 7, 2015 by Professor Gibson.

3. Subcommittee on Business Issues.

(A) The Subcommittee is considering possible changes to Official Forms 25A-C, and 26, and expects to make a report at the spring 2016 meeting. Exhibit A to Official Form 201, was renumbered as Official Form 201A at the spring 2015 meeting, and is on track to go into effect December 1, 2015. The Subcommittee is no longer considering further changes to that form.

4. Privacy, Public Access, and Appeals.

(A) Suggestion regarding amendment of Rule 8018 (Serving and Filing Briefs; Appendices) (Suggestion 15-BK-C).

Tab Consent 4A: Memo of September 4, 2015, by Professor Harner.

(B) Recommendation concerning timing of publication of deferred recommendations to revise Rules 8002(a)(5) and 8006(b) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting), and Rule 8023 (approved at the spring Advisory Committee meeting); and concerning Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding designation of the record in bankruptcy appeals.

Tab Consent 4B: Memo of September 4, 2015, by Professor Gibson.

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Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective July 7, 2015

Subcommittee on Consumer Issues Judge Arthur I. Harris, Chair Judge Adalberto Jordan Judge Dennis R. Dow Jeff J. Hartley, Esq. Jill Michaux, Esq. Richardo I. Kilpatrick, Esq. Professor Edward R. Morrison James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*	**Subcommittee on Business Issues** Judge Stuart M. Bernstein, Chair Judge Jean C. Hamilton Judge Robert James Jonker Judge Amul R. Thapar Jeff J. Hartley, Esq. Tom Mayer, Esq. James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*
Subcommittee on Forms Judge Dennis R. Dow, Chair Judge A. Benjamin Goldgar Judge Arthur I. Harris Richardo I. Kilpatrick, Esq. Jill Michaux, Esq. James J. Waldron, *ex officio* Diana Erbsen, Esq., *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*	**Subcommittee on Style** Judge A. Benjamin Goldgar, Chair Judge Arthur I. Harris Jeff J. Hartley, Esq. Diana Erbsen, Esq., *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*
Subcommittee on Privacy, Public Access and Appeals Judge Adalberto Jordan, Chair Judge A. Benjamin Goldgar Judge Jean C. Hamilton Diana Erbsen, Esq., *ex officio* Tom Mayer, Esq. Ramona D. Elliott, Esq., *EOUST liaison*	**Subcommittee on Attorney Conduct and Healthcare** Judge Robert James Jonker, Chair Jeff J. Hartley, Esq. Tom Mayer, Esq. Ramona D. Elliott, Esq., *EOUST liaison*
Subcommittee on Technology and Cross Border Insolvency Judge Jean C. Hamilton Judge Arthur I. Harris Professor Edward R. Morrison Ramona D. Elliott, Esq., *EOUST liaison*	**Ad Hoc Subcommittee on Rule 3002.1 (joint project of Consumer & Forms)** Judge A. Benjamin Goldgar – Chair Judge Dennis R. Dow Judge Arthur I. Harris Jill Michaux, Esq. Richardo I. Kilpatrick, Esq James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*
	Civil Rules Liaison: Judge Arthur I. Harris

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TAB 2A

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 20, 2015
Pasadena, CA

DRAFT MINUTES

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert James 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
Professor Edward R. Morrison
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Jill Michaux, Esquire
Thomas Moers Mayer, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Bankruptcy Judge Martin Isgur
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on the Administration of the Bankruptcy System
Bankruptcy Judge Eugene R. Wedoff
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Molly Johnson, Senior Research Associate, Federal Judicial Center
Patricia Ketchum, consultant to the Committee
James Wannamaker, Esq., consultant to the Committee
Michael T. Bates, Senior Company Counsel, Wells Fargo

Marcy Ford, Trott Law Firm, Farmington Hills, Michigan
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia
Raymond J. Obuchowski, National Association of Bankruptcy Trustees
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Daniel A. West, South Law Firm, St. Louis, Missouri

Introductory Items

1. Greetings

Judge Sandra Ikuta opened the meeting, welcoming Committee members to Southern California. The Committee members as well as guests introduced themselves. Judge Ikuta noted the absence of Troy McKenzie, the former Assistant Reporter to the Committee, who had taken a new position as deputy attorney general at the Department of Justice's Office of Legal Counsel. Judge Ikuta outlined her idea of using a consent and discussion calendar approach to the meetings going forward. Items that are non-controversial and do not need discussion could be considered on the consent calendar and those that need greater discussion could be considered on the discussion calendar. Any issue could be moved from one calendar to the other.

2. Approval of minutes of the Charleston, SC meeting of September 29-30, 2014

The minutes of the meeting of September 29-30, 2014 were approved.

3. Oral Reports on Meetings of Other Committees

(A) January 2015 meeting of the Committee on Rules of Practice and Procedure

Professor Elizabeth Gibson reported on the January 2015 Committee on Rules of Practice and Procedure (Standing Committee) meeting. The Committee had one action item, the proposed amendment to Rule 1001, and the Standing Committee approved it for publication. An update was provided to the Standing Committee about the Chapter 13 plan form process and the final set of modernized forms. The draft minutes from the January 2015 Standing Committee meeting were included in the agenda materials at Tab 3A.

(B) December 2014 meeting of the Committee on the Administration of the Bankruptcy System

Judge Erithe Smith reported on the December 2014 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). The Committee on Court Administration and Case Management (CACM) took the position that bankruptcy judges do not have the discretion to waive the reopening fees in individual chapter 11 cases and the Bankruptcy Committee asked CACM to review this decision.

No decision has been made. The Bankruptcy Committee deferred any action on the Bankruptcy Administrator (BA) program as the Administrative Office (AO) is completing an assessment of the program. There are several proposals to reduce or expand the powers of the BA program, including a proposal to transfer control of the U.S. Trustee program to the courts, but the Bankruptcy Committee recommended that these proposals be held off pending the completion of the assessment.

(D) Spring 2015 meeting of the Advisory Committee on Civil Rules

Judge Arthur Harris reported on the spring meeting of the Advisory Committee on Civil Rules (Civil Rules Committee), noting that Judge Bates will be the new chair of the Civil Rules Committee. The amended rules regarding discovery will likely be effective in December 2015. The Civil Rules Committee also discussed amending Civil Rule 6 to eliminate the rule providing three additional days to take an act when service is made electronically as well as an amendment to Civil Rule 5 to require electronic filing. The proposed amendment to Civil Rule 5 would require electronic filing unless prohibited by local rule. In response to concerns raised by the Advisory Committee on Criminal Rules, an express exception for *pro se* filers was added.

The Civil Rules Committee meeting also discussed potential changes to Civil Rule 68. The Bankruptcy Rules have a corresponding rule – 7068 – regarding offers of judgment. The Civil Rules Committee's Civil Rule 23 Subcommittee will have a conference in September 2015. Its Appellate Subcommittee is considering the issue of manufactured finality.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues

(A) Suggestion 14-BK-B from CACM to Amend Rules Regarding Redaction of Private Information in Closed Cases

Judge Harris provided a brief overview of the issue, referring to the memo at Tab 4A. The Judicial Conference adopted a policy that a case does not need to be reopened to redact a previously-filed document. The Conference approved a redaction fee of $25 per case for instances in which redaction is the only reason for reopening a case. It is on the miscellaneous fee schedule. For this reason, an immediate amendment is not necessary and the subcommittee will continue to consider several issues related to redaction, including notice.

(B) Report Regarding Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to Amend Rule 1006(b)

Judge Harris explained that this issue has been under consideration for several years. It relates to Suggestion 12-BK-I by Judge Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Bankruptcy Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

A report from Professor Gibson detailing the issue was included at Tab 4B of the materials.

At the fall meeting, the Committee decided not to make an amendment to Rule 1006(b) because no language change was needed to permit minimum payments with installment applications. The Committee also addressed a different issue: that some courts rejected filings where debtors did not have the upfront installment payments. That issue was referred back to the subcommittee, which recommended an amendment to Rule 1006(b) to require courts to accept a petition regardless of whether any portion of the filing fee is provided so long as the petition is accompanied by a signed application to pay the filing fee in installments. The subcommittee further recommended that the accompanying Committee Note cross-reference Rule 1017.

A motion was made to approve the recommendation and it was approved unanimously. The recommendation will be forwarded to the Standing Committee for consideration at its May 2015 meeting for approval for publication.

The subcommittee recommended that the Committee take no action on a separate suggestion from a Committee member to amend the Rule to detail the proper procedure in a case in which the debtor has unpaid fees from a prior case and requests to pay the filing fee for a subsequent case in installments.

(C) Report Concerning Suggestion 13-BK-G to Amend Rule 1015(b)

The suggestion to change the reference in Rule 1015(b) to the word "spouse" had been approved at the spring 2014 meeting. The Committee agreed with the subcommittee's recommendation to wait for the Supreme Court's decision in *Obergefell v. Hodges*, No. 14-556, to be decided by June before deciding about publication of the proposed amendment.

(D) Achieving a Better Life Experience Act of 2014 (the ABLE Act) Amendments

Judge Harris explained that the passage of the ABLE Act on December 19, 2014 necessitates several amendments to Official Forms 106A/B, 122A-2, and 122C-2 as well as a change to the Committee Note for Official Form 106A/B. The changes are all minor and add references to ABLE Act accounts to the forms. A memo detailing the required

changes is included at Tab 4D of the agenda materials. The subcommittee recommended the following edits to the materials in the agenda book: to change the term "interest" to "interests," the term "continues" in the means tests forms to "continuing," and "defined under" or "defined by" to "defined in" in the forms and Committee Note.

The changes will be included with the other modernized forms changes that will go to the Standing Committee for its May 2015 meeting. A motion was made to approve the amendments and it was unanimously approved.

5. Joint Report by the Subcommittees on Consumer Issues and Forms

(A) Discussion Regarding Proposed Chapter 13 Plan Form (Official Form 113) and Related Proposed Amendment Rules

Judge Ikuta started that the Committee's first decision was a policy decision regarding how to proceed with the plan form. She provided a brief overview of the history of the development of the plan form. The form was published in 2013 and again in 2014, and a hearing was held in January 2015 in Washington D.C. at which several people testified both for and against the published plan form. Both publications resulted in many comments, and the majority of the comments objected to a mandatory chapter 13 plan form. One of the comments received in 2014 was a letter opposing the plan form signed by 144 bankruptcy judges. Following the hearing, a compromise solution was proposed by a small group of bankruptcy judges and practitioners, including some of the 144 judges who had signed the letter opposing the plan form. The materials related to the chapter 13 plan form are included at Tab 5A of the agenda book and Appendix A of the appendices book.

Professor Gibson outlined the options for the chapter 13 plan form and related rules. The options include: (1) going forward with the published plan form and related rules with any necessary changes in response to comments received by presenting the package to the Standing Committee for approval at its May 2015 meeting, (2) going forward with the proposed amended rules as published but not issue an official form, using the published version of the plan form as either a Director's Form or have not form at all, (3) not proceed with any aspect of the chapter 13 plan form or related rules, or (4) proceed with some type of compromise with regard to the plan form and related rule amendments.

The compromise would not necessarily be the same as the one proposed by the commenters, but its premise would be the same: that district could opt-out of using the national form if the district had a local plan with certain required provisions. This option would require an amendment to Rule 3015.

If the Committee decided to proceed with a compromise approach, the Committee would also have to consider timing issues. Assuming that the Official Form and related

rules remain as a package, republication of any part of that package in August 2016 means that the form and rules would be on track to go into effect on December 1, 2018. On the other hand, if republication is not deemed necessary, the chapter 13 plan form and rules could be promulgated a year earlier.

The Committee engaged in a robust discussion. Many members spoke in favor of a compromise solution, noting that it achieves some of the goals of the original chapter 13 plan form project, including greater efficiency in the chapter 13 process and also will provide the opportunity to test the plan form. A number of members expressed support for continuing with the current plan form as published. Several members noted their objection to continuing with the proposed rule amendments by themselves. Members also discussed whether republication would be necessary.

Following the discussion, a motion was made to explore a compromise approach and the motion was approved unanimously. A second motion was made to defer a decision on republication until the Fall 2015 meeting. This motion was also approved unanimously. Judge Ikuta assigned this project to the Forms Subcommittee, which may seek the help of former members of the Working Group that developed the chapter 13 national form, as well as other members of the bankruptcy community. The Forms Subcommittee will recommend revisions to the form and rules and recommend whether to republish the form and associated rules at the fall meeting.

(B) Report Regarding Potential Forms to Implement Rules 3002.1(f) and (g)

Judge Goldgar reported that the subcommittee is continuing its work on the proposed forms related to Rules 3002.1(f) and (g).

(C) Report on Comments and Recommendation Regarding Published Rule 3002.1

Judge Goldgar reported that there were several comments on the published rule, although they were closer to suggestions than comments. A motion was made to approve the amended form as published and the motion was approved unanimously.

6. Report by the Subcommittee on Forms

(A) Report and Recommendation on Effective Date for Modernized Forms

Judge Dow reported on the Forms Subcommittee's recommendations. First, the subcommittee recommended, with one dissent, that the modernized forms become effective December 1, 2015. The Committee modernized the forms to make them more usable for debtors and creditors as well as to utilize the data benefits of the Next Gen system. Going forward with the forms in 2015 achieves the first of the two objectives and permits the AO to build its database for the new forms rather than for both sets of forms. The subcommittee's research established that the majority of private software

vendors will be prepared to proceed with the modernized forms in December. Therefore, the subcommittee did not recommend delaying the effective date of the forms until the Next Gen system is ready to accept data from the modernized forms, which would be December 2016, at the earliest, or December 2017.

Second, the subcommittee recommended permitting the use of the current Official Forms after December 1, 2015 solely by the Electronic Self-Representation (ESr) program. The program permits *pro se* debtors to use an online system to complete the case opening forms for bankruptcy in three courts: the District of New Jersey, the District of New Mexico, and the Central District of California. The ESr program is not designed to work with the modernized forms.

Third, the subcommittee considered how to provide the bankruptcy community with guidance regarding the conversion to the modernized forms by courts and parties, including guidance concerning the use of superseded forms in certain circumstances in cases that were started before the effective date of the new forms. The subcommittee proposed adopting language that is used with the promulgation of amended rules, that the new forms should be used in pending cases "insofar as just and practicable."

A motion was made to make December 1, 2015 the effective date for the modernized forms, permit the use of the current forms in the ESr courts post-December 1, 2015, and to use the suggested language regarding the use of the superseded forms. The motion was approved unanimously.

Judge Ikuta and Judge Dow thanked Judge Perris for her work on the project.

(B) Report on Comments on Published Forms

Judge Dow stated that reviewed the many comments filed on the published forms. A summary of all of the comments and the subcommittee's recommendations were included in the agenda book at Tab 6(B)(1) and in Appendix B. The proposed forms are included in Appendix C. Judge Dow noted that the Forms Subcommittee recommended several revisions to the forms' instructions, and these revisions did not need approval by the Standing Committee or the Judicial Conference.

A motion was made to approve the forms as set forth in the agenda book with the revisions that the language regarding "with net value" be deleted from Official Form 206A/B and that the term "lease" be added to questions about ownership to Official Form 206A/B to add "lease" in questions about ownership. The motion was approved.

A motion was made to approve the following of the published forms as set out in the agenda materials with the minor edits as described above: Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B,

309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B. The motion was approved.

(C) Report and Recommendation on Comments on Official Form 410A

Judge Dow stated that Official Form 410A is the proof of claim attachment form used by mortgage creditors and that the form was included as part of Appendix C. The form was published in August 2014 and the subcommittee recommended that the form be approved as published with a few minor alternations in response to comments. The Department of Justice commented that the modernized form eliminates an itemized list of fees included on the current version of the form. After discussion, the Committee determined not to include the itemized list of fees on the modernized form.

A motion was made to approve Official Form 410A as published, with the minor edits. The motion was approved.

7. Report by the Subcommittee on Business Issues

(A) Recommendation Concerning Whether to Publish Proposed Amended Official Forms 9F and 9F(Alt.) (to be Official Form 309F)

Judge Bernstein reported on Suggestion 12-BK-I regarding the language used on Official Forms 9F and 9F(Alt.) (Official Form 309F) regarding the commencement of a dischargeability action and the deadline for filing such an action. The Committee had previously approved a revisions to these forms in response to an ambiguity in section 1141(d)(6)(A) of the Bankruptcy Code at the fall 2014 meeting. The subcommittee recommended publishing the amended form after the modernized form goes into effect. A motion was made to approve this recommendation and the motion was approved.

(B) Report on Noticing Working Group

Judge Bernstein explained that because Troy McKenzie has left the Committee as Assistant Reporter, this issue will wait until the new Assistant Reporter is appointed.

(C) Report Regarding Small Business Forms

Judge Bernstein reported that these forms are ones related to small business cases (Official Forms 25A, 25B, and 25C), Official Form 26, and Exhibit A to the petition (to be re-numbered Official Form 201A). The subcommittee is continuing to work on the forms. Mr. Mayer provided an update on his research regarding Exhibit A/Official Form 201A, which included speaking with several lawyers at the Securities and Exchange Commission. He determined that the SEC does use the forms and would use the form with new Official Form 401. The SEC does not monitor bankruptcy filings by reviewing Form 8-K filings; instead, they look for Exhibit A/Official Form 201A filings in

bankruptcy cases. Although service of the form on the SEC would be helpful, it is not necessary. Mr. Mayer advised that he is working on a re-draft of Exhibit A/Official Form 201A and that he will circulate the draft to the subcommittee when complete.

Mr. Mayer will also provide a suggestion to the Business Subcommittee for a change in the rules to address a problem with companies ceasing SEC filings immediately before or after filing for bankruptcy.

(D) Recommendation Regarding Proposed Amended Rule 9006(f)

Professor Gibson reported that this amendment eliminated the rule providing three additional days to take an act when service is made electronically. A memo on the topic was included at Tab 7D of the agenda materials. The other rules committees published similar amendments. There were few comments submitted in response. The various rules committees are working together to develop consensual language in response to an objection raised by the Department of Justice (DOJ) that the elimination of the three-day rule could lead to gamesmanship in litigation.

A motion was made to delegate authority to the Reporter to communicate that while the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

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

(A) Recommendation Regarding Revising the Uniform Numbering System for Local Bankruptcy Rules

Judge Adalberto Jordan reported on the uniform local rules renumbering issue. Scott Myers explained that the uniform numbering system must be amended in order to match the revised Part VIII Rules. The uniform numbering system document is posted online for courts to use in promulgating their local rules. The Committee agreed to this change.

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

(A) Report Regarding Amendments Related to Electronic Filing

Professor Gibson reported on the current status of the Civil Rules Committee's electronic filing proposal which is discussed in the materials included in the agenda book at Tab 9A(1). The Advisory Committee on Criminal Rules proposed revised language

that would exempt *pro se* parties from electronic filing requirements and permit electronic filing by *pro se* parties where permitted by local rule. A motion was made to delegate the authority to complete the negotiations for this language to the Reporter and Chair, and the motion was approved unanimously.

Professor Gibson reported that the Civil Rules Committee has proposed permitting service via a court's CM/ECF system without the consent of the person served and via another electronic method with consent.

(B) Review and Recommendation Regarding Comments on Official Form 401 and Related Proposed Rule Amendments

Professor Gibson reported that Official Form 401 resulted from the Forms Modernization Project's decision to create separate petitions for individual and non-individual debtors and the determination that a separate chapter 15 petition would allow the deletion of otherwise unnecessary information from the other petitions. In addition, the rules that relate to chapter 15 were revised to create a separate rule governing responses to chapter 15 petitions. The form and proposed amended rules were published in August 2014. One comment suggested a small change to Rule 1012 regarding service of a response. The SEC suggested that an Exhibit A/Official Form 201A requirement be added to Official Form 401. This will be considered by the Business Subcommittee. A motion was made to approve Official Form 401and the related proposed chapter 15 rules, and the motion passed unanimously.

10. Report by the Subcommittee on Attorney Conduct and Health Care

(A) Report Concerning Suggestion 13-BK-C by the American Bankruptcy Institute's (ABI) Task Force on National Ethics Standards to Amend Rule 2014

Judge Robert Jonker discussed the subcommittee's work on this issue. The ABI suggested changes to Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals. The subcommittee will continue to work on this issue.

Information Items

11. Report on Decisions Interpreting 11 U.S.C. § 109(h)

Professor Gibson provided an update on this issue. There is one new case interpreting Bankruptcy Code § 109(h) as to whether credit counseling can be obtained on the day of the filing of the petition but after the time of the filing. There was as a direct appeal to the Seventh Circuit of a case from the Northern District of Illinois that allowed post-filing credit counseling but it was determined to be moot on appeal. She does not see a need for any changes to official forms at this time.

12. Report on Legislative Issues Related to Bankruptcy

There was nothing to report.

13. Supreme Court Update

Professor Gibson updated the group on *Sharif v. Wellness Int'l Network, Ltd.* (No. 13-935) which was heard by the Court in January. There are several other cases before the court, including a case regarding fee awards for defending a fee application and two cases involving stripping off junior mortgages where the senior lien is under-secured. During the argument on these cases, several justices questioned whether *Dewsnup v. Timm*, 502 U.S. 410 (1992) should be reconsidered.

14. *Deferred consideration*: The following items have been approved for submission to the Committee on Practice and Procedure in the future.

(A) Proposed revisions to Rule 8002(a)(5) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting*.

(B) Proposed revisions to Rule 8006(b) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting*.

(C) Proposed revisions to Rule 8023. *Approved at the spring 2014 Advisory Committee meeting*.

(D) Proposed revisions to Rule 3002.1 that notice requirements for payment changes for home equity lines of credit (HELOCs) may be modified by court order. *Approved at the fall 2014 Advisory Committee meeting*.

15. *Future consideration:* Suggestions and issues deferred for future consideration.

(A) Suggestion 12-BK-M by Judge Scott Dales to amend Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed proof of claim. *Placed on the future consideration list at the fall 2013 meeting pending receipt of comments on the Chapter 13 Plan Form and related rules amendments*.

(B) Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding the designation of the record in bankruptcy appeals.

(C) Recommendation concerning previously approved and then withdrawn amendments to Rules 7008, 7016, 9027, and 9033 (based on *Stern v. Marshall*), as well as Alan Resnick's Suggestion 12-BK-H to amend the Part VIII rules to

allow appellate courts to treat bankruptcy courts' judgments as proposed findings of facts and conclusions of law.

16. Future meetings: Fall 2015 meeting, October 1-2 in Washington, D.C.

Judge Ikuta stated that the next meeting with be in Washington, D.C. on October 1-2, 2015. The meeting will be held at the Administrative Office.

17. New Business

Judge Ikuta noted that the new suggestions have been assigned as set forth below. No one voiced any objections to the assignments.

(A) Suggestion 14-BK-G by Gary Streeting the Rule 2002(a)(1) be amended so that only the last 4 digits of a debtor's Social Security Number are including in the 341 meeting notice sent to creditors. Assigned to the Consumer Subcommittee.

(B) Suggestion 15-BK-A by Derek S. Tarson that the bankruptcy schedules be revised to reflect ownership categories that are gender neutral so that they can be accurately completed by same sex spouses. Assigned to the Forms Subcommittee.

(C) Suggestion 15-BK-B by Judge S. Martin Teel, Jr. to revise Director's Form 263-*Bill of Costs*. Assigned to the Forms Subcommittee.

(D) Suggestion 15-BK-C by Professor Kenneth N. Klee to amend Rule 8018-*Serving and Filing Briefs; Appendices*. Assigned to the Privacy, Public Access and Appeals Subcommittee.

18. Adjournment

Judge Ikuta thanked everyone for attending the meeting. The meeting adjourned at 3:20 p.m.

TAB 3A

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TAB 4A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: CACM SUGGESTION REGARDING REDACTION

DATE: AUGUST 29, 2015

The Committee on Court Administration and Case Management ("CACM") submitted a suggestion (14-BK-B) regarding the procedure for redacting personal identifiers in documents that have already been filed in bankruptcy cases. One of its recommendations concerns the procedure for redaction in closed cases. CACM made a recommendation to the Judicial Conference of the United States ("JCUS") that the judiciary's privacy policy provide that a closed bankruptcy case does not have to be reopened in order for the court to order the redaction of information described in Rule 9037. The JCUS accepted that recommendation and added § 325.60 to the *Guide to Judiciary Policy,* Vol. 10 (Public Access and Records) to reflect that policy.[1] CACM suggests that Bankruptcy Rule 5010 (Reopening Cases) be amended to reflect that policy.

CACM's second recommendation to the Advisory Committee relates to both open and closed cases. It suggests that Rule 9037 (Privacy Protection for Filings Made with the Court) be

[1] Section 325.60(a) provides:

> Bankruptcy courts are authorized by statute to open a case for cause, although a court may sometimes act without opening the case (e.g., to correct clerical errors in the record). 11 U.S.C. § 350(b); Advisory Committee Note to Fed. R. Bankr. P. 5010. A court should not typically reopen a case solely to address a request to redact personal identifiers from the case record. Generally, the act of redacting the record is ministerial in nature and does not impact the administration of the estate. Achieving some uniformity in this area will improve treatment of statistical credit associated with these types of requests.

Subsection (b) goes on to state that the Miscellaneous Fee schedule, as of December 1, 2014, does not allow a reopening fee to be charged for reopening a case solely to redact a record in the case. Instead, the schedule provides for a $25 redaction fee for each open or closed case affected by a redaction request.

amended to require that notice be given to affected individuals of a request to redact a previously filed document. This amendment would reflect the JCUS's recent addition of § 325.70 to the privacy policy, which states in part that "the court should require the . . . party [requesting redaction] to promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable)."

The Subcommittee began its consideration of the CACM suggestion in 2014. It reported to the Advisory Committee at the fall 2014 meeting that it was considering developing an amendment to Rule 9037 to specify the procedure for seeking redaction of previously filed documents, including any notice requirements, and that the issue of case reopening would be better addressed in that rule. The Subcommittee reported at the spring 2015 meeting that it wanted to gather information about how bankruptcy courts are currently responding to requests to redact information in previously filed documents. In particular, the Subcommittee was interested in learning the various ways in which courts are attempting to accommodate the need to inform individuals that belated redaction is being sought of personal identifiers without drawing attention to the public availability of the unredacted documents.

In April Jim Waldron conducted an online survey of bankruptcy clerks to obtain this information. This memorandum discusses the results of the survey and provides information about the Subcommittee's plans to draft an amendment to Rule 9037 to provide a national procedure for redaction of already filed documents.

Survey Results

There were 80 respondents, representing all of the circuits and 79 districts. 86.25% reported that they require a party seeking redaction to file a motion. The remaining respondents

indicated that in their districts parties request redaction by one of the following methods: application; notice of redaction; phone call or email to the clerk's office; request to restrict public access; filing of an amended, redacted claim; praecipe; and request. Several of the respondents said that the redacted document had to be submitted along with the request.

Most of the courts that require a motion put the motion on the docket (89.47%) but do not hold a hearing (94.67%). Courts vary regarding the point at which they restrict public access to the unredacted document. They are about evenly divided between courts that restrict access upon the filing of the motion and those that do not restrict access until an order is entered. Several of the respondents that follow the latter practice indicated that redaction requests are ruled on quickly. Some respondents noted that they also restrict access to the motion.

The responses were also about evenly divided on whether notice of the request to redact is given to the individuals whose personal identifiers were not originally redacted. 48.75% said that affected individuals are given notice, and 51.25% said that they are not required to be given notice. With respect to whether the court requires representation for affected minors, most respondents said either that the issue has not yet come up in their district or that the debtor's attorney represents any minors.

All but two respondents stated that after a redaction request is granted, they restrict access to the original document rather than delete it. This practice is consistent with § 325.80 of the *Guide to Judiciary Policy*. It states that "[i]t is recommended that the procedures for redaction preserve the full record so that the originally filed documents are restricted from public view and the correctly redacted documents are subsequently filed and made available to the public." Also consistent with the new JCUS policy, 85% of the respondents reported that they

do not reopen closed cases in order to redact a document. The other 15% said that they administratively reopen closed cases when redaction is sought.[2]

The Subcommittee's Next Steps

Judge Harris, the Subcommittee's chair, has appointed a group of Subcommittee members to produce a draft for the Subcommittee's review of an amendment to Rule 9037. Among the issues the group will consider in drafting the amendment are the following:

- Should the rule state that closed cases generally do not need to be reopened in order to redact a document, or is the new JCUS policy sufficient?
- Should the rule specify that a party seeking redaction of a previously filed document must proceed by motion? Should it require that the motion be accompanied by the document as it is proposed to be redacted? Should it require that the motion also include a request to restrict access to the unredacted document?
- Should the rule require that a motion for redaction be reflected on the docket?
- Should the rule specify when public access to the unredacted document or the motion itself should be restricted?
- Should the rule implement the JCUS policy that "prompt" notice of the motion to redact be given to the debtor, trustee, U.S. trustee, and anyone whose personal identifier was revealed? If so, should it address the issue of representation of minors?
- Should the rule prescribe the manner of redaction, i.e. that the original document should be protected from public access, but not altered, and the redacted document should be made available to the public?

[2] The remaining question asked about the procedure for handling a large redaction request affecting multiple cases. Several respondents said that they would open a miscellaneous proceeding to handle all the cases together, while others responded that they would require a motion and order in each case.

- Should the rule prescribe procedures for seeking and handling a redaction request affecting a large number of cases?

The Subcommittee expects to present a proposed amendment to the Advisory Committee at the spring 2016 meeting.

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TAB 4B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: SUGGESTION TO AMEND RULE 4003(c)

DATE: AUGUST 30, 2015

The Advisory Committee received a suggestion from Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, to amend Bankruptcy Rule 4003 in light of the U.S. Supreme Court's decision in *Raleigh v. Illinois Department of Illinois*, 530 U.S. 15 (2000). *See* Suggestion 15-BK-E. The Subcommittee has reviewed, and has discussed the issues identified by, the suggestion on a preliminary basis. To help the Advisory Committee understand the relevant issues, the Subcommittee has attached a preliminary memorandum prepared by the Assistant Reporter on the suggestion. The Subcommittee believes that the suggestion warrants further consideration, and it has asked the Assistant Reporter to conduct additional research to supplement the preliminary memorandum. The Subcommittee intends to provide a further report to the Advisory Committee on this matter at the Spring 2016 meeting. Accordingly, the Subcommittee is not making any recommendation on the suggestion at this time.

Attachment

PRELIMINARY MEMORANDUM

TO: SUBCOMMITTEE ON CONSUMER ISSUES

FROM: MICHELLE HARNER, ASSISTANT REPORTER

RE: SUGGESTION TO AMEND RULE 4003(c)

DATE: AUGUST 12, 2015

The Advisory Committee received a suggestion from Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, to consider the amendment of Bankruptcy Rule 4003(c).[1] The primary issue is the burden of proof in litigation involving a debtor's entitlement to a claimed exemption under section 522 of the Bankruptcy Code. Specifically, the suggestion posits that the language of Bankruptcy Rule 4003(c), which places the burden of proof on the party objecting to the claimed exemption, alters the substantive rights of the parties in violation of the Rules Enabling Act. This memorandum proceeds as follows: (i) a brief summary of the Advisory Committee's past deliberations on this particular issue; (ii) an analysis of the relevant case law, statutory law, and policy considerations; and (iii) a discussion of the suggested amendment to Bankruptcy Rule 4003(c) and competing considerations.

Past Deliberations

The Advisory Committee previously considered a suggestion to amend Bankruptcy Rule 4003(c), which was very similar in substance to Suggestion 15-BK-E.[2] The previous suggestion also was based on the Supreme Court's holding in *Raleigh v. Illinois Department of*

[1] *See* Suggestion 15-BK-E, submitted by letter dated July 10, 2015.
[2] *See* Advisory Committee on Bankruptcy Rules Agenda Book, September 18-19, 2003, at 135-136 (Memorandum from Jeff Morris, Reporter, to the Advisory Committee Regarding the Burden of Proof for Objections to Exemptions).

Illinois, 530 U.S. 15 (2000), that the burden of proof is a substantive part of a claim, and the potential conflict that this decision creates in the context of Bankruptcy Rule 4003(c). Based on the relevant report from the Advisory Committee meeting, the Advisory Committee decided to defer consideration of the suggestion to allow the law to develop further on the relevant legal issues.

Analysis of Bankruptcy Rule 4003(c) and Related Issues

Overview

The 1978 Bankruptcy Code introduced a new approach to exempting property from the reach of creditors in a debtor's bankruptcy case:

- The debtor would file a list of exempt property with her bankruptcy petition, and those claimed exemptions would be presumed valid unless a party objected. Under prior law, the trustee in bankruptcy would file a report identifying which of the debtor's claimed exemptions would be allowed or disallowed, and the debtor (or other party in interest) could object.[3]

- A debtor's choice of exemptions also changed. The debtor could choose between federal exemptions and state exemptions, unless the applicable state had opted out of the federal exemption scheme. Under prior law, state law governed exemptions in bankruptcy.[4]

The latter change was a last minute compromise between those policymakers concerned with uniformity in bankruptcy laws and those concerned with preserving state law rights.[5] Overall, the changes appeared to further the "fresh start" policy of the 1978 Bankruptcy Code.[6]

[3] FED. R. BANKR. P. 403 (repealed 1983).
[4] *See, e.g.*, Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 24 (1995) ("The exemption question, so divisive under the 1867 Act, was resolved in favor of allowing the debtor to claim only state exemptions. No separate federal exemptions were permitted.").
[5] Indeed, the 1978 Bankruptcy Code originally proposed giving the debtor the choice of federal or state exemptions. A last minute change to the legislation incorporated the opt-out provision, which allowed states to require debtors in their states to use state law exemptions. *See* Tabb, *supra* note 4, at 37. *See also* Veryl Victoria Miles, *A Debtor's Right to Avoid Liens Against Exempt Property Under Section 522*

Section 522(b) of the Bankruptcy Code identifies the kinds of exemptions a debtor may claim in her bankruptcy case. Section 522(b)(1) provides that "[n]otwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection." 11 U.S.C. § 522(b)(1). Section 522(b)(3), in turn, provides that exempt property includes "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition." 11 U.S.C. § 522(b)(3)(A). The majority of states have opted out of the federal exemption scheme.[7] For example, the applicable California statute provides: "Pursuant to the authority of [section 522(b)], the exemptions set forth in [section 522(d)] are not authorized in this state." CAL. CODE CIV. P. § 703.140.

Section 522(l) arguably creates a presumption in favor of the list of exemptions filed by the debtor, stating: "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section.... Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522(l). The Bankruptcy Code does not, however, allocate the burden of proof if a party objects to a debtor's claimed exemptions. Rather, Bankruptcy Rule 4003(c) provides: "In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections." FED. R. BANKR. P. 4003(c).

Although the case law resolving exemption disputes has largely applied Bankruptcy Rule 4003(c) regardless of whether a debtor's exemptions were governed by federal or state

of the Bankruptcy Code: Meaningless or Meaningful?, 65 AM. BANKR. L.J. 117, 121-125 (1991).

[6] *See, e.g.*, Schwab v. Reilly, 130 S.Ct. 2652 (2010) ("We agree that 'exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a "fresh start."'") (citations omitted).

[7] *See* Tabb, *supra* note 4, at 37-38.

law,[8] more recent decisions have questioned this scheme as the U.S. Supreme Court has articulated a preference for treating the burden of proof as a substantive part of the claim.[9] Characterizing the burden of proof in this manner suggests that the law governing the underlying claim (i.e., the law providing the rule of decision) should also govern the burden of proof. This potentially creates a conflict between Bankruptcy Rule 4003(c) and state law in those cases in which state law governs the exemption but places the burden of persuasion for establishing the exemption on the debtor.[10]

Supreme Court Jurisprudence on Burden of Proof

In *Raleigh v. Illinois Department of Illinois*, the Supreme Court stated, "[T]he burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden

[8] Even following the Supreme Court's decision in *Raleigh*, many courts have continued to apply Bankruptcy Rule 4003(c) in exemption litigation, or did not find it necessary to address the potential conflict to resolve the particular issue in the case. *See, e.g.*, Tyner v. Nicholson (*In re* Nicholson), 435 B.R. 622, 633-34 (9th Cir. B.A.P. 2010) ("Because Congress has regulated the allowance of exemptions in bankruptcy, the Code and Rules may alter burdens of proof relating to exemptions, even if those burdens are part of the 'substantive' right under state law."); Walters v. Bank of the West (*In re* Walters), 450 B.R. 109, 113 (8th Cir. B.A.P. 2011) ("However, the burden of proof is largely irrelevant in this case, because the bankruptcy court found that the bank had provided sufficient evidence and it found that there was no credible evidence to rebut the bank's showing. The burden of proof only would have made a difference if the evidence had been in equipoise or if the bank had failed to offer any credible evidence to support its case."); *In re* Fratzke, 2015 WL 4735654 (Bankr. D. Mont. Aug. 10, 2015) (recognizing Chief Judge Klein's decision in *Tallerico*, but finding that it was not necessary to resolve the issue for purposes of the pending dispute). In addition, some courts have articulated a shifting burden that first places the burden of production on the objecting party to rebut the presumption; if rebutted, places the burden of production on the debtor "'to come forward with unequivocal evidence to demonstrate that the exemption is proper'"; but at all times leaves the burden of persuasion with the objecting party. *See, e.g., In re* Scioli, 586 Fed.Appx. 615, 617 (3d Cir. 2014) (quoting Carter v. Anderson (*In re* Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999)). Finally, in the context of avoidance litigation concerning exempt property, some courts have placed the burden of proof on the debtor to establish the debtor's entitlement to the exemption as part of the debtor's motion to avoid the lien under section 522(f) of the Bankruptcy Code. *See, e.g., In re* Tinker, 355 B.R. 380, 383 (Bankr. D. Mass. 2006).

[9] *See, e.g.*, Gonzalez v. Davis (*In re* Davis), 323 B.R. 732 (9th Cir. B.A.P. 2005) (Klein, J., concurring); *In re* Tallerico, 532 B.R. 774 (Bankr. E.D. Ca. 2015); *In re* Pashenee, 531 B.R. 834 (Bankr. E.D. Ca. 2015).

[10] For example, California law provides, "the exemption claimant has the burden of proof." CAL. CODE CIV. P. § 703.580(b). California also has a slightly different standard for the burden of proof in the context of its homestead exemption.

of proof that normally comes with it." 530 U.S. 15, 21 (2000). *Raleigh* involved a creditor's proof of claim under section 502 of the Bankruptcy Code. The Supreme Court held that the state law governing the creditor's claim also governed the burden of proof in the claims litigation. Chief Judge Klein's decision in *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Ca. 2015), attached to his July 10, 2015 letter to the Advisory Committee, does an excellent job of explaining the Supreme Court's *Raleigh* decision and its potential implications for exemption litigation under Bankruptcy Rule 4003(c). Notably, since *Raleigh*, the Supreme Court has reiterated its general position that the burden of proof is a substantive part of a claim, most recently in the context of patent litigation in *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S.Ct. 843 (2014).[11]

Issue: Impact of Supreme Court Jurisprudence

The primary issue posed by the *Raleigh* and *Medtronic* decisions is whether the burden of proof in litigation involving a debtor's claim for exemptions under section 522 of the Bankruptcy Code—whether federal or state law exemptions—should be governed by the same substantive law governing the exemption or, rather, by Bankruptcy Rule 4003(c). If the former is correct, Bankruptcy Rule 4003(c) may alter a party's substantive rights in violation of the Rules Enabling Act.[12]

The Supreme Court's decision in *Raleigh* focuses on: (i) the state law foundation of the tax claim underlying the creditor's proof of claim, and (ii) the Bankruptcy Code's failure to

[11] In *Medtronic*, the Supreme Court explained its historical preference for treating the burden of proof as a substantive component of the claim, "And we have held that 'the burden of proof' is a '"substantive" aspect of a claim.' Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 20–21 (2000); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 271 (1994) ('[T]he assignment of the burden of proof is a rule of substantive law . . .'); Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942) ('[T]he burden of proof . . . [is] part of the very substance of [the plaintiff's] claim and cannot be considered a mere incident of a form of procedure')." 134 S.Ct. at 849.

[12] The Rules Enabling Act provides, "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075.

establish a burden of proof for claims litigation. The Supreme Court started from the basic principle set forth in *Butner v. United States* that "'[u]nless some federal interest requires a different result, there is no reason why [the state] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.'" *Raleigh*, 530 U.S. at 20 (quoting Butner v. United States, 440 U.S. 48, 55 (1979)). It then determined that state law placed the burden of proof on the taxpayer (not the state, which was the creditor), and that Congress did not evidence any intent to change these state law entitlements.[13] Indeed, the Supreme Court rejected the trustee's argument that the Bankruptcy Code's silence permitted an equitable allocation of the burden of proof, noting that the Bankruptcy Code does, in certain instances, establish the burden of proof (e.g., section 362(g)).[14]

Analysis: Impact of Supreme Court Jurisprudence

As Chief Judge Klein explains in the *Tallerico* decision, exemption litigation resembles claims litigation under the Bankruptcy Code in several respects. 532 B.R. at 787-788. For example, both the exemptions and claims sections of the Bankruptcy Code arguably establish a presumption in favor of the filing party, but they do not define the burden of proof. Both kinds of claims may be governed by nonbankruptcy law, i.e., primarily state law. In both instances, the allocation of the burden of proof may impact the outcome of the litigation and, consequently, appears to constitute a substantive part of the claim.

The question then becomes whether any meaningful differences exist between exemption litigation and claims litigation to warrant a different result in the exemption context. Is there

[13] *Raleigh*, 530 U.S. at 21 ("Congress of course may do what it likes with entitlements in bankruptcy, but there is no sign that Congress meant to alter the burdens of production and persuasion on tax claims.").
[14] *Id.* at 22 ("But the Code makes no provision for altering the burden on a tax claim, and its silence says that no change was intended.").

"some federal interest [that] requires a different result"[15] when analyzing litigation concerning a debtor's claim to exemptions versus a creditor's proof of claim? At least two factors should be considered: (i) the change in the exemption process implemented by the Bankruptcy Code and the underlying policy considerations, and (ii) the scope of deference to state law envisioned by section 522(b) of the Bankruptcy Code.[16]

As noted above, exemption practice under the Bankruptcy Code is different than pre-Code practice. The debtor (rather than the trustee) is now the party charged with identifying presumptively permissible exemptions, and those exemptions often are viewed as critical to the debtor's fresh start following the bankruptcy case. Does this shift in practice suggest a policy favoring a debtor's exemptions to such an extent that any party objecting to a claimed exemption should bear the burden of proof?[17] Certainly case law has long suggested a preference for the debtor's right to claimed exemptions.[18] The legislative intent is less clear, but courts and commentators have consistently interpreted exemption law as being "designed to assure that debtors have sufficient assets for a minimum standard of living, despite their impecuniousness."[19]

[15] *Butner*, 440 U.S. at 55.

[16] In addition, the promulgation of Rule 4003(c) itself may distinguish exemption litigation from claims litigation and provide additional support for a federal allocation of the burden of proof in exemption litigation. This reasoning appears to underlie, at least in part, the decision of the Ninth Circuit BAP in *Nicholson*. *See* Tyner v. Nicholson (*In re* Nicholson), 435 B.R. 622, 633-34 (9th Cir. B.A.P. 2010) ("Because Congress has regulated the allowance of exemptions in bankruptcy, the Code and Rules may alter burdens of proof relating to exemptions, even if those burdens are part of the 'substantive' right under state law.").

[17] Commentators suggest that the 1898 Bankruptcy Act was "not directed at debtor relief, but rather at facilitating the equitable and efficient administration and distribution of the debtor's property to creditors." Tabb, *supra* note 4, at 26. The 1978 Bankruptcy Code had a different policy focus, at least with respect to debtor relief.

[18] Courts frequently state, "[E]xemptions should be construed liberally in favor of debtors." Christo v. Yellin (*In re* Christo), 228 B.R. 48, 51 (1st Cir. B.A.P. 1999); *In re* McKinney, 317 B.R. 344, 345 (Bankr. C.D. Ill. 2004).

[19] Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*,

Another consideration is the extent to which section 522(b) incorporates state law. Although some case law suggests that the section defers to "the entire state law,"[20] courts have recognized limitations on this principle, particularly where the state law arguably impairs a debtor's exemptions.[21] Does placing the burden of proof on the debtor in accordance with applicable state law impair an exemption to which the debtor otherwise would be entitled under the Bankruptcy Code? Perhaps, but the burden of proof is arguably distinguishable from, for example, a state statute that subjects a debtor's claims to pre-existing liens. The burden of proof speaks to establishing the exemption in the first instance, whereas provisions addressing liens on the property speak more to restrictions on the exemption once established. Consequently, even if section 522(b) does not incorporate "the entire state law," it likely incorporates substantive elements of the claim itself.

Suggestion and Competing Considerations

Unfortunately, based upon this preliminary review, neither the Bankruptcy Code nor the legislative history provides a definitive answer to the question posed. Chief Judge Klein's *Tallerico* decision, as well as cases following his concurring opinion in *In re Davis*, articulates strong, well-reasoned arguments for deferring to the applicable nonbankruptcy law burden of

79 AM. BANKR. L.J. 397, 397 (2005). *See also* Schwab v. Reilly, 130 S.Ct. 2652 (2010) ("We agree that 'exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a "fresh start."'"); *In re* Hellen, 329 B.R. 678, 681 (Bankr. N.D. Ill. 2005) ("The purpose of the exemption provision is to protect a debtor's fresh start in bankruptcy.").

[20] *See, e.g.*, Wolfe v. Jacobson (*In re* Jacobson), 676 F.3d 1193, 1199 (9th Cir. 2012) ("[E]xemptions must be determined in accordance with the state law applicable on the date of filing… And it is the *entire* state law applicable on the filing date that is determinative of whether an exemption applies.").

[21] *See, e.g.*, Drenttel v. Jensen-Carter (*In re* Drenttel), 403 F.3d 611, 614 (8th Cir. 2005) ("References to state exemption statutes do not invoke the entire law of the state. Instead, Congress used state-defined exemptions as part of a federal bankruptcy scheme, while limiting the application of state policies that impair those exemptions.") (citing Owen v. Owen, 500 U.S. 305, 313 (1991)).

proof in exemption litigation.[22] Based on the trend in Supreme Court jurisprudence, the burden of proof appears to be a substantive component of a claim, at least for purposes of federal law. Congress can certainly change state law entitlements in bankruptcy cases, but it is arguably unclear that Congress chose to do so in the exemptions context. The simplest resolution would be a statutory amendment that incorporated Bankruptcy Rule 4003(c) into section 522.[23] Such a change would provide enhanced uniformity in exemption litigation in bankruptcy cases and further the fresh start policy.

With respect to the options available to the Advisory Committee, Chief Judge Klein offers two suggestions: (i) amend Bankruptcy Rule 4003(c) to carve out exemptions governed by state law; and (ii) eliminate Bankruptcy Rule 4003(c) in its entirety because, even with respect to federal law exemptions,[24] the substantive law should govern and the bankruptcy rules cannot conflict with such law. Both suggestions are grounded in the Supreme Court's *Raleigh* decision.

An alternative suggestion would be to modify Bankruptcy Rule 4003(c) to articulate a clear distinction between the burden of production and the burden of persuasion in exemption litigation. For example, the rule could provide that the party objecting to an exemption bears the burden of production in the first instance to rebut the arguable presumption in favor of the

[22] *See, e.g.*, Gonzalez v. Davis (*In re* Davis), 323 B.R. 732 (9th Cir. B.A.P. 2005) (Klein, J., concurring); *In re* Tallerico, 532 B.R. 774 (Bankr. E.D. Ca. 2015); *In re* Pashenee, 531 B.R. 834 (Bankr. E.D. Ca. 2015).

[23] *Raleigh*, 530 U.S. at 21–22 (discussing Congress's ability to change state law entitlements in bankruptcy).

[24] As noted above, the Bankruptcy Code does not expressly address the burden of proof under the federal exemption scheme. The Supreme Court has discussed the impact of a statute's silence on the burden of proof in previous decisions. *See, e.g., Raleigh*, 530 U.S. at 22 ("But the Code makes no provision for altering the burden on a tax claim, and its silence says that no change was intended."); Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 534 (2005) ("The plain text of [the Individuals with Disabilities Education Act] is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.").

debtor's claimed exemptions.[25] If rebutted, the debtor would bear the burden of persuasion (i.e., the burden of proof).[26] *See* Appendix A. This alternative proposal would comply with section 522(l) of the Bankruptcy Code and Federal Rule of Evidence 301, made applicable in bankruptcy cases by Federal Rule of Evidence 1101.[27] The one potentially lingering issue would be whether the amended rule may still conflict with a party's substantive rights under applicable nonbankruptcy law. The amended rule would, however, be grounded more firmly in an expressed statutory provision, section 522(l), which is applicable to all exemptions claimed under section 522.[28]

Presumably, the Advisory Committee could defer the issue again and allow courts in different jurisdictions to develop further analyses in support of a change or maintaining the status quo.[29] The primary downside to this alternative would be the potential for increased litigation and uncertainty in exemption litigation. One other potential compromise resolution would be to add the following simple caveat to Bankruptcy Rule 4003(c), "unless federal or state law

[25] The language of section 522(l) does not expressly set forth a presumption; rather, it simply states that the debtor is entitled to the claimed exemptions unless a party objects. This section often is referred to as the "exemption by default" section. Notably, the language of section 522(l) differs from, for example, the statutory presumption on insolvency set forth in section 547(f) of the Bankruptcy Code.

[26] In addition, as suggested at Appendix A, the amended rule could address only the burden of production with respect to the presumption and remain silent on the burden of persuasion.

[27] Federal Rule of Evidence 301 provides, "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."

[28] The likely opposition to this approach would focus on whether (i) the language of section 522(l) actually evidences an allocation of the burden of proof; and (ii) Congress intended that allocation to apply not only to federal exemptions, but state exemptions as well.

[29] *See, e.g.*, *In re* Altmiller-Rubio, slip op., 2011 WL 10639468, at *4 (Bankr. E.D. Ca. Sept. 13, 2011) ("The court declines the Objectors' invitation to disregard Rule 4003(c) and make new law for two reasons. First, J. Klein's concurring opinion, which thoughtfully questions the application of Rule 4003(c), has been in the record for more than six years, yet it has never been adopted by the Circuit as a shift away from the fundamental rule stated in *Carter*. Second, based on the evidence presented by the Debtors, and the lack of any rebuttal evidence by the Objectors, the court is satisfied that the Debtors have carried the burden of proof, even if it was appropriate that they be required to do so.").

governing the exemptions provides otherwise." *See* Appendix B. This caveat approach would acknowledge that the burden of proof is a substantive part of a claim,[30] but cabin the scope of Bankruptcy Rule 4003(c) to that permissible under the Rules Enabling Act.[31]

[30] Consequently, this approach may foreclose subsequent arguments that the burden of proof is procedural in certain circumstances.

[31] Admittedly, this caveat approach also may invite litigation concerning the applicable substantive law or the nature of the burden of proof under that law. Nevertheless, in most instances, the substantive law should be relatively straight forward, as a debtor must identify the law supporting the claimed exemption in Schedule C; thus, disputes should arise only where the allocation of the burden of proof under that law is unclear.

Appendix A[32]

Rule 4003. Exemptions

* * * * *

(c) BURDEN OF PROOF. In any hearing under this rule, the objecting party has the burden of ~~proving that the exemptions are not properly claimed~~producing evidence to rebut the presumption in favor of the exemptions claimed. If the objecting party meets this burden, the party claiming the exemptions has the burden of persuasion on whether the exemptions are proper under applicable law. After hearing on the notice, the court shall determine the issues presented by the objection.

* * * * *

[32] As noted in the memorandum, an amended rule also could limit its application to the implementation of section 522(l) of the Bankruptcy Code: "(c) Burden of ~~Proof~~Production. In any hearing under this rule, the objecting party has the burden of ~~proving that the exemptions are not properly claimed~~producing evidence to rebut the presumption in favor of the exemptions claimed. After hearing on notice, the court shall determine the issues presented by the objections."

Appendix B

Rule 4003. Exemptions

* * * * *

(c) BURDEN OF PROOF. In any hearing under this rule, unless federal or state law governing the exemptions provides otherwise, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on the notice, the court shall determine the issues presented by the objection.

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TAB 5A

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TAB 5B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEES ON CONSUMER ISSUES AND FORMS

SUBJECT: PROPOSED FORMS TO IMPLEMENT RULE 3002.1(f) AND (g) AND OTHER RULE 3002.1 ISSUES

DATE: SEPTEMBER 4, 2015

The Subcommittees have been considering several issues related to Rule 3002.1 (Notice Related to Claims Secured by a Security Interest in the Debtor's Principal Residence) over the last several years. These issues were first raised at a mini-conference sponsored by the Advisory Committee in 2012, a few months after the new home mortgage rules went into effect. The issues still under consideration are the following:

1. Should forms be promulgated to implement the notice and response provision of Rule 3002.1(f) and (g)?
2. Should a procedure for objecting to a payment change be added to the rule?
3. Should the rule provide an affirmative procedure for seeking a declaration at the end of a case that the mortgage is current?
4. Should Rule 3002.1(c) be clarified regarding whether there is a need to report charges that the court has already approved?

As reported at the spring Committee meeting, the Subcommittees decided last winter that issues 1, 2, and 4 should be pursued, but that there was no need for an additional procedure for seeking a declaration that the mortgage is current at the end of a chapter 13 case.

This memorandum presents the Subcommittees' recommendations that the Committee propose that the Administrative Office of the Courts issue Director's forms for a Notice of Final

Cure Payment to implement Rule 3002.1(f) and a Response to Notice of Final Cure Payment to implement Rule 3002.1(g). The Subcommittees further recommend that an amendment to Rule 3002.1(b) be proposed for publication to provide a procedure for objecting to payment change notices and that Official Form 410S2 be proposed for amendment without publication to reconcile it with Rule 3002.1(c). These matters are discussed in turn below.

Proposed Forms to Implement Rule 3002.1(f) and (g)

Rule 3002.1 went into effect on December 1, 2011, along with amendments to Rule 3001(c). This rules package was adopted to provide more complete information about home mortgage claims and, in chapter 13 cases, to keep the debtor and trustee informed about changes in payment amounts and the assessment of fees and charges with respect to a home mortgage that is being maintained during the course of the plan. Subdivisions (f) - (h) of Rule 3002.1 set forth a procedure applicable at the end of a chapter 13 case to determine the status of the home mortgage before the debtor emerges from bankruptcy. It consists of three steps.

First, under subdivision (f), after the debtor's successful completion of a chapter 13 plan, the trustee files a notice "stating that the debtor has paid in full the amount required to cure any default on the [home mortgage] claim." This notice is served on the debtor, the home mortgage creditor, and the debtor's attorney. It also informs the creditor of its obligation to file a response to the notice. There is a provision for the debtor to file the notice if the trustee fails to do so. Subdivision (f) was written to require the trustee only to give notice that any mortgage default has been cured, rather than stating that all mortgage payments to date have been paid, because in non-conduit districts the trustee does not have a record of postpetition mortgage payments that the debtor has made directly to the creditor. (In conduit districts, in contrast, the trustee makes the postpetition mortgage payments from funds the debtor pays the trustee.)

Second, under subdivision (g), the creditor files a response to the trustee's notice within 21 days after being served. The creditor indicates whether it agrees with the trustee's statement that the debtor has cured the mortgage default, and it also states whether the debtor is otherwise current on all mortgage payments. If the creditor contends that the debtor has not cured the default or is not current on the mortgage payments, the response must itemize any unpaid amounts. The creditor files this response as a supplement to its proof of claim.

Finally, subdivision (h) permits the trustee or debtor to move for a determination of whether the debtor has cured the default and paid all of the postpetition amounts. If this procedure is followed, a debtor who has made all of the required payments under the plan should not face the unpleasant surprise after bankruptcy of being informed that the mortgage is in default and that the creditor is commencing foreclosure proceedings.

Along with the package of mortgage rules, the Judicial Conference promulgated official forms drafted by the Advisory Committee to implement Rule 3001(c)(2)(A) (Mortgage Proof of Claim Attachment), Rule 3002.1(b) (Notice of Mortgage Payment Change), and Rule 3002.1(c) (Notice of Postpetition Mortgage Fees, Expenses, and Charges). No forms, however, were adopted to implement Rule 3002.1(f) and (g).

The Subcommittees decided last winter that forms should be created to implement subdivisions (f) and (g) but that they should be Director's forms, rather than official forms. Working from forms submitted to the Committee by the Mortgage Liaison Committee of the National Association of Chapter Thirteen Trustees, the Subcommittees created two proposed Director's forms—Form 4100N (Notice of Final Cure Payment) and Form 4100R (Response to Notice of Final Cure Payment). They follow this memorandum in the agenda book.

The Notice form, which will usually be filed by the chapter 13 trustee, begins with a statement that the prepetition arrearage has been cured and the debtor has completed all payments under the plan. After a section for providing identifying information about the mortgage, the form contains a section for listing the cure disbursements made by the trustee. These disbursements include payments on prepetition arrearages and any postpetition fees and arrearages paid by the trustee. The form then asks whether postpetition mortgage payments were paid directly by the debtor or by the trustee. The final section informs the mortgage creditor of its obligation to respond to the notice. The trustee is instructed to attach a payment history to the Notice.

The Response form asks the creditor to indicate whether or not it agrees that the debtor has cured the prepetition default. Next the creditor must state whether the debtor is current on all postpetition payments. If the creditor asserts that the debtor has not fully cured the arrearage or made all postpetition payments, the creditor must attach an itemized bankruptcy payment history.

Although use of these forms would not be mandatory, their availability as Director's forms would help standardize the procedure for the exchange of information between the trustee and home mortgage creditor at the end of a chapter 13 case regarding the status of the mortgage.

Procedure for Objecting to a Payment Change

Rule 3002.1(e) provides a procedure for challenging a claimed fee, expense, or charge after the servicer gives notice of it under subdivision (c), but the rule does not provide a similar procedure for payment changes that are reported under subdivision (b). Although the current rule does not preclude a debtor or trustee from initiating a proceeding to challenge a reported payment change or prevent the promulgation of local rules to prescribe a procedure for doing so,

the Subcommittees concluded that it would be beneficial to have a national procedure for raising and determining objections to payment changes.

The Subcommittees' proposed amendment to Rule 3002.1(b) follows in the agenda book. It would allow the debtor or trustee to file a motion for a determination of the validity of a payment amount change. Although the rule does not set a deadline for such a motion, it does provide that if a motion is not filed within 21 days after the service of the notice, the payment change goes into effect.

The draft of Rule 3002.1(b) includes an amendment, indicated by double underlining, that the Committee approved for publication at the fall 2014 meeting. That amendment was held in abeyance so that it could be submitted with any additional amendments to the rule that the Committee decided to propose. The Subcommittees recommend that both sets of amendments to Rule 3002.1(b) now be put forward to the Standing Committee for publication in August 2016.

Clarification of Whether Notice Must be Given of Charges Already Approved by the Court

Participants at the mini-conference pointed out an inconsistency between Rule 3002.1(c) and Official Form 10S2 (Notice of Postpetition Fees, Expenses, and Charges), which implements the rule provision.[1] The instructions to Part 1 of the form state, "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Subdivision (c), however, requires the creditor to give notice of all postpetition fees, expenses, and charges without excepting ones already ruled on. This issue was discussed in *In re* Sheppard, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012). Noting the difference between the rule and the form, Judge Huennekens held that the form's instruction "best effectuates the ultimate goal of Rule 3002.1 to provide debtors with accurate information regarding postpetition obligations that await them at the conclusion of their bankruptcy case." *Id.* at *4. He explained that requiring creditors to file a notice for amounts

[1] As of December 1, 2015, this form will be renumbered 410S2.

already approved by the court would result in duplication and uncertainty. Accordingly, he concluded that there was no need for the creditor to file notice of fees that had been included in a consent order resolving the creditor's motion for relief from the stay. *Id.*

Participants at the mini-conference came out the other way on the issue. They suggested that the instruction regarding amounts previously ruled on be deleted from Official Form 10S2 because giving notice of previously authorized fees would allow the trustee to determine if they had been paid.

The Subcommittees concluded that the ambiguity between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. The proposed addition is highlighted on Form 410S2 that follows this memorandum. Because this is a minor conforming amendment, the Subcommittees recommend that final approval of the change be sought without publication.

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due. For claims arising from home equity lines of credit, this requirement may be modified by court order. If either the debtor or the trustee objects to the change, the debtor or trustee shall file a motion to determine whether the change in the payment amount is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed within 21 days after service of the notice, the change shall go into effect, unless the court orders otherwise.

* * * * *

Committee Note

Subdivision (b) is amended in two respects. First, it is amended to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, subdivision (b) is amended to acknowledge the right of the trustee or debtor to object to a change in a home mortgage payment amount after receiving notice of the change under this subdivision. The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion is filed within 21 days after service of the notice on the debtor and trustee, the announced change goes into effect. If there is a subsequent motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b), leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Form 4100N

Notice of Final Cure Payment

12/16

File a separate notice for each creditor.

According to Bankruptcy Rule 3002.1(f), the trustee gives notice that the amount required to cure the prepetition default in the claim below has been paid in full and the debtor(s) have completed all payments under the plan.

Part 1: Mortgage Information

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Property address: _____
Number Street

_____

_____
City State ZIP Code

Part 2: Cure Amount

Total cure disbursements made by the trustee:		**Amount**
a. Allowed prepetition arrearage:	(a)	$ _____
b. Prepetition arrearage paid by the trustee:	(b)	$ _____
c. Amount of postpetition fees, expenses, and charges recoverable under Bankruptcy Rule 3002.1(c):	(c)	$ _____
d. Amount of postpetition fees, expenses, and charges recoverable under Bankruptcy Rule 3002.1(c) and paid by the trustee:	(d)	$ _____
e. Allowed postpetition arrearage:	(e)	$ _____
f. Postpetition arrearage paid by the trustee:	+ (f)	$ _____
g. **Total**. Add lines b, d, and f.	(g)	$ _____

Part 3: Postpetition Mortgage Payment

Check one:

❑ Mortgage is paid through the trustee.

Current monthly mortgage payment: $ _____

The next postpetition payment is due on: ____/____/_____
MM / DD / YYYY

❑ Mortgage is paid directly by the debtor(s).

Part 4: A Response Is Required By Bankruptcy Rule 3002.1(g)

Under Bankruptcy Rule 3002.1(g), the creditor must file and serve on the debtor(s), their counsel, and the trustee, within 21 days after service of this notice, a statement indicating whether the creditor agrees that the debtor(s) have paid in full the amount required to cure the default and stating whether the debtor(s) have (i) paid all outstanding postpetition fees, costs, and escrow amounts due, and (ii) consistent with § 1322(b)(5) of the Bankruptcy Code, are current on all postpetition payments as of the date of the response. Failure to file and serve the statement may subject the creditor to further action of the court, including possible sanctions.

To assist in reconciling the claim, a history of payments made by the trustee is attached to copies of this notice sent to the debtor(s) and the creditor.

✘ _____ Date ____/_____/_____
Signature

Trustee _____
First Name Middle Name Last Name

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Form 4100R

Response to Notice of Final Cure Payment

12/16

According to Bankruptcy Rule 3002.1(g), the creditor responds to the trustee's notice of final cure payment.

Part 1: Mortgage Information

Name of creditor: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Property address: _____
Number Street

_____

_____
City State ZIP Code

Part 2: Prepetition Default Payments

Check one:

❑ Creditor agrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim.

❑ Creditor disagrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim. Creditor asserts that the total prepetition amount remaining unpaid as of the date of this response is: $ _____

Part 3: Postpetition Mortgage Payment

Check one:

❑ Creditor states that the debtor(s) are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

The next postpetition payment from the debtor(s) is due on: ____/____/_____
MM / DD / YYYY

❑ Creditor states that the debtor(s) are not current on all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

Creditor asserts that the total amount remaining unpaid as of the date of this response is:

a. Total postpetition ongoing payments due: (a) $ _____

b. Total fees, charges, expenses, escrow, and costs outstanding: + (b) $ _____

c. **Total**. Add lines a and b. (c) $ _____

Creditor asserts that the debtor(s) are contractually obligated for the postpetition payment(s) that first became due on: ____/____/_____
MM / DD / YYYY

Part 4: Itemized Payment History

If the creditor disagrees in Part 2 that the prepetition arrearage has been paid in full or states in Part 3 that the debtor(s) are not current with all postpetition payments, including all fees, charges, expenses, escrow, and costs, the creditor must attach an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all payments received;
- all fees, costs, escrow, and expenses assessed to the mortgage; and
- all amounts the creditor contends remain unpaid.

Part 5: Sign Here

The person completing this response must sign it. The response must be filed as a supplement to the creditor's proof of claim.

Check the appropriate box::

❑ I am the creditor.

❑ I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this response is true and correct to the best of my knowledge, information, and reasonable belief.

Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this response applies.

✘ _____ Date ____/_____/_____
Signature

Print _____ Title _____
First Name Middle Name Last Name

Company _____

If different from the notice address listed on the proof of claim to which this response applies:

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/16

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ❑ No
- ❑ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case ~~or ruled on by the bankruptcy court~~. If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

❑ I am the creditor.

❑ I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

TAB 6A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

SUBJECT: AUTHORITY TO MAKE NON-SUBSTANTIVE, TECHNICAL, AND CONFORMING AMENDMENTS TO OFFICIAL FORMS

DATE: SEPTEMBER 4, 2015

If the modernized forms are approved by the Judicial Conference this month, they will go into effect on December 1. Once promulgated, it is almost inevitable—given the large scope of the project—that minor issues will arise regarding the wording, formatting, or other aspects of the content of some of the new forms. If a necessary change is sufficiently minor, the Committee could propose that it be approved without publication. Nevertheless, approval of the change would have to be obtained from the Standing Committee and the Judicial Conference, a process that would take from several months to more than a year.

The Subcommittee suggests that it would be preferable not to have to burden the Standing Committee and Judicial Conference with the consideration of non-substantive, technical, or conforming amendments to the Official Forms that are noncontroversial and unobjectionable. It therefore recommends that the Committee request that the Standing Committee ask the Judicial Conference to delegate authority to the Advisory Committee to make such changes.[1]

There is some precedent for this request. At its May 2015 meeting, the Standing Committee authorized the Advisory Committee to correct typographical and other minor errors

[1] The Supreme Court has the power to "prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." 28 U.S.C. § 2075. The Supreme Court, in turn, promulgated Rule 9009, which delegates to the Judicial Conference the authority to prescribe Official Forms.

in the modernized forms before they were submitted to the Judicial Conference. And the Judicial Conference on several occasions has authorized a Conference committee to make non-substantive, technical, and conforming amendments to policies it has approved.[2]

The Subcommittee recognizes that a request for this authority needs to provide assurance to the Standing Committee and the Judicial Conference that the authority, if granted, would be exercised in a narrow set of circumstances and only for changes that do not affect the substance of a form or the rights or obligations of any entities. To this end, it suggests that the Committee include in its request to the Standing Committee examples of the types of amendments it might make if authorized. They would generally fall into three categories: (1) the correction of typos and punctuation; (2) reformatting to facilitate data capture by CM/ECF; and (3) non-controversial conforming amendments needed to implement changes in the law or to Judicial Conference policy that become effective without sufficient lead time to conform an Official Form through the ordinary course.

The first category of changes—correction of typos and punctuation—would be the most common. The new forms were developed over the course of seven years, and there have been thousands of revisions over that time frame, including changes to line numbers, form names, and cross-references across and within forms. It is inevitable that, as the forms are implemented and put into use, future typos and inaccurate cross-references will be discovered and need to be fixed.

The second category—reformatting to facilitate data capture—will likely be less common, but this situation has come up several times over the past year as CM/ECF developers

[2] *See, e.g.*, JCUS - MAR 15, at 13 (the Conference authorized the Bankruptcy Committee to make "non-substantive, technical and conforming changes" to guidance for producing tax information); JCUS - SEP 14, at 9 (the Conference authorized the Court Administration and Case Management Committee (CACM) to make "non-substantive, technical or conforming amendments" to policy guidance regarding requests to redact bankruptcy records already filed); JCUS - SEP 14, at 11 (the Conference authorized CACM to make "non-substantive, technical, or conforming changes" to the Bankruptcy Noticing Center Appropriate Use Policy); JCUS - MAR 14, at 14 (the Conference, on CACM's recommendation, authorized the AO to make "non-substantive, technical and conforming revisions" to the Records Disposition Schedules).

create the next generation CM/ECF database that will store the information collected on the forms. For example, in developing the fields that provide detail for business income that must be reported by individual debtors on the means-test forms, the forms as originally approved did not have a separate breakout for detail in the rare situation of two joint debtors reporting separate business income. A pro forma update to the form was made and subsequently approved by the Advisory Committee, the Standing Committee and the Judicial Conference as a technical change.

The final category—changes in the law or to Judicial Conference policy that become effective before Official Forms can be conformed in the ordinary course—is somewhat rare. The most recent example was an increase in the amount of filing fees proposed by CACM and approved by the Judicial Conference at its March 2014 session to become effective two and a half months later on June 1, 2014. Because filing fees are listed on some Official Bankruptcy forms, there was a need to get Executive Committee approval to revise the forms to reflect the new amounts.

A statutory example may occur on December 19 of this year. After the Bankruptcy Abuse and Consumer Protection Act of 2005 made it more difficult for individuals to qualify for chapter 7 relief, Congress enacted the National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, 122 Stat. 5000, to reward National Guard members and Reservists for their service. The law became effective December 19, 2008. The Act was scheduled to expire in 2011, but was extended on the eve of expiration, and is now due to sunset on December 19, 2015. The Act creates an exception to the means test's presumption for members of the National Guard and Reserves who, after September 11, 2001, served on active duty or in a homeland defense activity for at least 90 days. Official Form 22A-1Supp (to become 122A-1Supp) includes language that implements the exemption, and that form will need to be amended if the

Act expires. Given the political sensitivity of taking away benefits from service members, however, it is difficult to predict very far in advance whether Congress will allow the Act to expire. For such a circumstance, delegating to the Advisory Committee the authority to make the appropriate technical changes to conform the Official Forms to the statute would be desirable.

TAB 6B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: CHANGE OF ADDRESS FORM

DATE: AUGUST 30, 2015

Bankruptcy Rule 2002(g) sets forth appropriate noticing addresses for parties in federal bankruptcy cases. In general, the rule permits service upon a party at the address listed in such party's last filed request or, if no such request, in the debtor's list of creditors or schedule of liabilities, whichever is filed later.[1] Although likely in a creditor's best interests, the Bankruptcy Rules do not explicitly require a creditor or other party to update its noticing or payment address. Accordingly, creditors, equity security holders, or other parties may not receive notices in the bankruptcy case or distributions under any confirmed plan.

[1] Bankruptcy Rule 2002(g) provides similar treatment for equity security holders. Specifically, the rule provides in relevant part:

> (g) Addressing Notices.
>
> (1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision—
>
> (A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and
>
> (B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.
>
> (2) Except as provided in §342(f) of the Code, if a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of equity security holders.

FED. R. BANKR. P. 2002(g).

Suggestion 15-BK-D, submitted by Russell C. Simon, Chapter 13 Standing Trustee, on behalf of the National Association of Chapter 13 Trustees ("NACTT"), requests the adoption of a national form to facilitate notice of a change of address. Mr. Simon's letter includes a proposed form, instructions, and committee note. A committee formed by the NACTT developed these materials. As Mr. Simon explains, "It was the Committee's consensus that having a uniform method by which creditors and parties in interest can change their mailing address—for both payments and notices—would not only increase efficiency but also reduce costs."

Overview of the Issue

Under current practice, no uniform approach exists for noticing a change of address for parties in federal bankruptcy cases. Some courts have adopted local rules or forms to address this issue.[2] Nevertheless, creditors, equity security holders, and other parties who participate in cases in multiple jurisdictions are faced with uncertainty and inconsistency whenever this issue arises. Moreover, as noted in Mr. Simon's letter, the lack of process also impacts trustees trying to distribute funds under confirmed plans and other parties required to serve notices or other papers on parties in the case. Consequently, some standardization in noticing a change of address likely would increase certainty and efficiency in many cases.

[2] *See, e.g.*, U.S. Bankruptcy Court for the District of Arizona, Separate Address Change Forms for Attorney, Creditor, Debtor, available at http://www.azb.uscourts.gov/court-forms; U.S. Bankruptcy Court for the Central District of California, Change of Mailing Address, available at http://www.cacb.uscourts.gov/forms/change-mailing-address; U.S. Bankruptcy Court for the District of New Jersey, Change of Address Form, available at http://www.njb.uscourts.gov/forms/change-address-form-0; U.S. Bankruptcy Court for the District of Oregon, Creditor Change of Address, available at http://www.orb.uscourts.gov/forms/creditor-change-address.

One disadvantage to creating a national form or process is that some jurisdictions already have a process or form in place.[3] These jurisdictions may resist any change or fail to see the value in implementing the change.

Proposed Approaches to Address the Issue

The primary avenues for implementing a process for noticing a change of address include: (i) a new Official Form; (ii) a new Director's Form; (iii) a change to the existing Official Form 410 (Proof of Claim); or (iv) a change to the Instructions for Official Form 410 (Proof of Claim). Each of these options is considered in turn below.

The cleanest approach to standardize a process for noticing a change of address would be a new Official Form or Director's Form. The proposed form attached to this memorandum could serve as the basis for either an Official Form or a Director's Form.[4] A new Official Form likely would be the best alternative to standardize the practice in all jurisdictions. This approach would address the NACTT's concerns, as well as those of creditors participating in cases in multiple jurisdictions. A Director's Form, on the other hand, also could improve the current state of affairs by encouraging a consistent and reliable process for noticing a change of address. It would not, however, standardize the practice to the same extent as a national form.

Alternatively, an amendment to Official Form 410 (Proof of Claim) and the related instructions also could achieve the stated objective. This amendment could be as simple as

[3] For example, some courts provide separate forms for attorneys, creditors, and debtors. In addition, some courts may cross-reference change of address filings on the claims register, which likely creates efficiencies for chapter 13 trustees in the distribution process. *See* U.S. Bankruptcy Court for the District of Oregon, Change of Address Form and Procedure Modifications, Mar. 15, 2013 ("The Court has replaced LBF #101, Change of Address, with LBF #101C, Change of Creditor Address, and LBF #101D, Change of Debtor Address. Address changes for other parties may be submitted by submitting a signed request. Creditors who have filed a claim will no longer need to file an amended claim to update their payment address. Address changes for claimants will appear on the claims register."), available at http://www.orb.uscourts.gov/news/change-address-form-and-procedure-modifications.

[4] The attached draft form should be reviewed primarily for content. The actual format would depend on the kind of form selected by the Subcommittee. Instructions to the new form also would help parties complete and file the form appropriately. The content of this draft form largely tracks the form suggested by Mr. Simon and the NACTT; the primary difference is that the form also would work outside of the proof of claim context.

adding a new box to the Official Form to denote "amendment only as to noticing or payment address." Drafts of an amended Official Form 410 (Proof of Claim) and the related instructions are attached to this memorandum. The changes to these documents are highlighted for ease of reference.

Similarly, a change only to the Instructions to Official Form 410 (Proof of Claim) could help mitigate the concerns raised by Mr. Simon and the NACTT in that the instructions could clarify that a proof of claim form could be used for changing the creditor's noticing or payment address. This approach would be the simplest to implement. It would not, however, clarify the process for noticing a change of address for creditors who are not required to file proofs of claim in chapter 9 or 11 cases or of other parties who are not creditors in the case.[5] The use of the proof of claim form to notice changes of address also may create conflicting filings and confuse the claims reconciliation process. Accordingly, the ease of this solution should be considered in light of its limitations and potential negative consequences.

Finally, another approach would be to maintain the status quo and allow individual courts to address this issue by local rule. Such an approach likely would not cause any disruption or hardship to the system, but it also would not improve the issue for trustees attempting to make distributions in the face of incorrect addresses or creditors and other parties participating in the system in multiple jurisdictions.

Subcommittee's Deliberations

The Subcommittee considered each of these alternatives during its August 12, 2015 conference call. The Subcommittee discussed, among other things, the advantages and disadvantages to each approach. The Subcommittee appreciated the concerns identified in the

[5] Similar changes could, however, be made to the instructions for any proof of interest form to address this issue with respect to equity security holders.

NACTT's suggestion. Several members of the Subcommittee commented on the uncertainty that exists regarding the procedures for filing and noticing a change of address. They also observed that the issue exists not only for trustees in chapter 13 cases, but also for creditors, debtors, and other parties in interest in cases under other chapters of the Bankruptcy Code. Accordingly, the Subcommittee discussed the benefit to evaluating the totality of the issue in considering any changes to existing practice.

Based on the Subcommittee's preliminary review of this matter, members of the Subcommittee suggested that an Official Form or a Director's Form likely is a better alternative than a change to the Proof of Claim Form or the related Instructions. Members noted that using the proof of claim process would not necessarily address the entirety of the issue, potentially excluding other parties that need to file a change of address notice, such as debtors, creditors not required to file proofs of claim, and other parties in interest. Members also recognized, however, the importance of noticing changes of address on the claims register.

The Subcommittee's discussion of the NACTT's suggestion and noticing changes of address on the claims register generated questions regarding the technical aspects of this issue (e.g., is there an efficient way to address changes of address through the CM/ECF system?). The Subcommittee determined that additional information and research was needed to allow it to make a fully informed decision. Accordingly, the Subcommittee asked the Assistant Reporter to conduct further research concerning, among other things, the local practices of bankruptcy courts on noticing changes of address, the technical aspects of this process, and the scope of the issue outside of the chapter 13 context addressed by the NACTT's suggestion. Mr. Waldron offered to assist with this research by surveying bankruptcy clerks concerning their practices with respect to changes of address.

The Subcommittee intends to provide a further report to the Advisory Committee on this matter at the Spring 2016 meeting. Accordingly, the Subcommittee is not making any recommendation on the suggestion at this time.

Attachments

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

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

Case number _____

[Form No.]

Creditor Change of Address

12/15

Read the instructions before filling out this form. This form is for making a change of address for a creditor, equity security holder, or party other than the debtor in a bankruptcy case. This form should not be used to make a change of address for the debtor. The debtor also may not use this form to add a creditor to the bankruptcy case.

Part 1: Identify the Change of Address Information

1. **Who is the creditor, equity security holder, or other party?**

   _____
   Name of the creditor, equity security holder, or other party

   Other names the creditor, equity security holder, or other party used with the debtor_____

2. **Where should notices and payments to the creditor, equity security holder, or other party be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices be sent?	**Where should any payments be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

__ __

3. **What information is being changed?**

   ❑ Address for notices
   ❑ Address for payments
   ❑ Address for both notices and payments

4. **Has a claim been filed for this creditor, equity security holder, or other party?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____
   MM / DD / YYYY

Part 2: Sign Below

The person completing this form must sign and date it.
FRBP 9011(b).

Check the appropriate box:

- ❑ I am the creditor, equity security holder, or other party.
- ❑ I am the attorney or authorized agent for the creditor, equity security holder, or other party.
- ❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

X_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Official Form 410

Proof of Claim

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

_____
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

❑ No
❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

__ __

4. **Does this claim amend one already filed?**

❑ No
❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

❑ Yes, but only as to Item 3 above listing the creditor's noticing or payment address. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

❑ No
❑ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

❑ No
❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**

❑ No
❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

_____

9. **Is all or part of the claim secured?**

❑ No
❑ Yes. The claim is secured by a lien on property.

Nature of property:

❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
❑ Motor vehicle
❑ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

❑ Fixed
❑ Variable

10. **Is this claim based on a lease?**

❑ No
❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**	❑ No ❑ Yes. Identify the property: _____	
12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?** A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	❑ No ❑ Yes. *Check all that apply:*	**Amount entitled to priority**
	❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
	❑ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
	❑ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
	❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
	❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
	❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____
	* Amounts are subject to adjustment on 4/01/16 and every 3 years after that for cases begun on or after the date of adjustment.	

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ❑ I am the creditor.
- ❑ I am the creditor's attorney or authorized agent.
- ❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

8 _____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Official Form 410

Instructions for Proof of Claim

United States Bankruptcy Court 12/15

These instructions and definitions generally explain the law. In certain circumstances, such as bankruptcy cases that debtors do not file voluntarily, exceptions to these general rules may apply. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process and privacy regulations.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157 and 3571.

How to fill out this form

- **Fill in all of the information about the claim as of the date the case was filed.**
- **Fill in the caption at the top of the form.**
- **If the claim has been acquired from someone else, then state the identity of the last party** who owned the claim or was the holder of the claim and who transferred it to you before the initial claim was filed.
- **Attach any supporting documents to this form.** Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.)

  Also attach redacted copies of any documents that show perfection of any security interest or any assignments or transfers of the debt. In addition to the documents, a summary may be added. Federal Rule of Bankruptcy Procedure (called "Bankruptcy Rule") 3001(c) and (d).
- **Do not attach original documents because attachments may be destroyed after scanning.**
- **If the claim is based on delivering health care goods or services, do not disclose confidential health care information. Leave out or redact confidential information both in the claim and in the attached documents.**
- **A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, individual's tax identification number, or financial account number, and only the year of any person's date of birth.** See Bankruptcy Rule 9037.
- **For a minor child, fill in only the child's initials and the full name and address of the child's parent or guardian.** For example, write *A.B., a minor child* (*John Doe, parent, 123 Main St., City, State*). See Bankruptcy Rule 9037.
- **A party may use this form to update a creditor's address for purposes of the creditor receiving notices or payments in the bankruptcy case. If this information changes the address set forth in a previously filed claim, the party should indicate that the filing is an amendment to a claim.**

Confirmation that the claim has been filed

To receive confirmation that the claim has been filed, either enclose a stamped self-addressed envelope and a copy of this form or go to the court's PACER system (www.pacer.psc.uscourts.gov) to view the filed form.

Understand the terms used in this form

Administrative expense: Generally, an expense that arises after a bankruptcy case is filed in connection with operating, liquidating, or distributing the bankruptcy estate.
11 U.S.C. § 503.

Claim: A creditor's right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. Use the debtor's name and case number as shown in the bankruptcy notice you received. 11 U.S.C. § 101 (13).

Evidence of perfection: Evidence of perfection of a security interest may include documents showing that a security interest has been filed or recorded, such as a mortgage, lien, certificate of title, or financing statement.

Information that is entitled to privacy: A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual's tax identification number, or a financial account number, only the initials of a minor's name, and only the year of any person's date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. You may later be required to give more information if the trustee or someone else in interest objects to the claim.

Priority claim: A claim within a category of unsecured claims that is entitled to priority under 11 U.S.C. §507(a). These claims are paid from the available money or property in a bankruptcy case before other unsecured claims are paid. Common priority unsecured claims include alimony, child support, taxes, and certain unpaid wages.

Proof of claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be filed in the district where the case is pending.

Redaction of information: Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to **privacy** on the *Proof of Claim* form and any attached documents.

Secured claim under 11 U.S.C. §506(a): A claim backed by a lien on particular property of the debtor. A claim is secured to the extent that a creditor has the right to be paid from the property before other creditors are paid. The amount of a secured claim usually cannot be more than the value of the particular property on which the creditor has a lien. Any amount owed to a creditor that is more than the value of the property normally may be an unsecured claim. But exceptions exist; for example, see 11 U.S.C. § 1322(b) and the final sentence of 1325(a).

Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment may be a lien.

Setoff: Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor.

Uniform claim identifier: An optional 24-character identifier that some creditors use to facilitate electronic payment.

Unsecured claim: A claim that does not meet the requirements of a secured claim. A claim may be unsecured in part to the extent that the amount of the claim is more than the value of the property on which a creditor has a lien.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your form.

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TAB 7A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: IMPACT OF *WELLNESS INTERNATIONAL NETWORK, LTD. v. SHARIF* ON PREVIOUSLY PROPOSED *STERN* AMENDMENTS

DATE: SEPTEMBER 7, 2015

In *Wellness International Network, Ltd. v. Sharif,* decided by the Supreme Court on May 26, the Court held that the Constitution permits a bankruptcy judge to adjudicate claims otherwise requiring an Article III adjudication if the parties knowingly and voluntarily consent to determination by the bankruptcy judge. 135 S. Ct. 1932. By so ruling, the Court upheld the constitutional validity of 28 U.S.C. § 157(c)(2), which authorizes bankruptcy judges to hear and determine non-core proceedings with the consent of the parties. The Court also held that the knowing and voluntary consent required by the Constitution and the statute need not be express, although it added that it is a good practice to require an express statement regarding consent.

As a result of the resolution of the consent issue, the Committee is now in a position to decide whether a previously proposed set of Bankruptcy Rules amendments—the "*Stern* amendments"—should be sent forward to the Supreme Court as originally proposed, or whether revised or additional amendments should be proposed in light of *Wellness*. This memorandum provides background information about the *Stern* amendments and addresses several options for responding to *Wellness* that the Committee may want to consider. The Subcommittee discussed these issues during its conference call on August 12, and it recommends that the Committee request that the previously submitted amendments be sent to the Supreme Court for its approval.

The *Stern* Amendments

In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Supreme Court held—in a case in which both parties had not consented to the bankruptcy court's adjudication—that the bankruptcy court lacked authority under Article III to hear and enter a final judgment on a state-law counterclaim by the estate against a creditor who had filed a claim against the estate. Such adjudication is expressly authorized by 28 U.S.C. § 157(b)(2), which classifies it as a core proceeding, but the Court concluded that the exercise of that authority in this case by the non-Article III bankruptcy judge was constitutionally impermissible because the proceeding did not fall within the "public rights" exception to Article III and the bankruptcy judge was not a mere adjunct of the Article III courts.

In 2011 the Committee began considering whether the Bankruptcy Rules needed to be amended in response to *Stern*. Existing Rules 7008 (General Rules of Pleading) and 7012 (Defenses and Objections) require parties to adversary proceedings to state in the complaint and the responsive pleading whether the proceeding is core or non-core and, if non-core, whether the pleader consents to entry of final judgment by the bankruptcy judge.[1] Rule 7012(b) further states that in "non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

The Committee concluded that *Stern* had created an ambiguity concerning the meaning of the terms core and non-core. The case demonstrated that a proceeding might be designated core by the statute but be beyond the constitutional authority of a bankruptcy court to hear and

[1] Rule 7008(a) provides in part: "In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does nor does not consent to entry of final orders or judgment by the bankruptcy judge." Rule 7012(b) provides in part: "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge."

determine, at least without the parties' consent. Thus it would be constitutionally non-core. The Committee therefore decided to propose amendments to Bankruptcy Rules 7008(a) and 7012(b) that would eliminate the distinction between core and non-core proceedings and would require parties in all proceedings to state in their pleadings whether they do or do not consent to entry of a final judgment or order by the bankruptcy judge. A similar amendment was proposed to Rule 9027(a) and (e) (Removal). The sentence in Rule 7012(b) prohibiting a bankruptcy court from entering a final order or judgment in a non-core proceeding without the express consent of the parties was proposed to be deleted. The Committee also proposed amendments to Rule 7016 (Pre-Trial Procedures), which would direct the bankruptcy court to determine the authority it would exercise in a proceeding—whether it would hear and determine it, hear and issue proposed findings of fact and conclusions of law, or take some other action. The final amendment included in the *Stern* package was to Rule 9033 (Proposed Findings of Fact and Conclusions of Law), which would omit the rule's limitation to non-core proceedings. These amendments, which follow in the agenda book, were published for public comment in August 2012.

The *Stern* amendments were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013. Later in the fall of 2013, the Judicial Conference withdrew the amendments from the Supreme Court due to the Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). That case presented the issue, among others, of whether Article III permits a bankruptcy court, with the express or implied consent of the parties, to enter final judgment on a *Stern* claim. Because the proposed rule amendments rely on the validity of consent, it was determined that the Court should not be asked to approve them while that issue was pending before it.

The Supreme Court decided *Arkinson* in June 2014 without reaching the consent issue.[2] But a few weeks later, the Court granted *certiorari* in *Wellness*, which also presented the issue of the constitutional validity of party consent to the adjudication by a bankruptcy judge of a *Stern* claim. As a result, the *Stern* amendments remained on hold awaiting a decision in *Wellness*.

The Upholding of Consent in *Wellness*

In ruling on the constitutional validity of consent, the Court in *Wellness* looked to its decision in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), for guidance. There the Court held that Article III's "guarantee of an impartial and independent federal adjudication" serves two functions: (1) protection of the personal rights of litigants and (2) maintenance of the separation of powers of the branches of the federal government. *Schor* held that, as a personal right, the protection is freely waivable. But, as the Court explained in *Wellness*, *Schor* also held that "'[t]o the extent that this structural principle is implicated in a given case'—but only to that extent—'the parties cannot by consent cure the constitutional difficulty.'" 135 S. Ct. at 1943.

The Court in *Wellness* therefore examined "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threate[n] the institutional integrity of the Judicial Branch.'" *Id.* at 1944. It concluded that there was no such threat, based on its examination of the degree of control Article III courts exercise over bankruptcy judges and the absence of evidence that Congress sought to "aggrandize itself or humble the Judiciary." *Id.* at 1945. As a

[2] *Arkison* did, however, confirm that *Stern* claims could be treated as non-core under § 157(c), as the rule amendments had assumed. *See* 134 S. Ct. at 2174 ("Accordingly, because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.").

result, the Court held that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent." *Id.* at 1949.

In Part III of the opinion, the Court examined the nature of the consent required. It concluded that neither the Constitution nor § 157(c)(2) requires the parties' consent to bankruptcy court adjudication to be expressly given. But whether such consent is express or implied, the Court stated, it must be knowing and voluntary. Thus the "key inquiry" in determining whether there is implied consent, said the Court, "is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator." *Id.* at 1948. The Court emphasized that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" *Id.*

Although the Court rejected the debtor's argument that consent to bankruptcy court adjudication must be express, it noted that Bankruptcy Rules 7008 and 7012 require parties to state in their pleadings whether or not they consent to bankruptcy court adjudication of non-core proceedings. The Court said that it is a "good practice" for courts to seek such express statements and that "[s]tatutes or judicial rules may require express consent where the Constitution does not." *Id.* at 1948 n.13.[3]

Justice Alito, in a separate opinion, concurred with the majority opinion in part and concurred in the judgment. 135 S. Ct. at 1949. He agreed that Article III permits a bankruptcy judge to adjudicate a *Stern* claim with the consent of the parties, but he thought that the majority

[3] As originally issued, footnote 13 of the Court's opinion went on to note (in connection with approval of courts seeking express consent) that the Court had recently approved and sent to Congress amendments to Rule 7008 and 7012 that would require parties to all adversary proceedings, not just non-core, to state expressly whether they consent to the bankruptcy court's entry of a final judgment. This description of the status of the *Stern* amendments was in error, and two days later the opinion was corrected to delete that sentence.

should not have addressed implied consent. Instead, he concluded that "respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below." *Stern* claims, he wrote, are not "exempt from ordinary principles of appellate procedure." *Id.* Although the majority opinion did not discuss forfeiture, the Court did remand for the Seventh Circuit to decide "whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below." *Id.*

Because the Court in *Wellness* did not decide whether the claim in question was a *Stern* claim, it provided no further guidance about the scope of *Stern* or how to determine whether a claim listed as core under § 157(b)(2) is beyond the bankruptcy court's authority to adjudicate without the consent of the parties. *Id.* at 1942 n.7 (noting that the opinion "does not address, and expresses no view on, . . . [whether] the Seventh Circuit erred in concluding the claim in count V of [the] complaint was a *Stern* claim").[4] *Wellness*, however, is significant because it answered the other major question that had divided the lower courts in the aftermath of *Stern*—whether parties can consent to allow a bankruptcy judge to enter a judgment in a proceeding that would otherwise require entry of judgment by an Article III court. By declaring that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge," *id.* at 1939, the Court left open a means for bankruptcy courts to resolve proceedings without the need to determine whether they are statutorily and constitutionally core. It also avoided a major shift of adjudicative responsibilities to the district courts, a result of apparent importance to the Court.[5]

[4] The Court did emphasize that the *Stern* opinion "took pains to note that the question before it was 'a narrow one,' and that its answer did 'not change all the much' about the division of labor between district courts and bankruptcy courts." *Id.* at 1946-47.

[5] *See id.* at 1938-39 (noting that without the service of magistrate and bankruptcy judges, "the work of the federal court system would grind nearly to a halt"); *id.* at 1946 (pointing out that elimination of the use of non-Article III judges "would require a substantial increase in the number of district judgeships").

Possible Rule Amendments in Response to *Wellness*

The Subcommittee considered three possible approaches for amending the Bankruptcy Rules to authorize bankruptcy courts, with the parties' consent, to adjudicate proceedings that would otherwise require Article III adjudication: (1) the pending *Stern* amendments; (2) the magistrate judge model; and (3) the Seventh Amendment model.

1. Pending *Stern* amendments. As discussed above, the pending amendments are based on the constitutional validity of party consent to non-Article III adjudication of *Stern* and non-core claims, which *Wellness* upholds. They provide for express consent in the parties' pleadings. If all the parties to a proceeding consent to bankruptcy court adjudication, no court would have to determine whether the proceeding is one that the bankruptcy court could have heard and determined in the absence of consent. On the other hand, if all of the parties do not consent in their pleadings, the bankruptcy court under amended Rule 7016 would have to determine whether the proceeding is constitutionally and statutorily core—in which case it could enter a final judgment—or a *Stern* or non-core proceeding—in which case it could do no more than submit proposed findings of fact and conclusions of law to the district court.

Requiring express consent goes beyond the constitutional minimum announced in *Wellness*. An express consent approach could result in more non-core and *Stern* claims being adjudicated in the district court by removing them from bankruptcy court adjudication. This is because parties who might decline to give express consent (if it is required) might otherwise be deemed to have implicitly consented to bankruptcy court adjudication of non-core and *Stern* claims under an implied consent approach. The express consent approach has the advantage, however, of clarity. Pleadings can be examined to determine if the parties in fact consented, thereby eliminating a more uncertain, retrospective determination of whether one or more parties

voluntarily and knowingly gave implied consent. Furthermore, it is a procedure that the Court in *Wellness* declared to be a good practice even if implied consent otherwise suffices. *See id.* at 1948 n.13 (explaining that express statements of consent "ensure irrefutably that any waiver of the right to consent to Article III adjudication is knowing and voluntary and . . . limit subsequent litigation over the consent issue").

2. Magistrate judge model. The Court in *Wellness* seemed to accept that a statement of consent in a party's pleading would constitute an express, knowing and voluntary waiver of the right to an Article III adjudication. *See* 135 S. Ct. at 1948 n.13. A more cautious approach, however, would be first to inform a party of the right to choose between an Article III and non-Article III adjudication of certain proceedings and then allow the party to make an affirmative choice. This is the procedure followed in the case of magistrate judge adjudications of civil proceedings under 28 U.S.C. § 636(c) and one that has been suggested to the Committee as the best way to respond to *Stern* and *Wellness*. *See* Suggestion 15-BK-F.

Federal Rule of Civil Procedure 73(b)(1) requires that the clerk give parties "written notice of their opportunity to consent under 28 U.S.C. § 636(c)." Parties indicate their consent by filing a statement affirmatively consenting to the referral. The rule provides that the district judge and magistrate judge may be informed of a party's choice only if all parties consent to the referral. Rule 73(b)(2) states that parties may be reminded of the availability of a magistrate judge but they must be advised that "they are free to withhold consent without adverse substantive consequences."

AO Form 85 implements Rule 73. It informs a party that a "United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment" and will exercise that authority only if

all parties to the case consent. It then provides the assurances required by Rule 73: "You may consent to have your case heard by a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case."

Attorneys Ben Logan and Peter Friedman of O'Melveny & Myers LLP submitted Suggestion 15-BK-F, which requests the Committee to adopt this approach. They state that adopting a rule similar to Civil Rule 73 will ensure that a party's consent is in fact knowing and voluntary. They also argue that adopting safeguards like those in Rule 73 will protect parties in a bankruptcy case, who may have numerous proceedings before the bankruptcy court, from any adverse consequences of declining to consent to bankruptcy court adjudication of a particular proceeding.

The magistrate approach is much more elaborate and cautious than the current consent procedures under Rules 7008 and 7012. Because *Wellness* held that neither Article III nor 28 U.S.C. § 157 requires express consent, one might question the reason for making such a significant change in the consent procedure in response to that decision. Furthermore, the wording of a similar consent form for bankruptcy proceedings would need to be modified to indicate that there are some proceedings—constitutionally and statutorily core proceedings—in which a bankruptcy judge may enter a final judgment regardless of the parties' decision on consent. Because of the continuing uncertainty regarding the scope of *Stern*, it would be difficult, if not impossible, for a form to describe in a meaningful way when consent is required. As a result, this approach of notifying a party of its right to choose an Article III adjudication or to consent to a non-Article III adjudication would likely be less effective than in the magistrate-judge context, and it could create greater confusion.

3. Seventh Amendment model. An alternative approach was suggested to the Committee in 2011 by Judges Benjamin Goldgar, Carol Doyle, and Bruce Black of the Bankruptcy Court for the Northern District of Illinois. Suggestion 11-BK-K. Under this approach a party would have to affirmatively request adjudication before a district judge; otherwise a bankruptcy judge would be authorized to hear the proceeding and enter a final judgment. The proposed procedure is similar to the district court procedure for invoking the Seventh Amendment right to a jury trial. Under Fed. R. Civ. P. 38(b), a party asserting a right to a jury trial on any issue must make a written demand for a jury trial no later than 14 days after service of the last pleading directed to that issue. The failure to do so results in waiver of the jury trial right.

The Bankruptcy Rules already include a rule that requires an affirmative assertion of a right to an Article III court in order to avoid waiver. Under Rule 8005(a) and Official Form 17A, if a Bankruptcy Appellate Panel ("BAP") has been established to hear an appeal from the bankruptcy court, an appeal will be taken to that court unless a party affirmatively elects to have it heard by a district court and makes the election in a timely manner. A failure to act results in the appeal being heard by the non-Article III BAP.[6]

The chief component of the judges' suggestion is a new Rule 7008.1 (Right to a Judgment by the District Court), which would require a party who desires an Article III adjudication to demand a judgment by the district court in its initial pleading. A failure to do so would constitute a waiver of the right. If a demand for a judgment by the district court is made,

[6] The suggestion submitted by Messrs. Logan and Friedman argues for a change in this procedure. They say that the "good practice" of requiring express consent to the non-Article III determination of a *Stern* or non-core matter should be followed here, as well as at the trial level. The Subcommittee, however, was not persuaded of the need to amend Rule 8005(a). The rule follows the statutory directive that if a BAP is established, each bankruptcy appeal "shall be heard" by the BAP "unless—(A) the appellant elects at the time of filing the appeal; or (B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court." 28 U.S.C. § 158(b)(1).

another party, or the bankruptcy court on its own motion, could object to the demand on the ground that the proceeding is not one in which there is such a right or that the right was not demanded in accordance with the rule.

When the Committee proposed the *Stern* amendments, it considered the suggestion but concluded that requiring an express statement of consent to bankruptcy court adjudication was preferable to allowing such adjudication by default unless district court adjudication is affirmatively requested. Several considerations went into the Committee's decision. The existing rules require an express statement of consent. It seemed to some members that it would be an odd response to a Supreme Court decision that emphasized the importance of the Article III safeguards to make waiver of that right easier by allowing it to occur through inaction. Moreover, the constitutional status of consent itself was undecided in the bankruptcy court context, which meant that implied consent was even more questionable.

Now that the Court has upheld implied consent, the Committee could reconsider the earlier determination favoring express consent. The major advantage of the suggested implied consent approach is its efficiency. By the time the pleadings are closed, it can be determined if all of the parties have waived any right they might have to entry of judgment by the district court. If there has been no demand, the bankruptcy court can hear and determine the proceeding. Inaction constitutes consent.

The major question under *Wellness*, however, is whether the suggested procedure satisfies the Court's standard for implied consent, which seems higher in this context than the standard for waiving jury trial rights. Quoting from *Roell v. Withrow*, 538 U.S. 580, 590 n.5 (2003), the *Wellness* Court said that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" 135 S. Ct. at 1948. Whether the

proposed demand procedure meets that requirement depends on how precise and direct the notification has to be. It is not clear whether the existence of a Bankruptcy Rule that presents bankruptcy court adjudication as an option that might be declined by demanding judgment by the district court would be a sufficient notification. Perhaps because the Court in *Wellness* was relying on a case involving consent to a magistrate judge adjudication, it had in mind a notice procedure like AO Form 85 (Notice, Consent, and Reference of a Civil Action to a Magistrate Judge) or an oral statement of the right to decline non-Article III adjudication. In *Roell* itself the petitioners appeared without objection and litigated before the magistrate judge after being told by the magistrate judge that they could choose her rather than a district judge and told by the district judge that the referral to the magistrate judge would be withdrawn if they did not consent. 538 U.S. at 582-83.

The Subcommittee's Recommendation

The Subcommittee concluded that the express consent requirement of the previously proposed *Stern* amendments would avoid any uncertainties about whether failure to demand entry of judgment by the district court constitutes implied consent, and it also would avoid the difficulties of attempting to inform parties of when they have a right to an Article III adjudication. The pending amendments have the further advantage of having been endorsed, albeit prematurely, by a majority of the Supreme Court. The Subcommittee therefore recommends proceeding with the *Stern* amendments that were approved by the Judicial Conference in 2013.

The *Stern* Amendments
(as approved by the Judicial Conference in September 2013)

Rule 7008. General Rules of Pleading

~~(a) APPLICABILITY OF RULE 8 F.R.CIV.P.~~ Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy ~~judge~~ court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or noncore and, if non-core~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court.

~~(b) ATTORNEY'S FEES. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.~~[*]

COMMITTEE NOTE

Former subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The

[*] The amendment deleting subdivision (b) went into effect on December 1, 2014.

bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

The rule is also amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Rule 7012. Defenses and Objections—When and How Presented— By Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(b) APPLICABILITY OF RULE 12(b)-(I) F.R. CIV. P. Rule 12(b)-(i) F.R. Civ. P. applies in adversary proceedings. A responsive pleading ~~shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core it~~ shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court. ~~In non-core proceedings, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties~~.

COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the

pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Rule 7016. Pre-~~-~~Ttrial Procedures~~; Formulating Issues~~

(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:

(1) to hear and determine the proceeding;

(2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or

(3) to take some other action.

COMMITTEE NOTE

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) *Where filed; form and content*. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core~~, ~~that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state~~ that the party does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court. A statement required by this paragraph shall be signed pursuant to Rule

9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

* * * * *

COMMITTEE NOTE

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy court has issued ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law,~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the

docket.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

TAB 7B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: SUGGESTION REGARDING PROCEDURE FOR TREATING FINAL JUDGMENT AS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

DATE: SEPTEMBER 7, 2015

Former reporter and Advisory Committee member Professor Alan Resnick submitted Suggestion 12-BK-H, which proposes a rule amendment to address the situation in which a district judge treats a judgment or order entered by a bankruptcy judge as proposed findings of fact and conclusions of law. This situation occurs when an appeal is taken from a purported bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. Professor Resnick submitted his suggestion in 2012 in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), but the Committee deferred taking any action it until the Supreme Court further clarified the scope of bankruptcy courts' authority. The suggestion is now ripe for consideration, and the Subcommittee recommends that an amendment to Rule 9033 to implement this suggestion be proposed for publication.

The Suggestion

At the time Professor Resnick made his suggestion, bankruptcy and district courts were trying to determine how best to proceed when a district court concluded that a bankruptcy court had erroneously entered a final judgment or order on a *Stern* claim, that is, a claim that was statutorily designated as core but for which the bankruptcy court lacked authority under Article III to enter a final judgment. Several district courts chose to treat such judgments as proposed

findings of fact and conclusion of law to be reviewed according to 28 U.S.C. § 157(c)(1).[1] This procedure eliminated the need for a remand to the bankruptcy court for the entry of proposed findings and conclusions.

Professor Resnick proposed a national rule provision that would endorse the described approach and flesh out the procedures applicable in such a situation. In particular he argued that parties should be given the option of either (1) treating their appellate brief as their objections or responses to the bankruptcy court's findings and conclusions or (2) filing new objections or responses. Because the district court employs a different standard of review when it reviews proposed findings and conclusions and enters a final judgment, as opposed to reviewing a final judgment as an appellate court, Professor Resnick suggested that parties should have the opportunity to file new responses and conclusions. He proposed implementing these changes by amending what was then Rule 8013 as follows:

> **Rule 8013. Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact; Treatment of Judgment, Order, or Decree as Proposed Findings and Conclusions**
>
> * * * * *
>
> (b) TREATMENT AS PROPOSED FINDINGS AND CONCLUSIONS. If the appeal is to the district court and the district court determines that the bankruptcy judge did not have the power consistent with Article III of the Constitution to enter the judgment, order, or decree, the district court may treat the

[1] Section 157(c)(1) provides as follows:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

judgment as proposed findings of fact and conclusions of law. In that event, Rule 9033(b), (c), and (d) shall apply, except that the district court shall set a time for serving and filing written objections under Rule 9033(b). Any party may elect to have its appellate brief treated as objections or responses to the proposed findings and conclusions.

The Subcommittee's Consideration of the Suggestion

After the submission of Professor Resnick's suggestion, the Supreme Court decided *Executive Benefits Insurance Agency v. Arkison,* 134 S. Ct. 2165 (2014), in which it held that *Stern* claims could be treated as non-core under § 157(c)(1). The Court explained that "because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*." While the case before the Court "did not proceed in precisely that fashion," the Court nevertheless affirmed. *Id.* at 2174. It concluded that the petitioner had received the equivalent of the review it was entitled to—de novo review—because the district court had reviewed the bankruptcy court's entry of summary judgment de novo and had "conclude[ed] in a written opinion that there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law." *Id.* at 2174.

The Subcommittee concluded that *Arkison* provides legal support for the validity of the approach Professor Resnick has suggested. The decision makes clear that *Stern* claims do not fall within a statutory gap of being neither core nor non-core. Instead, once identified as *Stern* claims, they can be treated under the statutory provisions for non-core claims, as the Resnick

suggestion proposes to do. Moreover, *Arkison* shows the Court's embrace of a pragmatic approach to dealing with errors in the handling of *Stern* claims. Rather than reversing and remanding for the bankruptcy court to handle the proceeding as a non-core matter, it accepted the district court's review as being tantamount to review of a non-core proceeding. *See also Stern*, 131 S. Ct. at 2602 (noting without criticism that "[b]ecause the District Court concluded that Vickie's counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court's judgment as 'proposed[,] rather than final,' and engage in an 'independent review' of the record").

Professor Resnick's suggested amendment would fill in a gap in the rules for dealing with claims that are determined on appeal to be *Stern* claims that must be treated as non-core. The Subcommittee noted that after *Wellness* and the implementation of other amendments that the Subcommittee is recommending in response to *Stern*, the proposed procedures will be used only in proceedings in which all parties did not consent to entry of judgment by the bankruptcy court, the bankruptcy court determined that it had constitutional authority to enter a final judgment, and the district court disagrees with that determination. The amended rule would then provide procedures for the parties to object and respond to what is now being treated as the bankruptcy court's proposed findings and conclusions.

The Subcommittee identified one problem with the suggestion, however. In 2014 as part of the overhaul of Part VIII of the Bankruptcy Rules, the content of former Rule 8013 was deleted as being duplicative of Rule 7052. The latter rule makes applicable in adversary proceedings Civil Rule 52, which, like former Rule 8013, provides that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judges the witnesses'

credibility."[2] The Subcommittee therefore considered other locations for the proposed amendment in the rules. These were the possibilities it considered:

- Rule 7052 (Findings by the Court). As stated above, it already addresses the standard of review of findings of fact on appeal to the district court of BAP.
- Rule 9033 (Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings). Because the proposed new provision incorporates portions of Rule 9033, the suggested language could be added as a new subdivision of this rule.
- Rule 80xx. The proposed provision could be designated as a new bankruptcy appellate rule—either at the end of the current appellate rules as Rule 8029 (or Rule 8027.1 if there is a preference for keeping the rule governing suspension of the rules as the final one) or in a logical location, perhaps as Rule 8008.1(between Indicative Rulings and Record on Appeal) or Rule 8018.1 (between Filing and Serving Briefs and Oral Argument).

The Subcommittee concluded that Rule 9033 was the best location and that it should be amended and proposed for publication as shown on the following page. The proposed draft includes amendments to the title and subdivision (a) that have already been approved by the Judicial Conference as part of the group of *Stern* amendments.

[2] Former Rule 8013 also provided that "[o]n appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." That part of the rule was deleted as being unnecessary.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy court has issued ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law,~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

(e) TREATMENT OF A JUDGMENT AS PROPOSED FINDINGS AND CONCLUSIONS. If an appeal is taken to the district court and the district court determines that the bankruptcy court did not have the power consistent with Article III of the Constitution to enter the judgment, order, or decree, the district court may treat the judgment as proposed findings of fact and conclusions of law. In that event, subdivisions (b), (c), and (d) of this rule shall apply, except that the district court shall set a time for serving and filing written objections under subdivision (b). Any party may elect to have its appellate brief treated as objections or responses to the proposed findings and conclusions.

Committee Note

Subdivision (e) is new. It is added to provide a procedure in appeals to a district court when the court determines that the bankruptcy court lacked constitutional authority to enter the final judgment, order, or decree appealed from. The Supreme Court held in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), that the district court in that situation may treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law. Subdivision (e) implements that authority and makes applicable the provisions of the rule governing objections, responses, and standard of review. It allows parties to either file (and respond) to objections to what will now be treated as the bankruptcy court's findings and conclusions or to use their appellate briefs for that purpose.

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TAB 7C

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MEMORANDUM

TO: SUBCOMMITTEE ON BUSINESS ISSUES

FROM: MICHELLE HARNER, ASSISTANT REPORTER

RE: ELECTRONIC NOTICING PROJECT WORK PLAN

DATE: SEPTEMBER 1, 2015

The Advisory Committee has received several comments that relate to noticing issues in federal bankruptcy cases. These comments include: (i) Suggestion 12-BK-M, submitted by Chief Judge Scott Dales, U.S. Bankruptcy Court for the Western District of Michigan, to amend Bankruptcy Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed a proof of claim; (ii) Suggestion 12-BK-B, submitted by Matthew T. Loughney, Clerk of Court, U.S. Bankruptcy Court for the Middle District of Tennessee, on behalf of the Administrative Office's Bankruptcy Noticing Working Group, regarding the noticing of an order confirming a chapter 13 plan; (iii) Comment BK-2014-0001-0062, submitted by Chief Judge Robert E. Nugent, U.S. Bankruptcy Court for the District of Kansas, on behalf of the National Conference of Bankruptcy Judges, regarding the service of entities under Bankruptcy Rule 7004(b) and, in turn, Bankruptcy Rules 4003(d) and 9014(b); and (iv) Suggestion 15-BK-H, submitted by the Administrative Office's Bankruptcy Judges Advisory Group, proposing an amendment to Bankruptcy Rule 9036 that would mandate electronic noticing in certain circumstances.[1] The Advisory Committee also has discussed various approaches to review the general landscape regarding electronic noticing provisions. This memorandum sets forth the work currently being done to examine the pending requests and bankruptcy noticing provisions more generally.

[1] In addition to formal comments, Rules Committee members David Lander and Edward Morrison have each submitted different suggestions for revisions to the noticing provisions of the Bankruptcy Rules.

Overview of Issues and Project

The Bankruptcy Rules govern, among other things, the noticing of parties in federal bankruptcy cases. These rules include the service of notices, pleadings, and other papers in bankruptcy cases, which often impact the substantive rights of potentially hundreds of parties. Noticing thus not only is important to ensure the service of justice in bankruptcy cases, but it also can be time-consuming, cumbersome, and expensive.

As noted above, some parties have identified specific concerns with the noticing provisions of the Bankruptcy Rules. For example, Bankruptcy Rule 2001(h) permits a court to limit notice to "creditors that hold claims for which proofs of claim have been filed" in chapter 7 cases. The rule does not, however, reference other chapters of the Bankruptcy Code. Chief Judge Dales has suggested extending this rule to chapter 13 cases to mitigate the time and cost associated with notice to "all creditors" in such cases. Similarly, Bankruptcy Rule 2002(f)(7) addresses the noticing of an order confirming a plan under chapters 9, 11, and 12, but not under chapter 13. Mr. Loughney suggests that "it would be helpful to have a rule that specifically addresses this notice in chapter 13 cases in order that it be made clear who should receive it."[2]

Another noticing issue involves Bankruptcy Rule 7004(b)(3), which permits service "[u]pon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Comments to the Advisory Committee

[2] *See* Suggestion 12-BK-B.

suggest that such service rarely provides actual notice to the correct individual within the entity and that similar issues exist under Bankruptcy Rule 4003(d).[3]

Moreover, the Administrative Office's Bankruptcy Judges Advisory Group (BJAG) has suggested that the Advisory Committee consider amending Bankruptcy Rule 9036 to mandate "electronic bankruptcy noticing for entities sent 100 or more court notices within a given month."[4] BJAG asserts that this amendment would enhance efficiency and produce significant monetary savings for the judiciary.

Each of these concerns could be considered and addressed discretely, and we have not received comments identifying significant concerns with noticing provisions generally. Nevertheless, we have heard informally that some other bankruptcy organizations are considering whether the noticing provisions generally are outdated or inefficient. These discussions raise two general questions: Do the Bankruptcy Rules identify the correct and necessary parties to receive notices, pleadings, and other papers in bankruptcy cases? Should the Bankruptcy Rules be modified to permit or require electronic service of notices, pleadings, and other papers in certain circumstances?

Although we have received little indication at this time that the bankruptcy community believes there is a significant problem regarding noticing generally, it may be prudent to survey the field and get an advance indication about whether such a problem exists or may exist in the future. There is a need to step cautiously here, though. The Bankruptcy Rules are an integrated set of principles that have served the bankruptcy system well for many years. Courts and parties

[3] Bankruptcy Rule 4003(d) provides, "A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014. Notwithstanding the provisions of subdivision (b), a creditor may object to a motion filed under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien." Bankruptcy Rule 9014(b), in turn, incorporates the service and noticing provisions of Bankruptcy Rule 7004.
[4] *See* Suggestion 15-BK-H.

generally understand the rules, as well as their rights and obligations under the rules. Moreover, many courts and practitioners have structured their noticing practices to comply with the existing rules, and any changes to the parties to be served or the methods of service could require significant revisions to those practices.

Accordingly, this project requires a methodical and systematic review of the existing noticing provisions in the Bankruptcy Rules. This review also should strive to answer the threshold key question: Is there a meaningful problem that needs to be fixed under the Bankruptcy Rules? We can obtain insight into this issue by determining whether bankruptcy organizations, such as the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter 13 Trustees, and the National Association of Bankruptcy Trustees, have concerns or are considering this issue. We can also obtain insight by determining whether other Rules Committees are considering undertaking an overhaul of noticing provisions.

Proposed Work Plan

To facilitate a meaningful review of the noticing provisions of the Bankruptcy Rules and the questions posed above, the Assistant Reporter will take the following steps:

- Complete a summary of the Bankruptcy Rules that identifies, among other things, the kinds of notices, pleadings, and other papers to be served; the party required to accomplish such service; the parties to be served; and the modes of acceptable service. A working draft of the chart collecting this information is in progress and will be circulated for review and comment. The chart will be finalized in connection with the preliminary report discussed below.

- Undertake a survey of the field to determine what, if anything, other organizations are doing on noticing issues in bankruptcy cases, including any concerns or issues they may have identified. This survey will also consider the work of other Rules Committees on these issues.

- Provide a preliminary report on the results of the foregoing tasks.

TAB 8A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: PENDING AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

DATE: SEPTEMBER 4, 2015

At its May 2015 meeting, the Standing Committee gave final approval to six sets of proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"). The amendments relate to the following topics: (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). If the amendments are approved by the Judicial Conference in September, they will be sent to the Supreme Court. If the Court approves them by May 1, 2016, they will go into effect on December 1, 2016, assuming that Congress takes no action to the contrary.

The recently revised bankruptcy appellate rules, which are located in Part VIII of the Bankruptcy Rules, are modeled on many FRAP provisions. Because the Part VIII rules track FRAP wording rather than incorporate FRAP by reference, the pending FRAP amendments will not automatically apply to bankruptcy appeals in district courts and bankruptcy appellate panels. One of the main goals of the Part VIII revision was to align the bankruptcy appellate rules more closely with FRAP so that bankruptcy appeals at the first level are governed in many respects by the same rules that apply to subsequent appeals to the courts of appeals. The prospect of changes to FRAP therefore necessitates a determination of which of the FRAP provisions proposed for

amendment have parallels in the Part VIII rules and whether those bankruptcy rules should be similarly amended.

The Subcommittee considered those issues during its August 13 conference call, and it recommends that the affected Part VIII rules be amended to remain consistent with the amended FRAP provisions.

This memorandum discusses four of the six sets of proposed FRAP amendments. The amendment to Rule 26(c)'s "three day rule" does not need to be considered because the Committee has already proposed and gained the Standing Committee's final approval of a similar amendment to Rule 9006(f). And because the amendment to Rule 26(a)(4)(C) concerns a cross-reference to a rule governing appeals from the Tax Court, it is irrelevant to bankruptcy appeals. For the other sets of proposed FRAP amendments, the following sections of the memorandum describe the proposed changes and discuss the extent to which they impact the Part VIII rules. If the Committee agrees that the Bankruptcy Rules should be amended to conform to the FRAP amendments, the Subcommittee will present drafts of the proposed amendments at the spring meeting with a recommendation that they be approved for publication in August 2016.

Inmate-Filing Provisions under Rules 4(c) and 25(a)

FRAP 4 (Appeal as of Right—When Taken) and FRAP 25 (Filing and Service) contain special rules for inmates confined in an institution. They treat notices of appeal and other papers as timely filed by such inmates if the documents are deposited in the institution's internal mail system on or before the last day for filing and several other specified requirements are satisfied. The proposed amendments to these rules are intended to clarify certain issues that had produced conflicts in the case law. They would (1) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions; (2) clarify that a document is timely filed

if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid; and (3) clarify that if sufficient evidence does not accompany the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.[1]

Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a) (Filing and Service; Signature) include inmate-filing provisions that are identical to the existing FRAP provisions. Because these bankruptcy provisions are new and have only been in effect since December 1, 2014, there is not yet any case law applying them. However, because they were added to the Bankruptcy Rules in order to be consistent with FRAP, the Subcommittee believes that they should be amended in order to maintain that consistency.

Tolling Motions under Rule 4(a)(4)

FRAP 4(a)(4) sets out a list of postjudgment motions that toll the time for filing an appeal. Under the current rule, the motion must be "timely file[d]" in order to have a tolling effect. The requirements of this rule are generally considered to be jurisdictional because Congress enacted 28 U.S.C. § 2107, which establishes the deadline for civil appeals, against the backdrop of a long history of the acceptance of tolling motions. *See* 16A Wright et al., Federal Practice & Procedure § 3950.4.

The Appellate Rules Committee proposed an amendment to Rule 4(a)(4) to resolve a circuit split on the question whether a tolling motion filed outside the time period specified by the relevant rule but nevertheless ruled on by the district court is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the proposed amendment would add an

[1] A new Appellate Form 7 is proposed to provide a suggested form of declaration that would satisfy the amended rules. Forms 1and 5 (which are suggested forms of notices of appeal) would be revised to include a reference alerting inmate filers to the existence of Form 7.

explicit requirement that the motion must be filed within the time period specified by the rule under which it is made. Although the district court has authority to rule on the listed postjudgment motions if it mistakenly extends the time for making the motion and no one objects, amended Rule 4(a)(4) would not allow such a motion to have a tolling effect for the purpose of determining the deadline for an appeal.

Bankruptcy Rule 8002(b) is similar to existing FRAP 4(a)(4). It too requires that the postjudgment motion be timely filed. The Subcommittee is not aware of any bankruptcy decisions that give a tolling effect to postjudgment motions that are filed after the specified deadline but are nevertheless ruled on by the bankruptcy court after it mistakenly extends the time for filing. Thus there is no evidence of a need to clarify the issue that prompted the proposed FRAP amendment. Nevertheless, adhering to the proposed FRAP language would eliminate any suggestion that the Bankruptcy Rule is intended to permit a result that FRAP 4(a)(4) does not.

Length Limits for Appellate Filings

The most significant set of proposed FRAP amendments would revise the length limits for briefs and other filings. The proposal would amend Rules 5 (Appeal by Permission), 21 (Extraordinary Writs), 27 (Motions), 35 (En Banc Determination), and 40 (Petition for Panel Rehearing) to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40. The current ratio is 280 words per page.

The amendments would also reduce the word limits of Rule 32 (Form of Briefs, Appendices, and Other Papers) for briefs to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals would correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) would set out a uniform list of the items that can be excluded when computing a document's length. A new appendix would collect in one chart all the length limits stated in FRAP.

Any court of appeals that wished to retain the existing limits, including 14,000 words for a principal brief, would be able to do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in FRAP.

These FRAP amendments would have a significant impact on the Part VIII rules. The Bankruptcy Rules were revised especially to create uniformity in brief length limits for the two stages of bankruptcy appeals. To retain consistency with this aspect of the proposed FRAP amendments, Rules 8013(f) (Motions), 8015(a)(7) and (f) (Form and Length of Briefs), 8016(d) (Cross-Appeals), and 8022(b) (Motion for Rehearing) would have to be amended, along with Official Form 417C (Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)). In addition a new provision would need to be added to Rule 8015 to correspond to new FRAP 32(f) regarding the calculation of a document's length, and an appendix similar to the proposed FRAP appendix might be created to present in one place all of the Part VIII length limits.

Amicus Filings in Connection with Rehearing: Rule 29

The Appellate Rules Committee proposed an amendment to Rule 29 (Brief of an Amicus Curiae) to provide a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule currently does not address the topic; it is limited to amicus briefs filed in connection with the original hearing of an appeal. The proposed amendment would not require courts to accept amicus briefs regarding rehearing, but it would provide guidelines for such briefs that are permitted.

Bankruptcy Rule 8017 governs amicus briefs, and it tracks the language of FRAP 39. There may not be a great need to provide guidelines for amicus briefs in connection with petitions for rehearing in the district court or BAP, but the Subcommittee concluded that there is no reason to depart from the amended FRAP provision.

Timing Considerations

Any amendments made to the Part VIII rules to conform to the FRAP amendments will need to be published for public comment. They are more than technical amendments, and comments might identify differences regarding bankruptcy appeals that make adoption of some of the FRAP amendments inadvisable. In order for the amendments to the Part VIII rules to go into effect as close to the effective date of the new FRAP rules as possible, they will need to be published for comment next summer. If the Subcommittee's proposed amendments are approved by the Committee at the spring 2016 meeting, they can be presented to the Standing Committee in June, with a request that they be published for public comment in August.

TAB 9A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

SUBJECT: PROPOSALS REGARDING ELECTRONIC FILING AND SERVICE

DATE: SEPTEMBER 10, 2015

The Committee previously reviewed several possible amendments to Civil Rule 5 regarding (1) electronic filing and signing of documents, (2) electronic service of documents after the summons and complaint, and (3) use of a notice of electronic filing in place of a certificate of service. These amendments were being considered by the Civil Rules Committee in coordination with the other advisory committees. At the spring 2015 meeting, the Committee voted to propose for publication an amendment to Rule 5005(a)(2) (Filing By Electronic Means) that would conform to the proposed amendment to Civil Rule 5(d). Because the language of the proposed amendment to Civil Rule 5(d) was still in flux at the time of the meeting, the Committee authorized the chair and the reporter to participate in inter-committee negotiations over the language of the proposed Rule 5(d) amendment and to incorporate into the proposed amendment to Rule 5005(a)(2) language that was mutually acceptable to the advisory committees.

The Civil Rules Committee subsequently decided not to seek publication of amendments to Rule 5 in 2015 in order to give the other advisory committees more time to consider any similar amendments they want to propose. It then presented its proposals as an information item at the May Standing Committee meeting, where it was decided that information should be gathered about the treatment of pro se litigants under local rules currently in effect regarding

electronic filing. Julie Wilson and Bridget Healy from the Administrative Office of the Courts are undertaking that research.

This matter is back before the Committee for an update on developments and additional consideration of the possible amendments to Civil Rule 5 and the related amendment to Bankruptcy Rule 5005. They were discussed by the Subcommittee during its conference call on August 6. Because the Civil Rule amendments are still a moving target, the Subcommittee has prepared this memorandum to provide information to the Committee in case it wants to give feedback to the Civil Committee about the wording or content of any of the amendments to Rule 5 that are under consideration. The deliberations of the other advisory committees and the survey of local rules being carried out by the Administrative Office are ongoing, so it is likely that no final decision regarding publication of an amendment to Rule 5005 and parallel amendments to other sets of rules will occur until the spring 2016 advisory committee meetings.

This memorandum discusses the possible amendments to Civil Rule 5, including wording changes that were made after the Committee's spring meeting; possible amendments to Criminal Rule 49 that were drafted after the Subcommittee's conference call; and the relationship of the Civil Rule amendments to the Bankruptcy Rules.

Electronic Filing

The Civil Rules Committee initially considered amending Rule 5(d)(3) to require electronic filing, subject to exceptions for good cause and as provided by local rules. It read as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made~~, signed, or verified~~ by electronic means that are consistent with any technical standards ~~or standards of form~~ established by the Judicial Conference of the United States. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~ But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically ~~in accordance with a local rule~~ is a written paper for purposes of these rules.

Criminal Rule 49(b) currently provides that "[s]ervice must be made in the manner provided for a civil action." In response to the initial proposal to amend Civil Rule 5(d), the Criminal Rules Committee expressed concerns about requiring or even allowing pro se litigants to file electronically and about the burden that adopting local rules to except pro se filings would impose on districts. Responding to this concern, the Civil Committee revised its proposed amendment to read as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

*** * * * ***

(d) Filing

*** * * * ***

(3) *Electronic Filing~~,~~ and Signing ~~, or Verification~~.*

(A) *When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified.~~ All filings, except

those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature.

The Criminal Rules Committee will be considering its own version of a rule on electronic filing at its fall meeting. The draft of an amendment to Criminal Rule 49(b) currently under consideration provides in part as follows:

Rule 49. Serving and Filing Papers

* * * * *

(b) Filing

* * * * *

(3) ***Means Used by Represented and Unrepresented ~~Parties~~ .***

(A) *Represented Party.*

OPTION #1: Unless excused by the court for good cause or local rule, a person represented by an attorney must file electronically.

OPTION #2: A person represented by an attorney must file electronically, but paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Nonrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

* * * * *

Although there are wording differences between the civil and criminal proposals, the substance of proposed Criminal Rule 49(b)(3) (particularly under Option #2) is similar to the substance of proposed Civil Rule 5(d)(3). The main difference is one of tone. The Civil Rule would authorize a pro se party to file electronically "only if allowed by court order or by local

rule," whereas the Criminal Rule would prohibit electronic filing by such parties "unless allowed to file electronically by court order or local rule."

Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore an amendment to Rule 5(d)(3) would automatically apply in adversary proceedings unless Rule 7005 were amended to provide otherwise. But the topic of electronic filing is also addressed in Bankruptcy Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). In order to make Rule 5005(a)(2) consistent with Rule 7005's incorporation of an amended Civil Rule 5(d)(3), Rule 5005(a) would need to be similarly amended. Based on the original version of the civil rule amendment, that could be accomplished as follows:

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Filing and Signing by Electronic Means*. ~~A court may by local rule permit or require documents to be filed, signed, or verified~~ All filings shall be made by electronic means that are consistent with any technical standards~~, if any, that~~ established by the Judicial Conference of the United States ~~establishes~~. ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ But paper filing shall be allowed for good cause, and may be required or allowed for other reasons by local rule. The act of electronic filing constitutes the signature of the person who makes the filing. A document filed by electronic means ~~in compliance with a local rule~~ constitutes a written paper for the purpose of

applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

COMMITTEE NOTE

Subdivision (a)(2) is amended to conform to Rule 5(d)(3) F.R. Civ. P, which Rule 7005 makes applicable in adversary proceedings. This amendment is based on recognition that electronic filing has matured. Most [All?] districts have adopted local rules that require electronic filing and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons. Many courts now have local rules that provide for paper filing by pro se litigants, and they may carry those rules forward.

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign.

The amended rule applies directly [only?] to the filer's signature. It does not address others' signatures. Many filings include papers signed by someone other than the filer. Examples include petitions, schedules, affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience. Local rules may address verification by electronic means.**]**

This was the proposed amendment that the Committee approved for publication at the spring meeting, subject to further negotiations on wording. The proposed amendment would generally require electronic filing by national rule. To the extent that local rules currently allow reasonable exceptions—for example, for pro se filers—those exceptions could continue because local exceptions are permitted. The amended rule would contain a new sentence providing that

the act of electronic filing constitutes the signature of the filer, but that provision also conforms to existing practice. When this Committee's proposed (and later withdrawn) electronic signature amendment was published, a similar provision was included, and it drew no negative comments. All of the criticism related to the provisions regarding the electronic signature of a non-filing party.

Should the revised version of the amendment to Civil Rule 5(d)(3) prevail, Rule 5005(b) could be amended this way:

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Filing and Signing by Electronic Means*.

(A) *When Required or Allowed; Paper Filing.* ~~A court may by local rule permit or require documents to be filed, signed, or verified~~ All filings, except those made by a person [individual] proceeding without an attorney, shall be made by electronic means that are consistent with any technical standards~~, if any,~~ ~~that~~ established by the Judicial Conference of the United States ~~establishes~~. ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ But paper filing shall be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person [individual] proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A document filed by electronic means ~~in compliance with a local rule~~ constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

Corresponding changes could be made to the Committee Note.

The Subcommittee concluded that it prefers the second version of Rule 5005(a)(2)—which would prohibit electronic filing by pro se litigants unless authorized by local rule. It also concluded that the language in brackets in proposed Rule 5005(a)(2)(C) is unnecessary and should be deleted.

Electronic Service

The Civil Rules Committee also proposed to amend Rule 5(b)(2)(E) to eliminate the consent requirement for the use of electronic service of documents filed after the original complaint. As noted above, Rule 7005 adopts Civil Rule 5 for adversary proceedings, so any amendment to Rule 5(b)(2)(E) would become applicable in adversary proceedings unless the Bankruptcy Rule were amended to deviate from the Civil Rule. Similarly, Rule 9014(b), which governs contested matters, requires service according to Civil Rule 5(b) for any paper filed after the initial motion, so any amendment to Rule 5(b) would automatically apply under this rule.

The proposed amendment to Rule 5(b)(2)(E) does not mandate the use of electronic service by the serving party; alternative methods of service would remain in subparagraphs (A), (B), (C), (D) and (F). When the Committee last reviewed the proposed amendment, it would have eliminated the requirement that the party being served consent in writing to the receipt of electronic service and would have replaced that requirement with "good cause" and local rule exceptions:

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served on the person to be served under this rule by:

* * * * *

(E) sending it by electronic means ~~if the person consented in writing~~, unless the person shows good cause to be exempted from such service or is exempted by local rule. ~~— in which event~~ Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

* * * * *

The Civil Rules Committee later narrowed the amendment to allow electronic service without consent only by means of the court's CM/ECF system on other authorized users. The version presented to the Standing Committee provides as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

*** * * * ***

(b) Service: How Made.

*** * * * ***

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means ~~if~~ that the person consented to ~~in writing — in which event~~. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

* * * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

As stated in the last paragraph of the Committee Note, accompanying this amendment would be a proposal to delete Rule 5(b)(3) as unnecessary:

~~(3) *Using Court Facilities*. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

The Criminal Rules Committee is considering a slightly different approach. The amendment to Criminal Rule 49(a)(3) under consideration would draw a distinction between represented and unrepresented parties:

(3) ***How Made Electronically***.

(A) *By a Represented Party*. A party represented by an attorney may serve a paper by sending it through the court's electronic-transmission facilities to a registered user or by other electronic means that the person consented to [in writing]. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

(B) *By an Unrepresented Party*. A party not represented by an attorney may use electronic service only if allowed by court order or by local rule.

The Civil Rule proposal would leave regulation of CM/ECF service up to the courts' registration process and would require consent of the person served for other means of electronic service, such as by email. The Criminal Rule would instead require authorization by court order or local rule for pro se parties to use any form of electronic service.

Because the proposed civil amendment would apply automatically to the Bankruptcy Rules, the Committee does not need to make any recommendation regarding Civil Rule 5(b)(2). Members of the Subcommittee, however, expressed a preference for the second version of the Civil Rule amendment, which would eliminate the consent requirement only for service through the CM/ECF system.

Notice of Electronic Filing

Along with the change to Rule 5(b)(2)(E), the Civil Rules Committee is also proposing an amendment to Rule 5(d)(1) regarding certificates of service. The Committee on Court Administration and Case Management suggested to the Standing Committee that the various advisory committees consider rule amendments that would allow a notice of electronic filing to be used in place of a certificate of service.

The proposed amendment to Rule 5(d)(1) is substantially the same as the version previously reviewed by the Committee. After undergoing stylistic changes, it provides as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

(1) *Required Filings; Certificate of Service*.

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * * * *

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any party [person] served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

The Criminal Rules Committee is considering a similar amendment to Rule 49(b)(1): "A notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities."

As with electronic service, the Civil Rule amendment, if approved, would become applicable in adversary proceedings pursuant to Rule 7005. Rule 9014, however, does not incorporate Rule 5(d). When the Committee previously reviewed this proposed amendment, no member raised any concerns about the prospect of the amended rule applying in adversary proceedings in bankruptcy.[*]

[*] Rule 8011(d), applicable in bankruptcy appeals, requires either an acknowledgment of service or a proof of service to be filed and does not refer to a notice of electronic filing. But Rule 8004(a)(3), which addresses appeals by leave, recognizes that electronic service may eliminate the need for certificates of service. It states that a certificate of service must be filed with a notice of appeal and motion for leave to appeal "unless [those documents are] served electronically using the court's transmission equipment." The Committee may in the future want to consider whether Rule 8011(d) should be amended along the lines of Civil Rule 5(d)(1).

MEMORANDUM

TO: Rules Committees Reporters

FROM: Julie Wilson
Bridget Healy

DATE: September 2, 2015

RE: Survey of Electronic Filing Provisions for Pro Se Litigants

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I. Introduction

This memorandum is in response to the request that the Rules Office conduct a survey of each federal district's local rules and procedures for provisions regarding electronic filing by pro se litigants; specifically, whether pro se litigants are permitted to file electronically via the CM/ECF filing system. The Rules Office researched the following three categories of pro se litigants: (1) non-incarcerated pro se litigants in the district courts; (2) incarcerated pro se litigants in the district courts; and (3) pro se debtors in the bankruptcy courts.

The accompanying spreadsheets contain information on all ninety-four federal judicial districts and bankruptcy courts. The spreadsheets indicate: (1) whether pro se litigants are permitted to file electronically; (2) where the provisions regarding electronic filing are located; and (3) any additional relevant notes.

II. Results of Survey

A. District Courts

1. Non-Incarcerated Pro Se Litigants

In the majority of districts, pro se litigants are expected (or required) to file paper documents. Thirty-nine districts categorically prohibit electronic filing; thirty-four districts have a default rule requiring paper filing, but do permit pro se litigants to file electronically after

seeking and obtaining permission from the court. Only sixteen districts allow pro se litigants who are not incarcerated to file electronically without having to first obtain permission from the court.

2. Incarcerated Pro Se Litigants

The default rule requiring paper filing is even more evident with regard to incarcerated pro se litigants. Among the federal districts, fifty-five categorically prohibit electronic filing by incarcerated pro se litigants. It is difficult to assess the number of districts that permit an incarcerated pro se litigant to use the CM/ECF system (or conceivably permit electronic filing by requesting leave of court). The difficulty is due to the fact that the provisions governing pro se litigants often do not distinguish between types of pro se litigants. In these instances, we assumed the rule for pro se litigants applied to all pro se litigants; however, we made note of the lack of clarity.

There are three districts that expressly permit electronic filing by incarcerated pro se litigants: the Central District of Illinois, the Southern District of Illinois, and the Eastern District of Washington. It is worth noting that, in these districts, electronically filed documents are filed by prison library staff and not the incarcerated litigant.

It is also worth noting that it was often difficult to find the answer to the question of whether pro se litigants (incarcerated or not) are permitted to file electronically. There is little uniformity among the federal districts with regard to the location of the provision governing pro se litigants. In some cases, even after looking at the local rules, standing orders, general orders, CM/ECF procedures, and pro se materials posted on the court's website, the answer was elusive. In such cases, we indicated that the answer was "unclear."

B. Bankruptcy Courts

Very few bankruptcy courts, ten in total, permit electronic filing by pro se debtors. For the few that do, the provisions permitting such filing are usually located within the court's local rules or electronic filing procedures. Two of the courts that permit electronic filing by pro se debtors do so through the Electronic Self-Representation program (eSR), a program developed with the Administrative Office that provides access for pro se debtors to file case opening forms electronically. The program permits electronic filing for case opening forms only; later filings must be done in paper unless otherwise permitted by the court and these courts otherwise do not permit electronic filing by pro se debtors.

The majority of bankruptcy courts do not permit electronic filing by pro se debtors. For a few of the courts (ten), it is unclear whether or not pro se debtors are permitted to file electronically, although the lack of any specific permission leads to the conclusion that it is not permitted.

Most local rules (usually a variant of Local Rule 5005) refer to the electronic filing procedures to provide greater detail about permitted electronic filers and the procedure for registration and filing. Usually the local rules do not specifically prohibit electronic filing by pro se debtors; instead, any specific prohibition is included in the electronic filing procedures.

In completing the review, it was often time consuming to determine whether pro se debtors were permitted to file electronically, given that it required reviewing both the local rules and electronic filing procedures, and the procedures were located in various places on court websites. Also, despite the fact that most bankruptcy courts have sections on their websites for pro se filers, specific guidance on whether or not a pro se debtor could file electronically was often not included in that section.

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U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Alabama Middle	Local Rule 5005-1 and CM/ECF procedures	http://www.almb.uscourts.gov/sites/almb/files/local_rules/120109%20Amended%20Local%20Rules.pdf	No	Beginning May 1, 2015, the court offers Debtor Electronic Bankruptcy Noticing (DeBN). With DeBN debtors receive court notices and orders by email in .pdf format the same day they are filed by the court, and there is no charge and	
Alabama Northern	Local Rule 5005-4	5005-4, http://www.alnb.uscourts.gov/sites/default/files/Local%20Rules%2010-1-13_0.pdf	No	The court offers debtors the opportunity to request receipt of orders and court-generated notices via email, instead of U.S. mail, through DeBN.	
Alabama Southern	Local Rule 5005-1	http://www.alsb.uscourts.gov/sites/alsb/files/local_rules/localrules.pdf	No		
Alaska	Local Rule 5005-4	LR 5005-4; http://www.akb.uscourts.gov/pdfs/2012_lbr.pdf	No		
Arizona	Local Rule 5005-2	http://www.azb.uscourts.gov/rule-5005-2	No	Pro se filers are specifically excepted from the electronic filing requirements.	
Arkansas Eastern & Western	Local Rule 5005-4	http://www.arb.uscourts.gov/orders-rules-opinions/rules/LR5005-4.pdf	No	Pro se filers are specifically excepted from the electronic filing requirements.	
California Central	Local Rule 5005-1	http://www.cacb.uscourts.gov/esr	Pro se filers can file electronically through the Electronic Self-Representation program.	Court offers Debtor Electronic Bankruptcy Noticing (DeBN). Pro se filers are excepted from mandatory requirements other than the eSR program.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
California Eastern	Local Rule 5005-1(d)	http://www.caeb.uscourts.gov/documents/Forms/LocalRules/15.Local_Rules.pdf	No		
California Northern	Local Rule 5005-1	http://www.canb.uscourts.gov/procedures/local-rules	No	The court offers Debtor Electronic Bankruptcy Noticing http://www.canb.uscourts.gov/faq/ebn	
California Southern	General Order 162-A	http://www.casb.uscourts.gov/pdf/GO162a.pdf	No		
Colorado	Local Rule 5005-4	http://www.cob.uscourts.gov/files/mrfa.pdf	No		
Connecticut	Standing Order No. 7	http://www.ctb.uscourts.gov/Doc/sorders/STorder7-1.pdf	No		
Delaware	Local Rule 5005-4	http://www.deb.uscourts.gov/sites/default/files/local_rules/LocalRules_2015.pdf	No	Debtors are not required to file electronically.	
District of Columbia	Administrative Order Relating to Electronic Case Filing	http://www.dcb.uscourts.gov/dcb/sites/www.dcb.uscourts.gov.dcb/files/AdmOrderSigned.pdf	No		
Florida Middle	Local Rule 5005-1	http://www.flmb.uscourts.gov/localrules/rules/5005-1.pdf	No	Debtors may sign up to receive electronic notice. http://www.flmb.uscourts.gov/filing_without_attorney/documents/pro_se_registration.pdf	
Florida Northern	Standing Order; Local Rule 5005-1	http://www.flnb.uscourts.gov/sites/default/files/standing_orders/so11.pdf	No	Debtors are not required to file electronically.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Florida Southern	Local Rule 5005-4	http://www.flsb.uscourts.gov/?page_id=2305#50054	No		
Georgia Middle	Local Rule 5005-4(b)	http://www.gamb.uscourts.gov/USCourts/sites/default/files/local_rules/Updated_Local_Rules.pdf	No		
Georgia Northern	Local Rules 5005-5; 5005-6	http://www.ganb.uscourts.gov/content/blr-5005-5-electronic-filing	No	See also: http://www.ganb.uscourts.gov/content/blr-5005-6-attorneys-trustees-and-examiners-required-file-documents-electronically	
Georgia Southern	General Order for Administrative Procedures	http://www.gasb.uscourts.gov/usbcGenOrders.htm#go_2010_1	No		
Hawaii	Local Rule 5005-2	http://www.hib.uscourts.gov/localrules/LBRs.pdf	No	The court permits Debtor Electronic Noticing through DeBN - http://www.hib.uscourts.gov/	
Idaho	ECF Procedures	http://www.id.uscourts.gov/announcements/ECFProcedures_Final.pdf	No		
Illinois Central	Standing Order	http://www.ilcb.uscourts.gov/sites/ilcb/files/3rd%20amd%20GO%20re%20ECF.pdf	Yes, with court approval. Limited to specific case.	Offers Debtor Electronic Bankruptcy Noticing through DeBN.	The Bankruptcy Court does not have separate local rules but instead refers to the District Court rules. The District Court rules permit pro se electronic filing (see District Court Local Rule
Illinois Northern	ECF Procedures and Local Rule 5005-2	http://www.ilnb.uscourts.gov/sites/default/files/Procedures_for_CMECF.pdf	No		
Illinois Southern	Electronic Filing Rules; Local Rule 5005-1	http://www.ilsb.uscourts.gov/sites/default/files/ElectronicFilingRulesDec2013.pdf; http://www.ilsb.uscourts.gov/sites/default/files/LocalRules-BkSoDistrict.pdf	No	There is a reference in the rules to pro se filers scanning their filings at the clerk's office.	
Indiana Northern	Standing Order	http://www.innb.uscourts.gov/pdfs/6thAmendedECFOrder.pdf	No		
Indiana Southern	Local Rule 5005-4 and Administrative Procedures	http://www.insb.uscourts.gov/AdminManual/Attorney/Admin_Policies_and_Procedures.htm	No		
Iowa Northern	Standing Order	http://www.ianb.uscourts.gov/publicweb/sites/default/files/standing-ordes/ExhibitOnetoStandingOrder1-Revised11-08.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Iowa Southern	None.		Not clear but most likely no.	The court offers debtors the opportunity to request receipt of court notices and orders via email, instead of U.S. mail, through a program called DeBN.	The court abolished its local rules in 2003.
Kansas	Local Rule 5005-1; Administrative Manual(see http://www.ksb.uscourts.gov/images/local_rules/LOCALRULES.MARCH.2015CompleteFiled.pdf)	http://www.ksb.uscourts.gov/images/local_rules/2014_Local_Rules.pdf	Yes, with court approval. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Kentucky Eastern	Local Rule 5005-4; Administrative Procedures Manual	http://www.kyeb.uscourts.gov/sites/kyeb/files/June%202015%20APM%20with%20TOC%20Web%20Version.pdf	Yes, with court approval. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Kentucky Western	None.		No	http://www.kywb.uscourts.gov/fpweb/pro_se_faqs.htm#6	
Louisiana Eastern	Local Rule 5005-1; Administrative Manual	http://www.laeb.uscourts.gov/sites/laeb/files/AdminProcManual121213.pdf	Not clear but most likely no.		
Louisiana Middle	Administrative Procedures	http://www.lamb.uscourts.gov/sites/lamb/files/adminprocedures-2013-12.pdf	No		
Louisiana Western	Administrative Procedures	http://www.lawb.uscourts.gov/sites/lawb/files/court/Administrative_Procedures_Feb2011.pdf	No		
Maine	Administrative Procedures	http://www.meb.uscourts.gov/meb/pdf/Administrative%20Procedures_%203_2011.pdf	No		
Maryland	Administrative Procedures	http://www.mdb.uscourts.gov/content/training-and-registration	No	Offers Debtor Electronic Bankruptcy Noticing through DeBN.	
Massachusetts	CM/ECF FAQs	http://www.mab.uscourts.gov/mab/ecf-faqs	No		
Michigan Eastern	Administrative Procedures	http://www.mieb.uscourts.gov/sites/default/files/courtinfo/ECFAdminProc.pdf	No		
Michigan Western	Administrative Procedures	http://www.miwb.uscourts.gov/sites/miwb/files/local_rules/AdminProc.pdf	Not clear but most likely no.	There are conflicting statements in the Administrative Procedures. It may be that pro se filers are permitted but not required to use the electronic filing system.	
Minnesota	Website, under Electronic Filing tab	http://www.mnb.uscourts.gov/cmecf-case-managementelectronic-case-filing	No		
Mississippi Northern	Local Rule 5005-1	http://msnb-dev.jdc.ao.dcn/sites/msnb/files/Red_Line_Local_Rules_12-1-2014.pdf	No		
Mississippi Southern	Local Rule 5005-1	http://msnb-dev.jdc.ao.dcn/sites/msnb/files/Red_Line_Local_Rules_12-1-2014.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Missouri Eastern	Procedures Manual; Local Rule 5005 (see http://www.moeb.uscourts.gov/pdfs/local_rules/2014/2014_Local_Rules.pdf)	http://www.moeb.uscourts.gov/pdfs/local_rules/2013/Procedures_Manual_2013.pdf	Not clear but most likely no.	The language in Local Rule 5005 reads:All documents filed by an attorney shall be filed electronically in accordance with the procedures for electronic case filing set forth in the Procedures Manual. If the deadline to file a document occurs, or a party must file an emergency motion while the Court's CM/ECF system is shut down, the attorney filer may file the document by paper following the procedures set forth in these Rules and the Procedures Manual for paper filing by unrepresented parties. The attorney filer may, in such an instance,	
Missouri Western	Local Rule 11002-1	http://www.mow.uscourts.gov/bankruptcy/rules/bk_rules.pdf	No		
Montana	Local Rules 5005-1; 5005-2	http://www.mtb.uscourts.gov/Reports/2009BKRulesFinal.pdf	No		
Nebraska	Local Rule 5005-1	https://www.neb.uscourts.gov/Robohelp_Manuals/Local_Rules/index.htm	No		
Nevada	Local Rule 5005	http://www.nvb.uscourts.gov/downloads/rules/local-rules-2012_12-17-12.pdf	No	Pro se filers are exempt from the mandatory electronic filing requirements.	
New Hampshire	Local Rule 5005-4	http://www.nhb.uscourts.gov/OrdersRulesForms/LocalRulesOrdersPDFs/2012%20LBRs%20IBRs%20AOs%20and%20LBFs%20-%20Clean.pdf	Not clear but most likely no.	Language from 5005-4: Attorneys admitted to the bar of this court (including those admitted pro hac vice), United States trustees and their assistants, trustees and others as the court deems appropriate, may register as Filing Users of the court's CM/ECF system upon: (A) completion of the court's training program, or (B) certification that the proposed Filing User has been trained in another court and is qualified to file pleadings in a federal court.	
New Jersey	Local Rule 5005-1	http://www.njb.uscourts.gov/sites/default/files/local_rules/Local_Rules_August_1_2015.pdf	Not clear but most likely no.		
New Mexico	Local Rule 5005-3	http://nmb.uscourts.gov/sites/default/files/local_rules/lr111514.pdf	Pro se filers can file electronically through the Electronic Self-Representation program.	The rule provides that: "except for proofs of claim and petitions filed using court-approved electronic filing procedures, all papers filed by unrepresented parties must be submitted to the clerk in paper unless the court, for good cause, authorizes an unrepresented party to submit papers for filing by alternate means." The District of New Mexico is participating in the eSR program that permits debtors to file case opening documents electronically.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
New York Eastern	Electronic Filing Procedures; Local Rule 5005-1 (see http://www.nyeb.uscourts.gov/usbc-edny-local-bankruptcy-rules#5005-1)	http://www.nyeb.uscourts.gov/sites/nyeb/files/general-ordes/ord_559.pdf	No		
New York Northern	Local Rule 5005-2; Electronic Filing Procedures (see http://www.nynb.uscourts.gov/sites/default/files/LBR_GenOrders/LBRs_2014.pdf#page=81)	http://www.nynb.uscourts.gov/sites/default/files/CMECF/AdminProc010112.pdf	No		
New York Southern	Administrative Procedures	http://www.nysb.uscourts.gov/sites/default/files/5005-2-procedures.pdf	Not clear but most likely no.		
New York Western	Administrative Procedures	http://www.nywb.uscourts.gov/sites/nywb/files/ECF_Administrative_Procedures_Oct_2010_update.pdf	No		
North Carolina Eastern	Local Rule 5005-1	http://www.nceb.uscourts.gov/sites/nceb/files/local-rules.pdf	No		
North Carolina Middle	Local Rule 5005-4(2)	http://www.ncmb.uscourts.gov/sites/default/files/local_rules/LR%20July%201%202014%20update%20final%20with%20TOC.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
North Carolina Western	None.		Not clear but most likely no.	The court offers Debtor Electronic Bankruptcy Noticing through DeBN.	
North Dakota	Administrative Procedures	http://www.ndb.uscourts.gov/CM-ECF%20Administrative%20Procedures/CM-ECF_Administrative_Procedures.htm	Not clear but most likely no.	See Administrative Procedures (in effective through Local Rule 5005-1)	
Ohio Northern	Administrative Procedures	https://www.ohnb.uscourts.gov/ecf/repository/administrative_procedures_manual.pdf	No		
Ohio Southern	Administrative Procedures	https://www.ohsb.uscourts.gov/New%20Local%20Rules/AdminProcs_Clean.pdf	No		
Oklahoma Eastern	Administrative Procedures	http://www.okeb.uscourts.gov/sites/default/files/AdmGuide10-01-09.pdf	No		
Oklahoma Northern	Local Rule 5005-1	http://www.oknb.uscourts.gov/sites/default/files/Local%20Rules.pdf	No		
Oklahoma Western	Local Rule 5005	http://www.okwb.uscourts.gov/sites/okwb/files/Local_Rules.pdf	No		
Oregon	Local Rules 5005-4	http://www.orb.uscourts.gov/sites/orb/files/documents/general/Local_Rules_clean.pdf	No		
Pennsylvania Eastern	Procedures for Electronic Filing	http://www.paeb.uscourts.gov/sites/paeb/files/general-ordes/StandingOrder1.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Pennsylvania Middle	Local Rules	http://www.pamb.uscourts.gov/sites/default/files/LocalRulesandForms/USBC_PAMB_Local_Rules.pdf	No	Debtors can now request to receive court notices and orders from the Bankruptcy Noticing Center (BNC) by email rather than by U.S. mail via DeBN.	
Pennsylvania Western	Local Rule 5005-2	http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule5005-2.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Puerto Rico	Local Rule 5005-4	http://www.prb.uscourts.gov/sites/default/files/local_rules/LBR-5005-4.pdf	No	The rule states that pro se filers "may" conventionally file rather than an actual prohibition on electronic filing.	
Rhode Island	Local Rule 5005-4	http://www.rib.uscourts.gov/newhome/rulesinfo/html5/default.htm#5000/5005-4.htm%3FTocPath%3D5000%7C_____6	No		
South Carolina	Local Rule 5005-4, Order Regarding Electronic Filing and Participant's Guides	http://www.scb.uscourts.gov/pdf/oporder/opor13-03.pdf	No	Debtor electronic noticing is available through DeBN.	
South Dakota	Administrative Procedures	http://www.sdb.uscourts.gov/sites/sdb/files/Administrative%20Procedures.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Tennessee Eastern	Administrative Procedures	http://www.tneb.uscourts.gov/sites/default/files/2008_admin_procedures.pdf	No		
Tennessee Middle	Administrative Procedures for Electronic Filing	http://www.tnmb.uscourts.gov/documents/ecf_procedures[1].pdf	Yes, with court approval. Limited to specific case.		
Tennessee Western	ECF Guidelines	http://www.tnwb.uscourts.gov/PDFs/ECF/ECF_guidelines.pdf	No	Debtor electronic noticing is available through DeBN. Also, pro se parties are permitted to access CM/ECF through computers at the Clerk's Office. See http://www.tnwb.uscourts.gov/PDFs/ECF/ecffaq.pdf	
Texas Eastern	Administrative Procedures	http://www.txeb.uscourts.gov/LBRs%2012_09/5005.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Texas Northern	Administrative Procedures	http://www.txnb.uscourts.gov/content/ecf-administrative-procedures	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Texas Southern	Administrative Procedures	http://www.txs.uscourts.gov/attorneys/cmecf/bankruptcy/adminproc.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Texas Western	Administrative Procedures	administrative_procedures_electronic_filing-2.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Utah	Local Rule 5005-2	https://www.utb.uscourts.gov/sites/default/files/news-attachments/2014localrules_clean.pdf	Not clear - see notes.	Offers Debtor Electronic Bankruptcy Noticing. Local rule permits "individuals" with the court's consent.	
Vermont	Local Rule 5005-3	http://www.vtb.uscourts.gov/sites/vtb/files/Local_Rules_2012.pdf	Yes, with court approval and training. Limited to specific case.		
Virginia Eastern	Local Rule 5005 and Electronic Filing Procedures	https://www.vaeb.uscourts.gov/wordpress/?wpfb_dl=546	No	The court offers debtors the opportunity, pursuant to Federal Rule of Bankruptcy Procedure 9036, to request delivery by email, rather than by U.S. mail, of court-generated notices and orders that have been filed by the court, through DeBN, a Bankruptcy Noticing Center (“BNC”) program.	
Virginia Western	Administrative Procedures	http://www.vawb.uscourts.gov/sites/default/files/adminpro08.pdf	No		
Washington Eastern	Local Rule 5005-3	http://www.waeb.uscourts.gov/sites/default/files/waeb/local_rules/Local_Rules_Complete_Set.pdf	No		
Washington Western	Local Rule 5005 and Administrative Procedures	http://www.wawb.uscourts.gov/read_file.php?file=3812&id=919	No		
West Virginia Northern	Local Rule 5005.4-02	http://www.wvnb.uscourts.gov/sites/wvnb/files/local_rules/N.D.W.V.%20LBR%205005-4.02.pdf	No		
West Virginia Southern	General Order re: Administrative Procedures for Electronic Filing	http://www.wvsb.uscourts.gov/sites/wvsb/files/general-ordes/genord08-07.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Wisconsin Eastern	Administrative Procedures	http://www.wieb.uscourts.gov/index.php/orders-rules/1-local-rules/41-rules-a-procedures	No		
Wisconsin Western	Administrative Procedures	http://www.wiwb.uscourts.gov/pdf/admin_procedures.PDF	No		
Wyoming	Local Rule 5005-2	http://www.wyb.uscourts.gov/sites/default/files/pdf-files/local-rules-20120701.pdf	No	Due to original signature requirements per Rule 9011, the Court's electronic filing system is not available to pro se filers	

Electronic Filing Provisions for Pro Se Litigants

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Alabama Middle		No			No. Admin. Procedures: "Pro se litigants shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute."		No			No. Same reference.
Alabama Northern		No			No. Admin. Procedures: "Pro se litigants shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute."		No			No. Same reference.
Alabama Southern	Yes				Yes. Admin. Procedures: "Pro se filers may conventionally file paper originals of complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute. *Pro se filers may also register for electronic filing.* "	Yes				Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Alaska		No			No. Electronic Filing Admin. Policies & Procedures: "Non-attorney filers may not file documents electronically but must file all documents conventionally on paper."		No			No. Same reference.
Arizona			With Permission		With permission. LRCiv 5.5(d) states "Unless the Court orders otherwise, parties appearing without an attorney shall not file documents electronically."			With Permission		With permission. LRCrim 49.3 incorporates LRCiv 5.5.
Arkansas Eastern		No			No. Admin. Procedures for Civil Filings: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statute. The Clerk's office will scan these original documents into an electronic file in the system, but shall also maintain the original in a paper file."		No			No. Admin. Procedures for Criminal Filings: "Pro se filers shall file paper originals of all motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statute. The Clerk's office will image these original documents into an electronic file in the system, but shall also maintain the original in a paper file."
Arkansas Western		No			No. Admin. Procedures for Civil Filings: "Pro se filers shall file paper originals of pleadings with the Clerk's office. The Clerk's office will scan these original documents into an electronic file, uploadand file them in the System. The original pleadings will be maintained by the Clerk's office in a paper file."		No			No. Admin. Procedures for Criminal Filings: "Pro se filers shall file paper originals of documents with the Clerk's office. The Clerk's office will scan these original documents into an electronic file, upload and file them in the System. The original documents will be maintained by the Clerk's office in a paper file."

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
California Central			With Permission		With permission. LR 5-4.2 Unless otherwise ordered by the Court, pro se litigants shall continue to present all documents to the Clerk for filing in paper format.			With Permission		No/with permission. LRCrim 49-1.2: "Unless otherwise ordered by the Court, pro se litigants shall continue to present all documents to the Clerk for filing in paper format. "
California Eastern			With Permission		With permission. LR 133(b)(2): "Any person appearing pro se may not utilize electronic filing except with the permission of the assigned Judge or Magistrate Judge." (see also LR 183(c))			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
California Northern			With Permission		With permission. LR 5-1: "A case that involves a pro se party is subject to electronic filing, unless it is a sealed case. However, the pro se party may not file electronically unless the pro se party moves for and is granted permission by the assigned judge to become an ECF user in that case. Parties represented by counsel in a case involving a pro se party must file documents electronically and serve them manually on the pro se party unless the pro se party has been granted permission to become an ECF user."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants, but LRCrim 44-3 implies that it is possible: "Any act these local rules require to be done by defense counsel shall be performed by the defendant, if appearing pro se."
California Southern			With Permission		With permission. ECF Policies & Procedures: "Unless otherwise authorized by the court, all documents submitted for filing to the Clerk's Office by parties appearing without an attorney must be in legible, paper form. The Clerk's Office will scan and electronically file the document. A pro se party seeking leave to electronically file documents must file a motion and demonstrate the means to do so properly by stating their equipment and software capabilities in addition to agreeing to follow all rules and policies in the CM/ECF Administrative Policies and Procedures Manual. If granted leave to electronically file, the pro se party must register as a user with the Clerk's Office and as a subscriber to PACER within five (5) days. A pro se party must seek leave to electronically file documents in each case filed. If an attorney enters an appearance on behalf of a pro se party, the attorney must advise the Clerk's Office to terminate the login and password for the pro se party."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Colorado			With Permission		With permission. LR 5.1(b)(3): "All unrepresented parties must file in paper unless receive permission from court to file electronically."		No			No. LR 5.1(b)(2): Prisoners must file in paper
Connecticut		No			No. Guide for Pro Se Litigants & Admin. Procedures: Pro se litigants may not file electronically, but can consent to receiving electronic notices		No			No. Same reference.
Delaware			With Permission		With permission. Subsection N of the Admin. Procedures: "A party to a case who is not represented by an attorney may file and serve all pleadings and other documents on paper. Upon approval of the judge, a pro se party may register as a user of CM/ECF in accordance with subsection (B) of these procedures."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
District of Columbia			With Permission		With permission. LR 5.4(e)(2): "A party appearing pro se shall file with the Clerk and serve documents in paper form and must be served with documents in paper form, unless the pro se party has obtained a CM/ECF password."		No			No. LCrR 49(e)(2): "A party appearing pro se shall file with the Clerk (original plus one) and serve documents in paper form and must be served with documents in paper form, unless the pro se party has obtained a CM/ECF password."
Florida Middle			With Permission		With permission. Admin. Procedures: "A pro se litigant (i.e., an individual proceeding without legal representation) is not permitted to file electronically, absent authorization by the Court. A pro se litigant must file all pleadings and documents in paper format with the appropriate divisional Clerk's Office. The Clerk will scan a pro se litigant's documents and file them in CM/ECF."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Florida Northern			With Permission		With permission. LR 5.1: "All documents in civil and criminal cases shall be filed by electronic means, except that documents in cases filed pro se (prisoner and non-prisoner), and documents in other categories of cases (or types of documents) identified by Administrative Order, shall continue to be filed in paper form. A judicial officer may grant other exceptions for good cause."			With Permission		With permission. Same reference.
Florida Southern		No			No. Section 5 of the Admin. Procedures states that pro ses must file paper.		No			No. Same reference.
Georgia Middle			With Permission		With permission. LR 5.0 (A): "Pro se parties are not authorized to file electronically without permission from the court." Guide for Self-Represented Litigants (http://www.gamd.uscourts.gov/sites/gamd/files/GuideForSelfRep			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Georgia Northern		No			No. Appx. H, Ex. A of LR states: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk's Office will scan these original documents and upload them into ECF, but will also maintain a paper file."		No			No. Same reference.
Georgia Southern		No			No. Admin. Procedures state: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk's Office will scan these original documents and upload them into ECF. Once documents are scanned into the system, the electronic version will become the official record."		No			No. Same reference.
Guam		No			No. General Order No. 13-0003: "Non-ECF Users, including pro se parties, shall continue to file documents conventionally by submitting paper documents to the court."		No			No. Same reference.
Hawaii			With Permission		With permission. LR 100.2.2(1): Pro se filers may not file electronically without leave of the court			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Idaho			With Permission		With permission. Electronic Case Filing Procedures: non-attorney pro se parties cannot file electronically without leave of court			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Illinois Central			With Permission		With permission. LR 5.5(B): Unless the court, in its discretion, grants leave to a pro se filer to file electronically, pro se filers must file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents.	Yes				Yes. Electronic submissions are made by library staff of participating correctional facility. Prisoner E-Filing Initiative (http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/General%20Order%2014-01.pdf)
Illinois Northern	Yes				Yes. General Order 14-0024: "A party to a pending civil action who is not represented by an attorney and who is not under filing restrictions imposed by the Executive Committee of this Court, may register as an E-Filer solely for purposes of the case."		No			No. General Order 14-0024: "Parties who are in custody are not permitted to register as E-Filers. If, during the course of the action, a party who is registered as an E-Filer is placed in custody, the E-Filer shall promptly advise the Clerk of the Court to terminate the E-Filer'sregistration as an E-Filer."
Illinois Southern	Yes				Yes. Electronic Filing Rule 1: Pro se filers may, but do not have to, utilize the ECF system. Pro se filers who do not utilize the ECF system shall file all documents with the Clerk of Court by U.S. Mail or personal delivery to the Clerk's Office.	Yes				Yes. Electronic submissions are made by library staff of participating correctional facility. Prisoner E-Filing Initiative (http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/General%20Order%2014-01.pdf)
Indiana Northern		No			No. CM/ECF User Manual: "While all parties, including those proceeding pro se, may register to receive "read only" PACER accounts, only registered attorneys, as officers of the court, are permitted to file electronically at this time."		No.			Same; however, unclear if incarcerated pro se litigants can also obtain "read only" PACER accounts.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Indiana Southern		No			No. LR 5-2: Papers filed by pro se litigants are exempt from electronic filing requirement and must be filed directly with the clerk.		No			No. LCrR 49-1: Papers filed by pro se defendants are exempt from electronic filing requirement and must be filed directly with the clerk.
Iowa Northern		No			No. LR 5.2: "All documents submitted to the Clerk of Court for filing by parties proceeding pro se must be in paper form."		No			No. LCrR 55.1 incorporates LR 5.2.
Iowa Southern		No			No. LR 5.2: "All documents submitted to the Clerk of Court for filing by parties proceeding pro se must be in paper form."		No			No. LCrR 55.1 incorporates LR 5.2.
Kansas	Yes				Yes. LR 5.4.2: "[P]ro se parties may register as Filing Users of the court's Electronic Filing System."		No			No. Admin. Procedures: Incarcerated pro se civil litigants must email their documents to the clerk, who will file electronically. Incarcerated pro se criminal litigants must file paper.
Kentucky Eastern			With Permission		With permission. General Order 11-02: "A party proceeding pro se shall not file electronically, unless otherwise permitted by the court. Pro se filers shall file paper originals of all documents. The clerk's office will scan these original documents into the court's electronic System."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Kentucky Western			With Permission		With permission. General Order 11-02: "A party proceeding pro se shall not file electronically, unless otherwise permitted by the court. Pro se filers shall file paper originals of all documents. The clerk's office will scan these original documents into the court's electronic System."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Louisiana Eastern		No			No. Rule 13, Admin. Procedures: "All pleadings and documents filed by unrepresented parties including individuals who are incarcerated."		No			No. Same reference.
Louisiana Middle		No			No. Admin. Procedures: Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statue, unless otherwise authorized by the court. The Clerk's Office will scan these original documents into an electronic file in the System.		No			No. Same reference.
Louisiana Western		No			No. Admin. Procedures: "Pro se filers shall file fully signed paper originals of all petitions, lists, schedules,statements, amendments, pleadings, affidavits, and other documents which must contain either original signatures or verification by unsworn declaration under any applicable rule or statute. These documents will be scanned by the Office of the Clerk and the original documents will be retained by the Clerk of Court for at least five (5) years after the case is closed."		No			No. Same reference.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Maine	Yes				Yes. Admin. Procedures: "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register to receive service electronically and to electronically transmit their documents to the Court for filing in the ECF system. If during the course of the action the person retains an attorney who appears on the person's behalf, the Clerk shall terminate the person's registration upon the attorney's appearance."		No			No. Admin. Procedures: "All pleadings and documents filed by pro se litigants who are incarcerated or who are not registered filing users in ECF" must be filed in paper.
Maryland				Unclear	Unclear. Electronic Filing & Requirements & Procedures (Civil & Criminal) refer only to attorneys.		No			No. There are Electronic Filing Procedures for Self-Represented Prisoner Cases (includes § 1983, *Bivens* , writs of mandamus, § 2254 petitions, § 2241 petitions, and other civil actions; does not include § 2255 motions), but the procedures require the litigant to file paper.
Massachusetts			With Permission		With permission. Admin. Procedures: "Pro Se Litigants. Anyone who is a party to a civil action, and not a prisoner, and who is not represented by an attorney may register as a filer in the CM/ECF system. The party must (1) have the approval of the judicial officer assigned to the case; and (2) attend a training session offered by the clerk's office on the ECFsystem or otherwise prove their proficiency on the use of the CM/ECF system before an ECF login will be issued."		No			No. Admin. Procedures: "Pro Se Litigants. Anyone who is a party to a civil action, *and not a prisoner* , and who is not represented by an attorney may register as a filer in the CM/ECF system. The party must (1) have the approval of the judicial officer assigned to the case; and (2) attend a training session offered by the clerk's office on the ECFsystem or otherwise prove their proficiency on the use of the CM/ECF system before an ECF login will be issued."
Michigan Eastern		No			With permission. Rule 3 of the Electronic Filing Policies & Procedures: "A filing user must be . . . a non-incarcerated pro se party granted access permission."		No			No. Rule 3 of the Electronic Filing Policies & Procedures does not apply to pro se defendants.
Michigan Western			With Permission		No. LR 5.7(d): "Pro se parties who are not members of the bar of the Court may not file pleadings or other papers electronically, but must submit them in paper form."		No			No. Same reference.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Minnesota			With Permission		With permission. ECF Procedures Guide: "Non-Prisoner Pro Se. A non-prisoner pro se party may complete and sign an “Application for Pro Se Litigant to File Electronically” form. The form is available from the Clerk’s Office or on the “Court Forms” page of the court’s website at: www.mnd.uscourts.gov. If the application is approved, the applicant will receive a login ID and password and the applicant's account will be activated, enabling the applicant to file electronically and to receive system-generated notices of electronic filing. If the court becomes aware of misuse of ECF, access will be revoked by the court without advance notice. Upon closure of the case for which access is granted (and the expiration of all appeal periods), the account will be deactivated."		No			No. ECF Procedures Guide: "Prisoner Pro Se. Prisoner pro se parties may not receive a login and password to use ECF and must file their documents in paper."
Mississippi Northern		No			No. Admin. Procedures: "While all parties, including those proceeding pro se, may register with PACER to receive “read only” accounts, only registered attorneys, as officers of the court, are permitted to file electronically. Pro Se (Non-Prisoner) parties may consent to receive documents electronically."		No			No. Same reference.
Mississippi Southern		No			No. Admin. Procedures: "While all parties, including those proceeding pro se, may register with PACER to receive “read only” accounts, only registered attorneys, as officers of the court, are permitted to file electronically. Pro Se (Non-Prisoner) parties may consent to receive documents electronically."		No			No. Same reference.
Missouri Eastern		No			No. Rule 3-2.10: "Filings shall be made by means of the Court’s electronic case filing system, except by pro se litigants." Note: the district has an electronic document preparation application called E-Pro Se that allows pro se litigants to create case initiation documents for Social Security, employment, consumer, and civil rights complaints		No			No. Same reference.
Missouri Western				Unclear	Unclear, but implication is that pro se litigants cannot file electronically. LR 5.1: "[A]ll litigants and other interested parties represented by legal counsel shall electronically file all pleadings and documents (including initiating documents) in connection with a case on the Court's electronic filing system."; Admin. Procedures state that only attorneys are eligible to register for ECF.				Unclear	Unclear. Same reference.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Montana				Unclear	Unclear. LR 1.4 states: "All attorneys and self-represented litigants must follow the guidance of the Clerk's Office to facilitate electronic filing and to make the record legible and complete."				Unclear	Unclear. Same referemce.
Nebraska	Yes				Yes. LR 1.3: "A pro se party, i.e., one not represented by an attorney, to a pending civil case may register to use the System only in that case. A pro se party is assigned a password allowing electronic retrieval and filing of documents in the case."				Unclear	Unclear, but implication is that an incarcerated pro se litigant could file electronically. LR Crim 49.1(c)states that pro se parties *who are not registered users* are excepted from mandatory electronic filing.
Nevada				Unclear	Unclear. The Pro Se Assistance Packet refers to paper filings.				Unclear	Unclear. Same reference.
New Hampshire			With Permission		With permission. Supplemental Rules for Electronic Case Filing 2.1(d): A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain an Electronic Case Filing (ECF) login and password.		No			No. Same reference.
New Jersey		No			No, but may apply to receive filed documents electronically. Electronic Case Filing Policies and Procedures: A party who is not represented by counsel must file documents with the Clerk as a Paper Filing. A Pro Se party who is not incarcerated may request to receive filed documents electronically upon completion of a "Consent & Registration Form to Receive Documents Electronically."		No			No. Same reference.
New Mexico			With Permission		With permission. CM/ECF Admin. Procedures Manual: Pro se parties can register and consent to electronic service, but must request permission to be able to file electronically.			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
New York Eastern		No			No, but can receive electronic notifications of filings. https://img.nyed.uscourts.gov/files/forms/ProSeConsElecSvc-Flier.pdf		No			No. Incarcerated pro se litigants cannot file or receive electronic notification of filings.
New York Northern			With Permission		With permission. Admin. Procedures (Gen. Order #22) 12.1: "A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain an Electronic Case Filing (ECF) login and password on a form prescribed by the Clerk's Office."		No			No. Same reference.
New York Southern			With Permission		With permission. Electronic Case Filing Rules & Instructions Section 2.2(a): "The Court may permit or require a pro se party to a pending civil action to register as a Filing User in the ECF system solely for purposes of that action." Section 2.2(b): A pro se party may also consent to receiving electronic notifications.				Unclear	Electronic Case Filing Rules & Instructions Section 2.2(a) does not distinguish between types of pro se litigants; however, implication is that an incarcerated pro se could not file electronically because, in order to file electronically, a pro se litigant may be required to attend in-person training and because only non-incarcerated pro se

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
New York Western			With Permission		With permission. Admin. Procedures: "Pro Se litigants who have been granted permission to file documents electronically must register as a Filing User of the Court's Electronic Filing System." (Default is paper filing.)			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
North Carolina Eastern		No			No. Admin. Policies. www.nced.uscourts.gov/pdfs/cmecfPolicyManual.pdf		No			No. Same reference.
North Carolina Middle		No			No. Admin. Procedures: http://www.ncmd.uscourts.gov/sites/ncmd/files/ecfprocman.pdf		No			No. Same reference.
North Carolina Western		No			No. Admin. Procedures http://www.ncwd.uscourts.gov/ECFDocs/ADMINORDER.pdf		No			No. Same reference.
North Dakota			With Permission		With permission. Section II, Administrative Policy Regarding Electronic Filing & Service		No			No. Sections II & XI, Administrative Policy Regarding Electronic Filing & Service
Northern Mariana Islands				Unclear	Unclear. Admin. Procedures imply that a pro se litigant could register as a Filer: "All pleadings and documents filed by pro se litigants who are not registered Filing Users in the Electronic Filing System [shall be filed in paper]."				Unclear	Unclear. Same reference.
Ohio Northern			With Permission		Yes, with court permission. LR 5.1(b) and LCrR 49.2 refer to Electronic Filing Policies and Procedures Manual, located in Appendix B http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixB.pdf			With Permission		Same.
Ohio Southern		No			No. LR 5.1 refers to ECF Manual http://www.ohsd.uscourts.gov/sites/ohsd/files/Electronic%20Filing%20Policies%20and%20Procedures.%202013.0222.pdf; LCrR 49.1 addresses signatures of criminal defendants		No			Same.
Oklahoma Eastern		No			No. LR 5.1 and LCrR 49.1 refer to the CM/ECF Administrative Guide of Policies and Procedures		No			Same.
Oklahoma Northern			With Permission		Yes, with court permission. LR 5.1 and LCrR 49.3 refer to the CM/ECF Administrative Guide of Policies and Procedures. See http://www.oknd.uscourts.gov/docs/08906891-22d0-4806-9544-b574b9932935/CMECFAdminManual.pdf			With Permission		Same.
Oklahoma Western		No			No. LR 5.1 and LCrR 49.1 refer to Electronic Case Filing Policies and Procedures Manual (ECF Policy Manual)		No			Same.
Oregon	Yes				Yes. LR 5.2 and LCrR 3001 refer to the CM/ECF User Manual http://www.ord.uscourts.gov/index.php/about-cmecf-and-pacer/user-manual. Signature Requirements in LR 11	Yes				Same.
Pennsylvania Eastern			With Permission		Yes, with court permission, for the specific case. LR 5.1.2 "Electronic Case Filing Procedures"			With Permission		Same.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Pennsylvania Middle	Yes				Yes. LR 5.6 refers to Standing Order and to ECF User Manual http://www.pamd.uscourts.gov/sites/default/files/ecf_manualv2.pdf	Yes				Same.
Pennsylvania Western		No			No. LR 5.5 and LCrR 49 refer to the Court's Standing Order regarding Electronic Case Filing Policies and Procedures and the ECF User Manual		No			Same.
Puerto Rico			With Permission		Yes, with court permission, limited to specific cases. See http://www.prd.uscourts.gov/sites/default/files/documents/ajax/2014%20CM%20ECF%20Manual%20%28rev%2007%202015%29_0.pdf			With Permission		Same.
Rhode Island	Yes				Yes. See http://www.rid.uscourts.gov/; also Local Rule 303 (http://www.rid.uscourts.gov/menu/generalinformation/rulesandprocedures/localrulesandprocedures/Local_Rules-121514.pdf). Pro se filers must move to file electronically.		No			No. Same reference.
South Carolina		No			No. Local Rule 5.02 and Local Cr Rule 49.02 refer to ECF Policies and Procedures Manual http://www.scd.uscourts.gov/AttorneyResourceManuals/ECF/ECF_Policy_and_Procedures.pdf		No			Same.
South Dakota		No			No. Local Rule 5. See http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/Civil_Local_Rules.pdf		No			No. Local Rule 49.1 See http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/LocalRulesCriminal.pdf
Tennessee Eastern	Yes				Yes. LR 5.2 refers to Electronic Filing Rules and Procedures http://tned.uscourts.gov/docs/ecf_rules_procedures.pdf	Yes				Same.
Tennessee Middle	Yes				Yes. See http://www.tnmd.uscourts.gov/files/AO167-1AmendedPracticesandProcedures.pdf (see also Local Rule 5.03 http://www.tnmd.uscourts.gov/files/LocalRules-20120425.pdf)	Yes				Same.
Tennessee Western		No			No. Electronic Case Filing Policies and Procedures Manual located in Appendix A to the Local Rules		No			Same.
Texas Eastern	Yes				Yes. Local Rule 5.6.	Yes				Same.
Texas Northern		No			No Local Rule 5.1.		No			Same.
Texas Southern		No			No. Administrative Procedures for Electronic Filing http://www.txs.uscourts.gov/attorneys/cmecf/district/admcvcrproc.pdf		No			Same.
Texas Western	Yes				Yes. See http://www.txwd.uscourts.gov/CMECF/Documents/efileprocd.pdf		No			No. See http://www.txwd.uscourts.gov/CMECF/Documents/efileprocd.pdf

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Utah			With Permission		Only if permitted by the court. See http://www.utd.uscourts.gov/documents/utahadminproc.pdf			With Permission		Same.
Vermont		No			No. LR 5 refers to Administrative Procedures for Electronic Case Filing http://www.vtd.uscourts.gov/sites/vtd/files/ECFAdminProc.pdf		No			Same.
Virgin Islands			With Permission		Yes, if permitted by the court. LR 5.4. See http://www.vid.uscourts.gov/sites/vid/files/local_rules/VID_LRCi_1-10-2014.pdf			With Permission		Same.
Virginia Eastern		No			No. E-Filing Policies and Procedures Manual http://www.vaed.uscourts.gov/ecf/documents/ECF%20Procedures%20Manual/.pdf		No			Same.
Virginia Western			With Permission		If permitted by court. See http://www.vawd.uscourts.gov/media/3355/ecfprocedures.pdf			With Permission		Same.
Washington Eastern	Yes				Yes. See http://www.waed.uscourts.gov/sites/default/files/ECF%20Administrative%20Procedures%20-%20Rev.%20May%206%202015_0.pdf and Local Rule 3.1.	Yes				A prisoner who is a party to a civil action, is not represented by an attorney and resides in a correctional facility that participates in the prison electronic filing initiative is required to adhere to the procedures established in General Order No. 15-35-1, absent a court order to the contrary. Prisoners who reside in correctional facilities that do not participate in the prison electronic filing initiative are not eligible to register or participate in electronic filing.
Washington Western	Yes				Yes. Pro se filers are permitted but not required to file electronically. See http://www.wawd.uscourts.gov/sites/wawd/files/ECFFilingProceduresAmended8-3-15.pdf	Yes				Same.
West Virginia Northern			With Permission		Yes, with permission of the court. See Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf		No			No. See Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf
West Virginia Southern			With Permission		Yes, with permission of the court. See http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures.pdf		No			No. See http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures.pdf
Wisconsin Eastern		No			No. Electronic Case Filing Policies and Procedures Manual file:///Users/juliemwilson10/Downloads/072811%20ECF%20Policies%20and%20Procedures%20-%20FINAL.pdf		No			Same.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Wisconsin Western	Yes				Yes. See http://www.wiwd.uscourts.gov/electronic-filing-procedures#C._Exceptions_to_Electronic_Filing	Yes				Same.
Wyoming		No			No. See http://www.wyd.uscourts.gov/pdfforms/cmprocmanual.pdf		No			Same.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON ATTORNEY CODUCT AND HEALTHCARE

RE: SUGGESTION TO AMEND RULE 2014

DATE: AUGUST 30, 2015

The Advisory Committee received, and has previously discussed, a suggestion from the American Bankruptcy Institute's Task Force on National Ethics Standards (the "ABI Task Force") concerning Bankruptcy Rule 2014. *See* Suggestion 13-BK-C. After further consideration, and as more fully explained below, the Subcommittee recommends no action on this matter at this time because it is not convinced the burdens of the current Rule outweigh its benefits, or that there is any proposed change to the Rule that would alleviate the burdens without creating other problems.

Suggestion and Past Deliberations

The ABI Task Force undertook an extensive two-year study of ethics, and the application of state ethics rules, in federal bankruptcy cases. One of the recommendations put forth by the ABI Task Force in its Final Report involved the scope and application of Bankruptcy Rule 2014. As the ABI Task Force notes in its suggestion, "The Task Force's suggested amendments to Rule 2014, along with a proposed 'disclosure grid' to accompany the Rule, stem from the difficulty of determining just what 'connections' a professional should disclose to a bankruptcy court when that professional is seeking approval of an employment application and when new

'connections' affect that professional's continued employment."[1] Indeed, the suggestion would, among other things, clarify and limit the "all … connections" language in Rule 2014.

The Subcommittee has thoroughly reviewed the ABI Task Force's suggestion, as well as the Advisory Committee's prior proposals to amend Rule 2014.[2] As the Subcommittee reported to the Advisory Committee at the Fall 2014 meeting, the Subcommittee: (i) examined the strengths and weaknesses of any proposed amendments to Rule 2014; (ii) considered alternative approaches to amending the Rule; and (iii) reviewed likely areas of support for, and opposition to, any amendments to the Rule.[3] The Subcommittee has further deliberated on this matter since that time.

Subcommittee's Review and Recommendation

Overall, the Subcommittee found the ABI Task Force's suggested amendments to Rule 2014 to be thoughtful and comprehensive. The Subcommittee also generally appreciated certain aspects of the suggestion that endeavor to improve efficiency and accuracy in disclosures. For example, the suggestion proposed a disclosure grid that would list in a chart format the connections disclosed by the professional in the application, thereby making it easier for courts to identify relevant potential connections. The suggestion also clarified a professional's obligation to update the disclosures upon the professional obtaining new or otherwise undisclosed relevant information.

[1] *See* Suggestion 13-BK-C.
[2] As set forth more fully in the Subcommittee's memorandum to the Advisory Committee, dated August 21, 2014, the Advisory Committee previously considered, and published for public comment, amendments to Rule 2014 that addressed, among other things, the scope of required disclosures under the Rule. These amendments were published in August 2000. After extensive consideration, the Advisory Committee ultimately voted to table those amendments in 2002. *See* Memorandum from the Subcommittee on Attorney Conduct and Healthcare to the Advisory Committee on Bankruptcy Rules (Aug. 21, 2014).
[3] *See id.*

Ultimately, however, no member of the Subcommittee was prepared to endorse the core of the ABI Task Force's suggestion: namely, a restriction in the scope of the required disclosures. Rule 2014 currently requires a professional to disclose, "to the best of the applicant's knowledge, *all of the person's connections* with the debtor, creditors, any party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." (Emphasis added.) The ABI Task Force's suggestion would clarify and limit a professional's disclosure obligations to "Relevant Connections," which would enable a professional, subject to court review, to determine required disclosures based on materiality and other standards detailed in the suggested amendments.[4] Such a change would alleviate the burden of what often is referred to as the "phonebook disclosures" provided by professionals, particularly in the larger chapter 11 cases. But as the United States trustee noted, there are times when such disclosures are necessary and helpful.

The Subcommittee explored alternative approaches, including one maintaining the current disclosure standard, but allowing a professional to request, and the court to order, more limited disclosures "for cause shown in a particular case."[5] This approach did not, however, mitigate the concerns about restricting disclosures. It also arguably could lead to litigation regarding the "for cause" standard and to a routine practice of limited disclosures. These and other concerns led the full Advisory Committee to return the project to the Subcommittee for

[4] In addition, the suggested amended Rule provides, "With respect to each Relevant Connection, the applicant shall disclose personal and professional relationships and other connections relevant to determining the existence of bias or influence on professional judgment. Any materiality threshold used by the applicant for each Relevant Connection shall be set forth in the application. If the court directs use of a different threshold, the professional shall amend its disclosures to conform to such threshold. The list of Relevant Connections is intended to be comprehensive and encompass connections relevant to the court's consideration of the application. Any additional relevant connections necessary to prevent the application and the professional's verified statement from being materially misleading shall be included." *See* Suggestion 13-BK-C.

[5] *See* Memorandum from the Subcommittee on Attorney Conduct and Healthcare to the Advisory Committee on Bankruptcy Rules (Aug. 21, 2014), at 6-7.

further consideration of all options, including the possibility of taking no further action on the ABI suggestion.

Given the lack of support for a Rule amendment restricting disclosure, the Subcommittee evaluated the potential benefits to moving forward with a more limited amendment addressing, for example, only the presentation of disclosures in a disclosure grid and a clarification of a professional's obligation to update disclosures. As noted above, the Subcommittee generally was appreciative of these aspects of the ABI Task Force's suggestion. Nevertheless, the Subcommittee concluded that such changes did not warrant an amendment to the Rule itself, but were more akin to best practices. To the extent that the United States trustee, bankruptcy courts, or practitioners found value in these measures, they could adopt the practices and would not need a national form or rule to do so.

Accordingly, on balance, the Subcommittee recommends no action on this matter at this time.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: REFERENCES TO "HUSBAND AND WIFE" IN RULE 1015(b)

DATE: AUGUST 29, 2015

At the spring 2014 meeting, the Committee approved for publication a proposed amendment to Rule 1015(b) (Consolidation or Joint Administration of Cases) that would change references to "husband and wife" in the provision to "spouses." The Committee took this action in response to a suggestion (13-BK-G) submitted by Gary Streeting, an attorney advisor with the Bankruptcy Court for the Eastern District of Missouri. He suggested that, in light of the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, Rule 1015(b) should be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Although the Committee approved the proposed amendment for publication, it decided to wait for further clarification of the law before submitting it to the Standing Committee.[1] At the

[1] The first reference to "husband and wife" in Rule 1015(b) falls squarely within the holding of *Windsor*. In contrast to the language of Rule 1015(b), § 302 of the Code authorizes the filing of a joint petition under a chapter by "an individual that may be a debtor under such chapter and such individual's spouse." The rule's use of the more restrictive term "husband and wife" could be justified only by reliance on § 3 of DOMA, which amended the Dictionary Act to provide that "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. *Windsor*'s invalidation of the DOMA provision removed support for the rule's deviation from the statutory language.

The other reference to "husband and wife" in Rule 1015(b), however, is consistent with the statutory language. The rule implements § 522(b)(1) of the Code, which provides a restriction on the choice of exemptions in cases in which the debtors are a "husband and wife." While some of the Court's reasoning in *Windsor* could be read to suggest that same-sex married couples in bankruptcy should not have a greater choice of exemptions than husbands and wives have, the decision did not directly invalidate that part of the rule.

spring 2015 meeting, the Committee decided to wait for the Supreme Court's decision in *Obergefell v. Hodges* before sending the proposed amendment to Rule 1015(b) forward to the Standing Committee.

Obergefell

On June 26, 2015, the Court issued its decision in *Obergefell*, 135 S. Ct. 2584, holding that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604. The decision therefore supports the Committee's decision to amend Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under § 303 or that single-sex married couples are subject to different rules regarding their choice of exemptions.

The Proposed Amendment

As previously approved by the Committee, Rule 1015(b) would be amended as follows:

Rule 1015. Consolidation or Joint Administration of Cases Pending in the Same Court

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~ spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of

different estates against potential conflicts of interest. An order directing joint administration of individual cases of ~~a husband and wife~~ spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elected the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

The approved Committee Note previously states:

> Subdivision (b) is amended to replace "a husband and wife" with "spouses" in light of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

The Subcommittee recommends that the citation now be changed to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Is There a Need for Publication?

The Subcommittee also recommends that the Standing Committee be asked to approve the amendment without publication. The Subcommittee concluded that because the rule is being amended to conform to the Supreme Court's decision in *Obergefell*, publication would be pointless. No comment is likely to lead the Committee to decide that Rule 1015(b) should remain limited to husbands and wives. If the Standing Committee agrees, the amendment will be on schedule to go into effect on December 1, 2017.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTION REGARDING SOCIAL SECURITY NUMBERS ON NOTICES OF MEETING OF CREDITORS

DATE: AUGUST 29, 2015

Gary Streeting, who is an attorney advisor in the clerk's office of the Bankruptcy Court for the Eastern District of Missouri, submitted a suggestion (14-BK-G) that Rule 2002(a)(1) be revised to require that only the last four digits of the debtor's social security number ("SSN") be included on the notice of the meeting of creditors (Official Forms 9A-I). Rule 2002(a)(1) currently states that the notice of the meeting of creditors "shall include the debtor's employer identification number, social security number, and any other federal taxpayer identification number," unless the court orders otherwise. This directive contrasts with Rule 1005, which requires that only the last four digits of the debtor's SSN be included in the caption of a bankruptcy petition, and Rule 9037, which similarly provides that filings with the court shall include only the last four SSN digits. Mr. Streeting states that because of the possibility of identity theft, it is "irresponsible" to require full SSNs to be on documents sent out by the court, and he suggests that creditors will be able to properly identify debtors with their names and last four SSN digits.

The same issue was presented to the Committee in 2012 in a suggestion (11-BK-J) submitted by Judge Julie A. Robinson on behalf of the Committee on Court Administration and Case Management ("CACM"). After careful consideration, the Committee accepted the recommendation of the Subcommittee on Privacy, Public Access, and Appeals to retain the full

SSN on the notice of meeting of creditors. The decision was based on the results of two surveys conducted by the AO that showed that a number of public and private creditors still needed the full SSN to accurately identify debtors. The February 2012 memorandum to the Committee that explained the background of this issue, summarized the survey findings, and recommended that Rule 2002(a)(1) not be amended is attached to this memorandum.

At the time that the Committee considered the CACM suggestion, it recognized that because creditors were increasingly using identifiers other than SSNs, at some point in the future they would no longer need to receive a debtor's full SSN. The question that Mr. Streeting's suggestion presents is whether there has been a sufficient change in SSN usage over the last three years to warrant the Committee's reconsideration of the issue. Diana Erbsen checked with the Office of Chief Counsel of the IRS and learned that its position remains the same. The IRS still relies on full SSNs to identify taxpayers, and having only the last four digits of the debtor's SSN on a notice of the meeting of creditors would require a labor-intensive manual search of the IRS database to identify the correct taxpayer.

The Subcommittee recommends that the Committee not reconsider the issue now, given its relatively recent thorough consideration of a similar suggestion. The Subcommittee does, however, plan to engage in some additional informal outreach to certain creditors (e.g., state governments, credit unions) to inquire whether they are still reliant on full SSNs. Unless the Subcommittee determines that there is generally no longer a need for such information—in which case it will report back at the spring 2016 meeting—it recommends that the Committee take no further action on this suggestion.

Attachment

Attachment

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: CACM SUGGESTION FOR AMENDMENTS TO RULE 2002(a)(1) AND OFFICIAL FORM 21

DATE: FEBRUARY 25, 2012

Judge Julie A. Robinson, chair of the Judicial Conference's Committee on Court Administration and Case Management ("CACM"), has submitted a suggestion (11-BK-J) on behalf on her Committee for bankruptcy rule and form amendments intended to reduce the likelihood that the privacy of debtors' social-security numbers ("SSNs") will be breached. This recommendation arose in response to CACM's consideration of the report and recommendations of the Standing Committee's Privacy Subcommittee, which met during 2009-10 and was composed of members from each of the Rules Advisory Committees and from CACM.

Neither the Privacy Subcommittee nor the Standing Committee recommended any bankruptcy rule or form amendments. CACM, however, asked the Administrative Office of the U.S. Courts ("AO") to undertake follow-up studies regarding the need for full SSNs in bankruptcy, apparently in response to a Federal Judicial Center study for the Privacy Subcommittee that had revealed that the greatest number of public disclosures of SSNs occurred in bankruptcy cases. Based on the results of the AO studies, CACM recommends that Rule 2002(a)(1) be amended to eliminate the requirement that the notice of the meeting of creditors include the debtor's full SSN and that Official Form 21 (Statement of Social-Security Number or Individual Taxpayer-Identification Number) be amended to include a prominent notice that the

form should not be filed on the public docket. **The Subcommittee recommends that the Advisory Committee propose an amendment of Form 21 for publication but that it not propose an amendment of Rule 2002(a)(1) at this time.**

Background of Rule 2002(a)(1)

Rule 2002(a)(1) requires 21-day notice to be given of "the meeting of creditors under § 341 or § 1104 of the Code, which notice, unless the court orders otherwise, shall include the debtor's employer identification number, social security number, and any other federal taxpayer identification number" (emphasis added). The underlined language was added in 2003 in conjunction with an amendment to Rule 1005 that limited the caption of a bankruptcy petition to the last four digits of the debtor's SSN. As originally proposed, only Rule 1005, and not Rule 2002(a)(1), would have been amended, and only the last four digits of the debtor's SSN would have been provided on the § 341 notice. Private creditor interests, the credit reporting industry, United States trustees, and the Justice Department all expressed concern that permitting debtors to list only the final four digits of social-security numbers would create problems in identifying debtors. They feared that this truncated information could lead to inadvertent violations of the automatic stay and discharge injunction. They also stated that it could limit the ability of creditors and trustees to determine whether a particular debtor had obtained bankruptcy relief previously and was engaged in a serial bankruptcy filing and that it could hamper law enforcement efforts to prosecute debtors for bankruptcy fraud and related crimes.

In response to the comments, the Advisory Committee proposed that the amendment to Rule 1005 be joined by the addition of Rule 1007(f) – which requires the debtor to submit to the court, but not file, a statement of his or her full SSN – and the amendment to Rule 2002(a)(1) requiring the notice of the meeting of creditors to contain the debtor's full SSN. These

amendments were approved, and Form 21 was adopted for the statement of the debtor's full social-security number.

AO Studies

In October 2010 the AO's Bankruptcy Court Administrative Division submitted a report to CACM on "The Use of Debtors' Full Social Security Numbers in Bankruptcy Cases." (This report is Attachment 1 to Judge Robinson's suggestion.) The AO study noted several ways in which, contrary to the intent of the rules, debtors' SSNs get publically disclosed: Form 21s are mistakenly bundled with other documents and are filed on the court docket; the notice of the meeting of creditors with the full SSN is sent by mail to some creditors and does not arrive at the correct destination; the Bankruptcy Noticing Center mistakenly sends the full SSN to unintended recipients; and creditors attach the Form 21 to proofs of claim that are filed on the claims register.

The study discussed the continued need for full SSNs by various users internal to the bankruptcy system. It also stated that for many public and private sector entities, SSNs remain important identifiers, although it reported that there is a trend toward reducing reliance on SSNs. Some entities are now using systems that use a combination of data elements for identification purposes, rather than a single number. The AO study concluded that using only the last four digits of a debtor's SSN, in combination with either the debtor's first and last name or with the debtor's first and last name and the district of filing, permits the unique identification of a debtor in the overwhelming majority of cases.

Based on these findings, the authors of the AO study recommended to CACM that the full SSN not be sent to notice recipients in bankruptcy cases, that the process for collecting full

SSNs and providing access to various government agencies be improved, and that Form 21 prominently state that it should not be filed on the docket.

In 2011 the Bankruptcy Court Administration Division engaged in an additional phase of the study for CACM. (This is Attachment 2 to the Suggestion.) It solicited input from 25 private and public entities that would be affected by a decision to use only the last four digits of a debtor's SSN on the notice of the meeting of creditors. It received mixed responses from 15 of the entities. Six of eleven responding private entities indicated that they no longer rely on full SSNs for identification purposes and thus they would not be adversely affected by receiving only the last four digits of the debtor's SSN. Only one of the four public entities that responded, the California Franchise Tax Board, shared that view.

The other three public respondents – the IRS, the Georgia Department of Revenue, and the Washington Department of Revenue – all indicated that they rely on the full SSN for identification. The IRS stated that the absence of this information would require a time-consuming manual identification process. Some of the private entities that responded also indicated that they still use the full SSN. This group included several claims purchasers who also serve as claims servicers or noticing agents.

The AO report stated that the study was presented to the spring 2011 meetings of the Bankruptcy Clerks Advisory Group and the Bankruptcy Judges Advisory Group. According to the report, "[n]either group expressed concern or anticipated difficulty with the Judiciary truncating the SSN on the notice of meeting of creditors."

The report concluded that it might be appropriate to continue to collect and provide the full SSN to internal court system users and to the U.S Trustee Program, the Bankruptcy Administrators Program, and U.S. Attorney's Offices, and perhaps also to other government

entities such as the IRS and state taxing authorities. The information could be provided to these users electronically through secure means. On the other hand, the report concluded that there may be less justification for continuing to provide the full SSN to private entities, some of whom might transmit or sell the data to third parties for commercial gain.

The authors of the AO study recommended that Rule 2002(a)(1) be amended to truncate the debtor's SSN on the notice of meeting of creditors. They explained that publication of such an amendment would provide an opportunity for more widespread public comment on the impact of the change. They further recommended that CACM consider an exception to the privacy policy that would enable governmental entities to receive full SSNs by means of secure, electronic transmission. The report indicated that CACM had already agreed to recommend that Form 21 be amended to state prominently that the form not be filed on the docket and that the AO work with court personnel and CM/ECF program staff to ensure that e-filers understand how to submit Form 21 as a private docket entry.

The Subcommittee's Recommendation

The Subcommittee recognized that the suggestion to provide only the last four digits of the debtor's SSN to most creditors rests on the balancing of competing concerns: the interest in protecting debtors against the inappropriate public disclosure of their SSNs, on the one hand, and the legitimate need for creditors and other participants in the bankruptcy system for this information, on the other. As long as debtors are still required to provide the court with their full SSNs, as they would be even if the suggestion is adopted, there remains a risk of erroneous disclosure. However, imposing greater restrictions on access to full SSNs should at least decrease the incidence of breaches of privacy.

After a full discussion during its January 11 conference call, the Subcommittee concluded that the AO studies show that there remains a sufficient need for access to debtors' SSNs among both public and private creditors that it would be premature at this time to propose removal of the full SSN from the notice of the meeting of creditors. If this information is still needed by creditors to ensure that they are seeking payment from the correct debtor or that a debtor from whom they are seeking payment has filed for bankruptcy, it is hard to ignore that concern. Mr. Kohn reaffirmed the need of the IRS for full SSNs, and the Subcommittee was not convinced that there is an appropriate basis for drawing a distinction between the degrees of access granted public and private creditors. The trend among creditors of using other types of identifiers for debtors is likely to continue, in which case the need for SSNs will decrease. In that case, an amendment of Rule 2002(a)(1) can be reconsidered in the future.

The Subcommittee concluded that an amendment of Form 21 to include a prominent warning not to file the form on the public docket would be beneficial without producing any harm. It therefore recommends that the Advisory Committee propose adding the following language to Form 21: "**An individual debtor must submit this form to the court, but must not file it on the public docket. This form will not be included in the court's electronic records.**"

COMMITTEE NOTE

> The form is amended to remind debtors that, in accordance with Rule 1007(f), it should be submitted to the court, but not filed on the public docket. This rule protects the debtor's social-security number or taxpayer identification number from becoming accessible to the public.

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Consent 2A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: GENDER NEUTRALITY OF SCHEDULES

DATE: AUGUST 30, 2015

The Advisory Committee has received a suggestion to amend bankruptcy schedules A, B, D, E, and F—Official Forms B 6A, B 6B, B 6D, B 6E, and B 6F—to delete any references to gender-specific categories. *See* Suggestion 15-BK-A, submitted by Derek S. Tarson, Legal Aid Society of Rockland County, Inc. Mr. Tarson's suggestion is based, in part, on the U.S. Supreme Court's decision in *United States v. Windsor*, 570 U.S. 12 (2013). His submission describes the challenges faced by certain debtors in completing and filing their bankruptcy schedules. For example, he states: "Where an asset or debt belongs to one same-sex spouse debtor, but not the other—in a non-community-property state—these Official Forms do not permit the categorization of those assets or debts."

The amended Official Forms that take effect December 1, 2015 address Mr. Tarson's concerns. These forms replace gender-specific references (e.g., husband, wife) with "Debtor 1" and "Debtor 2." They also allow a debtor to separately categorize an asset or debt as being owned or owed by "[a]t least one of the debtors and another" or as "community" property/debt. Accordingly, the Subcommittee recommends no further action on this matter.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: BILL OF COSTS (DIRECTOR'S FORM 263)

DATE: AUGUST 30, 2015

Bankruptcy Rule 7054(b) provides that a court may, under certain circumstances, "allow costs to the prevailing party" in adversary proceedings. Director's Form 263 (2630), Bill of Costs, facilitates a party's request for the clerk to tax such costs as ordered by the court. The Advisory Committee has received a suggestion to update Director's Form 263 (2630). *See* Suggestion 15-BK-B, submitted by Judge S. Martin Teel, Jr., United States Bankruptcy Court for the District of Columbia. Specifically, the suggestion requests that the Advisory Committee consider: (i) eliminating the reference to the place and time for presentation of the Bill of Costs to the clerk; and (ii) updating the descriptions of the applicable rules to reflect recent amendments. This memorandum briefly describes the justifications for the requested changes, as incorporated into the proposed revised form.

Eliminating Place and Time of Presentation

Director's Form 263 currently requires the party submitting the form to identify the address of the clerk of the bankruptcy court and the time at which the party will be presenting the Bill of Costs to the clerk at such address. The Instructions to the form further provide: "The address of the clerk's office and the date and time the bill will be presented to the clerk should be stated in the boxes provided. This date and time should be cleared with the clerk in advance of service of the notice." The purpose of disclosing this information appears to be to allow parties

to dispute the costs set forth in the Bill of Costs before the clerk. As the Instructions explain: "If both parties appear before the clerk and cannot reach agreement on the costs being sought, or if the fees sought are miscalculated, the clerk should exercise the clerk's best judgment as to the amount of costs to be awarded."

Judge Teel posits that the Director's Form and, more explicitly, the Instructions situate the clerk as a mediator with respect to disputes concerning costs claimed in the Bill of Costs. He states, "We do not believe that the clerk/clerk's office should be required to act as mediator, at any location, during such dispute." Judge Teel's observation is a reasonable interpretation of the Director's Form and accompanying Instructions, which suggest that the parties should appear in-person before the clerk at the designated place and time to resolve their differences. Notably, some courts have tried to clarify their process for contesting the Bill of Costs with the clerk. These courts have adopted a local rule or provided instructions that direct parties desiring to contest the Bill of Costs to file an objection, which the clerk will then consider in taxing costs.[1] If the parties are not satisfied with the clerk's decision, they retain their right to seek review by the court under Bankruptcy Rule 7054(b).

Judge Teel correctly notes that the District Court's form for a Bill of Costs (Form AO 133) does not require the disclosure of the clerk's address or the time of presentation of the Bill of Costs to the clerk at such address. The proposed revised Director's Form 263 mirrors the District Court's form in this respect. In addition, the Instructions for Director's Form 263 have been simplified to explain the filing, notice, and resolution procedure relating to the Bill of Costs, as set forth in the applicable Bankruptcy Rules.

[1] *See* Instructions for Bill of Costs, U.S. Bankruptcy Court for the Northern District of Oklahoma, available at http://www.oknb.uscourts.gov/bill-costs; Local Rule 7054-1, U.S. Bankruptcy Court for the District of Arizona; Local Rule 7054-1, U.S. Bankruptcy Court for the District of Utah.

Updating Description of Applicable Bankruptcy Rules

Judge Teel also requests that the descriptions of Bankruptcy Rules 7054(b) and 9006(f) on page 2 of Director's Form 263 be updated to reflect the current version of those rules. Likewise, the reference to Bankruptcy Rule 9021 should be replaced with a reference to Bankruptcy Rule 7058. Both of these suggestions are valid and have been incorporated into the revised form.

Subcommittee's Review

In light of the foregoing, the Subcommittee agrees with the proposal and recommends that the Director of the Administrative Office adopt the changes as set forth in the attached revised Director's Form 263 and the related Instructions.

Attachments

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United States Bankruptcy Court

_____ District Of _____

In re _____, Debtor

_____, Plaintiff

v. _____, Defendant

Case No. _____

Chapter ____

Adv. Proc. No. _____

BILL OF COSTS

~~Notice is given that the following Bill of Costs will be presented to the bankruptcy clerk at the following place and time:~~

~~Address~~ _____

_____

_____

~~Room~~ _____

~~Date~~ _____

~~Time~~ _____

Judgment was entered in the above entitled action on _____ (date) against _____ .

The clerk of the bankruptcy court is requested to tax the following as costs:

Fees of the clerk	$ _____
Fees for service of summons and complaint	$ _____
Fees of the court reporter for any and all part of the transcript necessarily obtained for use in the case	$ _____
Fees and disbursements for printing	$ _____
Fees for witnesses (*Itemized on reverse*)	$ _____
Fees for exemplifications and copies of papers necessarily obtained for use in this case	$ _____
Docket fees under 28 U.S.C. § 1923	$ _____
Costs incident to taking of depositions	$ _____
Costs as shown on Mandate of appellate court	$ _____
Other costs [*Itemized on reverse*]	$ _____
TOTAL	$ _____

DECLARATION

I, attorney for _____ (name of party) declare under penalties of perjury that the foregoing costs are correct and were necessarily incurred in this action, that the services for which fees have been charged were actually and necessarily performed, and that a copy of this Bill of Costs was mailed this day with postage fully prepaid to:

Name of Judgment Debtor _____

Address _____

_____

_____

_____

Date _____ Signature of Attorney _____

COSTS ARE TAXED IN THE FOLLOWING AMOUNT AND INCLUDED IN THE JUDGMENT: $ _____

Clerk of the Bankruptcy Court _____

Date _____ By Deputy Clerk: _____

Witness Fees (computation, cf. 28 U.S.C. § 1821 for statutory fees)

Name and Residence	**Attendance**		**Subsistence**				**Total Cost** Each **Witness**
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
		$		$		$	$
		$		$		$	$
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		$		$		$	$
		$		$		$	$
						TOTAL	$

NOTICE

Section 1924, Title 28, U.S. Code provides:
"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

Section 1920 of Title 28 reads in part as follows:
"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Bankruptcy Procedure contain the following provisions:
Rule 7054(b)(1)
"(1) Costs *Other Than Attorney's Fees*. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court."

Rule 9006(f)
"ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D), (E), OR (F) F.R.~~CIV~~Civ.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a)."

Rule 7058
This rule incorporates Rule 58 F.R.Civ.P. Rule 58(e) provides, in part, "Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees."

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BILL OF COSTS

Applicable Law and Rules

1. Fed. R. Bankr. P. 7054(b) authorizes the court to allow costs to the prevailing party in an adversary proceeding. The text of this rule and of other relevant provisions of the law and rules is printed on the second page of the form.

2. ~~Rule 7054(b) provides that~~The prevailing party must submit the bill of costs ~~be presented~~ to the clerk on notice to the other parties to the adversary proceeding.

3. The length of time required for notice is often fixed by local rule. Some local rules also limit the time in which costs may be sought. In addition, the local rules may include specific filing procedures. A copy of the local rules may be obtained from the clerk of court.

4. The clerk will not tax costs unless the judgment signed by the court specifically awards costs to the prevailing party. Rule 7054(b). The Bankruptcy Rule is different from Fed. R. Civ. P. 54(d), where costs are allowed unless the court orders otherwise.

5. It is not necessary to have the bill of costs issued simultaneously with the entry of the judgment. Fed. R. Civ. P. 58, which is incorporated by reference by Fed. R. Bankr. P. ~~9021~~7058.

Instructions

Caption

1. Identify the Judicial District in which the bankruptcy case was filed. Example: "Eastern District of California."

2. "~~:~~": Insert the name of the debtor as it appears in the bankruptcy petition. Then insert the names of the plaintiff(s) and defendant(s) as they appear on the original complaint.

3. "Case No.~~:~~.": Insert the bankruptcy case number assigned by the court at the time of filing.

4. "Adv. Proc. No.~~:~~.": Insert the number assigned to the adversary case by the court at the time of the filing of the complaint.

~~**Notice:** The address of the clerk's office and the date and time the bill will be presented to the clerk should be stated in the boxes provided. This date and time should be cleared with the clerk in advance of service of the notice.~~

Fees: The fees necessarily incurred during the proceeding should be itemized in the space provided. The list is intended as a guide. It is not expected that every cost will be on the list. Therefore, several lines have been provided at the bottom of the list for additional costs to be itemized.

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Declaration: The declaration serves as both an affirmation that the costs sought were actually incurred, were necessary, and have been calculated in good faith, and as an affidavit of service of the bill of costs on the judgment debtor.

Service: A copy of the proposed bill of costs must be served on the judgment debtor at least ~~one day~~14 days prior to the ~~presentation~~award of ~~the bill to~~costs by the clerk. ~~Bankruptcy~~ Rule 7054(b).

Objections: Either party may move for court review of the bill, on ~~five~~seven days notice. Rule 7054(b).

General Information for the Clerk

Prior to issuing the bill of costs, the clerk should ensure that:

1. A judgment was entered in the adversary proceeding.

2. The judgment specifically states that costs are awarded to the party seeking the bill of costs. NOTE: This is different from federal civil practice where Fed. R. Civ. P. 54 automatically permits costs. Fed. R. Bankr. P. 7054 specifically declines to follow this part of Rule 54.

3. The ~~attorney's~~attorney's declaration has been executed, and that the name and address of the judgment debtor have been filled in. This declaration is both an affirmation that the costs sought in the bill are correctly calculated, and that the judgment debtor has been served with a copy of the proposed bill.

~~If both parties appear before the clerk and cannot reach agreement on the costs being sought, or if the fees sought are miscalculated, the clerk should exercise the clerk's best judgment as to the amount of costs to be awarded.~~ Rule 7054(b) permits either party to move for review of the ~~clerk's~~clerk's action in fixing the costs, or in refusing to fix costs. The clerk will almost certainly be called upon to testify at such a hearing. Thus, the clerk should keep specific notes of the basis for any decision to amend or deny the bill of costs.

Some courts have adopted a local rule fixing the length of time for notice of the ~~presentation~~submission of the bill of costs.

Several courts have also adopted a local rule limiting the time in which costs may be sought after the judgment is entered. In addition, some courts have adopted a local rule establishing specific procedures for the filing of the bill of costs and of objections to such bill prior to the clerk taxing costs. Clerks may wish to consider whether such rules should be adopted in their districts.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

SUBJECT: MODERNIZATION OF OFFICIAL FORMS 20A AND 20B

DATE: SEPTEMBER 7, 2015

Two official forms were overlooked in the Forms Modernization Project, and therefore they were not included with the large group of forms sent to the Judicial Conference for approval at its September meeting. As currently numbered, these forms are Official Form 20A (Notice of Motion or Objection) and Official Form 20B (Notice of Objection to Claim). The Subcommittee recommends that the forms be renumbered, that a minor wording change be made to them, and that the Committee propose them for final approval without publication.

The forms need to be renumbered as Official Forms 420A and 420B under the new numbering convention. In addition, the Subcommittee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Subcommittee recommends that "mail" be changed to "send."

If approved by the Standing Committee at either the January or June 2016 meeting and by the Judicial Conference in March or September, the renumbered forms will go into effect on December 1, 2016. Because courts are accustomed to making alterations to these forms to reflect local motion and objection practices, the Subcommittee proposes that national instructions regarding the Official Forms specify that these forms may be modified as appropriate, thereby satisfying the requirements of proposed Rule 9009 (Forms).

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: FILING REQUIREMENTS UNDER RULE 8018

DATE: SEPTEMBER 4, 2015

The Advisory Committee has received a suggestion from Professor Kenneth Klee that highlights a potential ambiguity in Bankruptcy Rule 8018(a)(1) when read in conjunction with Bankruptcy Rule 8010(c). Bankruptcy Rule 8018(a)(1) provides, "The appellant must serve and file a brief within 30 days after the docketing of notice that the record has been transmitted or is available electronically." As further explained below, the suggestion posits that the meaning of the term "the record" in Rule 8018(a)(1) is unclear in circumstances where the clerk transmits only part of the record in connection with preliminary motion practice under Rule 8010(c). *See* Suggestion 15-BK-C, submitted by Professor Kenneth N. Klee, UCLA School of Law.

This memorandum describes the potential ambiguity identified by Professor Klee, as well as the treatment of this issue under the pre-2014 bankruptcy rules and under the appellate rules. It also analyzes both a simple amendment to Bankruptcy Rule 8018 to address the issue and a reading of the rules, without an amendment, that may mitigate the concern. Finally, it summarizes the Subcommittee's deliberations concerning the suggestion during its August 17, 2015, conference call. For the reasons set forth below, the Subcommittee recommends no action on this matter at this time.

Overview of the Issue

Bankruptcy Rule 8018 was amended in 2014. As explained in the Committee Notes: "This rule is derived from former Rule 8009 and F.R.App.P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices." Former Rule 8009 provided, in relevant part: "The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007." Amended Bankruptcy Rule 8018(a) changed two aspects of former Rule 8009: (i) the deadline for the filing from 15 days to 30 days, and (ii) the trigger for the deadline from the "entry of the appeal on the docket" to "the docketing of notice that the record has been transmitted or is available electronically." The Committee Notes to amended Bankruptcy Rule 8018 explain, "The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007."[1]

Professor Klee asserts that the trigger in amended Bankruptcy Rule 8018(a)(1) is ambiguous because "the record" could be either the complete record as designated under Bankruptcy Rule 8009(a) or a partial record transmitted in connection with preliminary motion practice under Bankruptcy Rule 8010(c). If interpreted as the latter, the rules place the appellant in a difficult position. Professor Klee offers the following example:

> [I]n an appeal in which I'm currently involved, an emergency stay motion was filed in the district court on the same day the appeal was docketed. The bankruptcy court clerk transmitted a preliminary record consisting solely of the notice of appeal and the orders on appeal. Three days later, the district court

[1] The Committee Notes to amended Bankruptcy Rule 8010 also discuss the change in the triggering event as follows: "In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c) and F.R.App.P. 12(a), the district, BAP, or circuit clerk dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. §158(a)(3), the notice of appeal and the motion for leave to appeal. Accordingly, by the time the district, BAP, or circuit clerk receives the record, the appeal will already be docketed in that court."

> entered a notice on the docket entitled "Notice of docketing bankruptcy record on appeal..." Although it seems absurd for this to trigger the 30-day clock under Rule 8018 (given that the parties had not yet designated the record below), that is arguably what the plain language of Rule 8018 provides. Given the harm that would befall us if we blew the briefing deadline, we assumed, out of an abundance of caution, that the 30-day clock began ticking on the date of the notice.[2]

This potential ambiguity exists because Bankruptcy Rule 8010(c) provides that, "if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any [preliminary relief]….[t]he bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically." Arguably, reference to "the record" in amended Bankruptcy Rule 8018(a)(1) could include the clerk's transmittal of parts of the record in connection with preliminary motion practice under amended Bankruptcy Rule 8010(c).[3]

Analysis of, and Potential Approaches to, the Issue

A plain meaning approach to the rules supports Professor Klee's interpretation and concern. The term "record" generally refers to a "written account" and does not generally incorporate the parameters of that account. As such, it arguably is unclear whether the reference to "the record" in amended Bankruptcy Rule 8018(a)(1) is limited to the "complete" record as designated by the parties under Bankruptcy Rule 8009(a) or also includes something less than the complete record, such as a transmittal of parts of the record under Bankruptcy Rule 8010(c). As Professor Klee suggests, this ambiguity could be resolved by amending Bankruptcy

[2] *See* Suggestion 15-BK-C.

[3] Bankruptcy Rule 8010(c) is derived from former Rule 8007(c), which provided in relevant part, "If prior to the time the record is transmitted a party moves [for preliminary relief,] the clerk at the request of any party to the appeal shall transmit … a copy of the parts of the record as any party to the appeal shall designate." As noted above, however, former Rule 8009(a) did not base the filing deadline on transmittal of the record; rather, the former rules focused on the docketing of the appeal so arguably this ambiguity did not exist.

Rule 8018(a)(1) to read, in relevant part, "the complete record" or "the record, as designated pursuant to Rule 8009(a)." *See* Appendix.

That being said, a contextual reading of amended Bankruptcy Rule 8018(a)(1) might suggest otherwise. For example, amended Bankruptcy Rule 8018(a)(1) references "the record." Bankruptcy Rule 8010(c), in turn, discusses situations that occur "before *the record* is transmitted" and directs the clerk to transmit "*any parts* of the record designated by any party to the appeal" in connection with preliminary motion practice. FED. R. BANKR. P. 8010(c) (emphasis added). Moreover, Bankruptcy Rule 8010(b) provides that "when *the record is complete*, the bankruptcy clerk must transmit to the clerk of the court where the appeal is pending either the record or a notice that the record is available electronically." FED. R. BANKR. P. 8010(b)(1) (emphasis added). Reading these rules together in the context of the designation requirement set forth in Bankruptcy Rule 8009(a)[4] creates a strong inference that the "the record" identified in amended Bankruptcy Rule 8018(a)(1) is the complete record. Indeed, the Committee Notes to Bankruptcy Rule 8010 explain, "In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk…. Accordingly, by the time the district, BAP, or circuit clerk receives the record, the appeal will already be docketed in that court. The clerk of the appellate court must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received. Under Rule 8018(a) and F.R.App.P. 31, the briefing schedule is generally based on that date."

[4] Bankruptcy Rule 8009(a) sets forth the process for designating the record for appeal.

The contextual reading of the rules also is supported by the appellate rules, which the Advisory Committee referenced in promulgating Part VIII of the bankruptcy rules.[5] For example, Appellate Rule 31(a)(1) provides in relevant part, "The appellant must serve and file a brief within 40 days after the record is filed." FED. R. APP. P. 31(a)(1). Appellate Rule 11(b)(2) states, "When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified." FED. R. APP. P. 11(b)(2). Finally, Appellate Rule 11(g) addresses preliminary motion practice by providing, "If, before the record is forwarded, a party makes any of the following motions in the court of appeals …, the district clerk must send the court of appeals any parts of the record designated by any party." FED. R. APP. P. 11(g). As noted above, the Committee Notes to amended Bankruptcy Rule 8018(a) indicate that the rule is based, in part, on Rules 30 and 31 of the Federal Rules of Appellate Procedure.

Summary of the Subcommittee's Deliberations

The Subcommittee reviewed the potential ambiguity in Rule 8018(a) discussed in the suggestion. The Subcommittee appreciated the concern raised by the suggestion and the particular litigation context in which it arose for Professor Klee. To consider the extent of any potential problem with Rule 8018(a), the Subcommittee analyzed various interpretations of the applicable rules and the origins of the amendments to those rules. For example, the Subcommittee discussed the similar provisions in the appellate rules, which formed the basis for the amendments to Rules 8018(a) and 8010(c). It noted that the appellate rules were enacted well prior to the amended bankruptcy rules and that this particular issue does not appear to have

[5] In addition, as explained in the Committee Notes to Bankruptcy Rule 8001, "The Federal Rules of Appellate Procedure generally govern bankruptcy appeals to courts of appeals."

posed significant issues under the appellate rules. Members of the Subcommittee suggested that Professor Klee's particular case, although concerning, was likely an exception that could be addressed through the clerk's transmission, docketing, and noticing practices. [6]

After considering all of the foregoing, as well as the Advisory Committee's objective to maintain consistency between Part VIII of the bankruptcy rules and the appellate rules, the Subcommittee determined that Bankruptcy Rules 8018(a)(1) and 8010(c) adequately provide that the briefing schedule set forth in Rule 8018(a) is triggered only upon the transmission of the complete record by the clerk, unless otherwise ordered by the court. The Subcommittee believes that this result also is supported by the appellate rules. Accordingly, the Subcommittee recommends no action on this matter at this time.

[6] The case law on this kind of issue under the amended bankruptcy rules is sparse. One district court has interpreted Bankruptcy Rule 8018(a)(1) as referencing the complete record. *See* Morris v. Ark Cty. Credit Union, 2015 WL 1523907 (D. Kan. Apr. 2, 2015). This case did not, however, involve the transmittal of a partial record under Bankruptcy Rule 8010(c). Rather, the transcript ordered by the appellant had not yet been filed with the court. The district court held, "The transcript has not yet been transmitted to and docketed in this court. The record on appeal is thus incomplete. The briefing schedule under Rule 8010 [sic] will begin only when a copy of the transcript is docketed and electronically available in this court. Appellant will have 30 days from such time to file his initial brief in this appeal." *Id.* at *2. Another district court rejected the appellant's argument that its briefing obligation had not yet been triggered because the record was incomplete. *See* Daughtrey v. Rivera (*In re* Daughtrey), 2015 WL 1268324 (M.D. Fla. Mar. 19, 2015). Nevertheless, in that case, the primary issue was the extent of the record transmitted by the clerk because of the appellant's untimely designation. As the court explained, "Although the record was sparse due to counsel's failure to timely designate any items, the Notices of Appeal and Orders appealed were transmitted and the Court issued a Notice with regard to appellants' obligations to file a timely brief." *Id.* at *2 (court ultimately allowed filings because parties had cured all deficiencies).

Appendix[7]

Rule 8018. Serving and Filing Briefs; Appendices

* * * * *

(1) The appellant must serve and file a brief within 30 days after the docketing of notice that the complete record has been transmitted or is available electronically.

* * * * *

[7] The Committee Note to the amendment could, in turn, reference Bankruptcy Rule 8010(b)(1), which provides, "Subject to Rule 8009(f) and subdivision (b)(5) of this rule, *when the record is complete*, the bankruptcy clerk must transmit to the clerk of the court where the appeal is pending either the record or a notice that the record is available electronically." FED R. BANKR. P. 8010(b)(1) (emphasis added).

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TAB

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY APPEALS

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: ISSUES AWAITING FURTHER ACTION BY THE COMMITTEE

DATE: SEPTEMBER 4, 2015

The Advisory Committee voted at the fall 2013 and spring 2014 meetings to defer taking further action on several matters that were reported by the Subcommittee:

- It approved three items recommended by the Subcommittee but chose to hold them in abeyance rather than seek the Standing Committee's immediate approval for publication.
- The Committee chose to defer taking any action on another issue but to retain it on the agenda pending possible consideration of the issue by the Standing Committee's CM/ECF Subcommittee.

All of these matters arose out of suggestions made in public comments following publication of the proposed revision of the Part VIII Bankruptcy Rules, which went into effect on December 1, 2014.

Last year the Subcommittee recommended that the matters remain in their current hold status for at least another year, and the Committee agreed at the fall 2014 meeting. The Subcommittee now recommends that the previously approved amendments be submitted to the Standing Committee in June, with a request that they be published with the Part VIII amendments that will be proposed to conform to the FRAP amendments.

<u>Proposed Amendments Approved by the Committee for Publication</u>

Currently being held in abeyance are three sets of proposed amendments to the revised bankruptcy appellate rules:

1. **Rule 8002 (Time for Filing Notice of Appeal)**—An amendment is proposed to subdivision (a) that would add a new paragraph (5) to clarify the effect of the separate-document requirement of F.R. Civ. P. 58(a) (made applicable in adversary proceedings by Rule 7058) on the entry of a judgment, order, or decree for the purpose of determining the time for filing a notice of appeal. The Subcommittee recommended this amendment in response to a suggestion made by Judge Christopher Klein (Bankr. E.D. Cal.) in his comment on Rule 8002. The Advisory Committee approved the amendment for publication at the fall 2013 meeting.
2. **Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)**—Subdivision (c) would be amended to provide authority for the court to file a statement on the merits of a certification for direct review in the court of appeals when the certification is made jointly by all of the parties to the appeal. It would be a counterpart to subdivision (e)(2), which allows a party to file a similar statement when the court certifies direct review on the court's own motion. This amendment was proposed in response to a comment by Judge Klein and was approved for publication at the fall 2013 Advisory Committee meeting.
3. **Rule 8023 (Voluntary Dismissal)**—The rule would be amended by adding a cross-reference to Rule 9019 to provide a reminder that when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court. The Subcommittee proposed the amendment in response to a comment by the National Conference of Bankruptcy Judges, and the Advisory Committee approved it for publication at the spring 2014 meeting.

The Advisory Committee placed the three proposed amendments on hold in order to allow the revised Part VIII rules to go into effect before seeking publication of any amendments to them. The Committee's reasoning for delaying publication was twofold. First, members thought that it would be confusing to publish amendments to rules that were not yet in effect. Second, the Committee sought to follow the advice of the chair of the Standing Committee to publish rules in related bundles, rather than piecemeal. Because members of the Committee thought that experience under the new Part VIII rules might reveal other needed revisions, the Committee accepted the Subcommittee's recommendation to delay publication until after the revised Part VIII rules took effect and there was a sufficient period of experience with them to determine whether any additional amendments were needed.

The revised Part VIII rules took effect at the end of last year. If the previously approved amendments are proposed for publication in 2016, the Subcommittee will be able to determine whether any other issues that need addressing have arisen in the initial 15 months of the new Part VIII rules. The publication of these proposed amendments could then be packaged with the proposed amendments that respond to changes in the Federal Rules of Appellate Procedure.

Matter Awaiting a Recommendation

In response to the publication of the proposed revision of the Part VIII rules, the Committee received three comments that suggested that designation of the record no longer be required and that the record in the bankruptcy court be the record on appeal. *See* Comments 12-BK-005—Judge Robert J. Kressel (Bankr. D. Minn.); 12-BK-015—Judge Barry S. Schermer (Bankr. E.D. Mo.); 12-BK-040—Bankruptcy Clerks Advisory Group. The comments noted that the 8th Circuit BAP has such a rule and that parties in that court refer to the appropriate bankruptcy court docket entries in their briefs, and BAP judges access the bankruptcy court

record electronically. The commenters suggested that proposed Rule 8009 be amended to incorporate or accommodate that practice.

Upon the Subcommittee's recommendation, the Advisory Committee at the fall 2013 meeting placed these suggestions on hold pending possible consideration of the issue by the Standing Committee's CM/ECF Subcommittee. At the spring and fall 2014 meetings, the Committee retained the suggestions in that status, reasoning that the use of electronic records on appeal is a matter that should be pursued more broadly than just in the context of bankruptcy appeals and that the CM/ECF Subcommittee, with a membership drawn from all of the rules advisory committees, was better positioned to pursue to issue.

The CM/ECF Subcommittee, which never took up the issue, has now been terminated, and no other advisory committee has shown an interest in pursuing it. There does not seem to be any urgency to the issue, however, since courts are adapting their procedures to the availability of CM/ECF as they see fit. The Subcommittee therefore recommends that no action be taken on the comments.

From: Arthur I Harris/OHNB/06/USCOURTS
To: "Elizabeth Gibson" <elizabeth_gibson@unc.edu>
Cc: Judge Ikuta/CA09/09/USCOURTS@uscourts, Stuart Bernstein/NYSB/02/USCOURTS@uscourts, mharner@law.umaryland.edu, Scott Myers/DCA/AO/USCOURTS@uscourts, Bridget Healy/DCA/AO/USCOURTS@uscourts
Date: 09/28/2015 09:21 AM
Subject: agenda item 7B - Professor Resnick's suggestion to add new subdivision 9033(e)

Elizabeth and others,

I want to give you a heads up regarding some comments I have concerning Professor Resnick's suggestion to add a new subdivision 9033(e) that was referred to the business subcommittee. Please refer to the attached PDF. I am happy with this being forwarded to the full committee, but will leave that decision to you, Judge Ikuta, and Judge Bernstein. Look forward to seeing you in DC later this week.

Hope this helps.

Thanks, Art

Re: Agenda item 7B - Professor Resnick's suggestion to add new subdivision 9033(e); memo at pp. 123-29 of agenda materials

Elizabeth and others,

I want to give you a heads up regarding some comments I have concerning Professor Resnick's suggestion to add a new subdivision 9033(e) that was referred to the business subcommittee. Let me preface my comments by noting that the thing I've learned most about this amendment process is that even little changes can affect lots of other provisions because all the rules are so interrelated.

Anyhow, I have three comments/suggestions to the proposed amendment that I describe as small, medium, and large.

First, the small suggestion. Proposed subdivision (e) incorporates existing subdivisions (b), (c), and (d), but has the district court set the time for serving and filing objects under subdivision (b) instead of the bankruptcy court. That's fine, but we also should have the district court decide extensions of time under subdivision (c) instead of the bankruptcy court, because the appeal will already be in front of the district court. I would change the language at lines 19-21 of p. 128 to read as follows:

> except that the district court shall set <u>or extend the</u> time for serving and filing written objections under subdivision<u>s</u> (b) <u>and (c)</u>.

Second, the medium suggestion. The last sentence of proposed subdivision (e) gives each party the right to elect to have its appellate brief treated as objections or responses to the proposed findings and conclusions. I believe district judges may want the parties to specifically identify the findings and conclusions to which it objects, particularly if the appellate briefs are too general. This would be consistent with section 157(c)(1) of title 28, which provides for de novo review of "those matters to which any party has timely and specifically objected." and subdivisions (b) and (d) of rule 9033 which provide for de novo review of any portion ... to which specific written

objection has been made. I don't have great suggested language, but we could add at line 23 of page 128:

> ", unless the district court provides otherwise."

That would give the district court the right to insist that each party identify the specific portions of the bankruptcy court's findings that the party seeks de novo review. It would probably only be needed if the bankruptcy court makes factual findings, because the district court would probably need to conduct de novo review of any conclusions of law whether the matter is on direct appeal or as a proposed judgment.

Third, the large suggestion. The new subdivision does not address the analogous situation where the appeal is to the BAP. The BAP situation is more complicated because the BAP can't treat the judgment as proposed findings and conclusions and because there are issues of consent and waiver in appealing to the BAP.

For example, the appellant may have expressly refused to consent to the bankruptcy court entering final judgment, but the bankruptcy court may have found the claim not to be a Stern claim based on district court precedent and entered final judgment. The appellant may have appealed to the BAP and still preserved its argument that the claim was a Stern claim. But it's possible the issue was waived by appealing the BAP and not the district court.

I'm not sure if the business subcommittee considered a possible procedure for BAPs such as remanding the matter or transferring the appeal to the district court for treatment under Rule 9033(e) or for other appropriate action. I think it might be appropriate for our committee to think about the BAP implications before making any final recommendation on Rule 9033. We might also want to include language in the committee note similar to what was done with Rule 3016(d) in 2008:

> "Subdivision (e) does not apply should the appeal be taken to the BAP."

Hope this helps.

From: Stuart_Bernstein@nysb.uscourts.gov
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Sent: Monday, September 28, 2015 12:56 PM
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Cc: Bridget_Healy@ao.uscourts.gov; Gibson, S. Elizabeth; Judge_Ikuta@ca9.uscourts.gov; mharner@law.umaryland.edu; Scott_Myers@ao.uscourts.gov
Subject: Re: agenda item 7B - Professor Resnick's suggestion to add new subdivision 9033(e)

Having reviewed Judge Harris' thoughtful memo, I wanted to add my own comments to his suggestions - small medium and large.

Small: I agree that Proposed Rule 9033(e) should be clarified along the lines suggested but for a different reason. Proposed Rule 9033(e) grants the district court the power to set the time for serving written objections. Rule 9033(c), which 9033(e) incorporates, places certain deadlines on the time to seek an extension and limits on the length of the extension, and Rule 9006(b)(3) provides that the court may enlarge the time limits in Rule 9033 only to the extent and under the conditions stated in the Rule 9033. Depending on the stage of the appeal, the time limits under Rule 9033 may have expired by the time the district court asks for specific objections. Proposed Rule 9033(e) should make clear that notwithstanding the time limits set forth in Rule 9033(c), the district court can extend the time for submitting objections.

Medium: I also agree with this suggestion although the district court undoubtedly has the authority to insist on more specific written objections, particularly where they are directed at proposed findings of fact. De novo review under Rule 9033 is limited to the findings to which specific written objections are made. While the party may elect to treat its brief as its objection, that may not suffice to identify those findings of fact that are subject to de novo review and those that are not.

Large: I believe that the "large" suggestion is unnecessary because Proposed Rule 9033(e) is expressly limited to appeals to the district court. That said, I do not know how the BAPs are dealing with the same situation, and it may be worthy of further consideration apart from our consideration of Rule 9033(e).

Hon. Stuart M. Bernstein
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Date: 09/28/2015 03:30 PM
Subject: RE: agenda item 7B - Professor Resnick's suggestion to add new subdivision 9033(e)

Judge Harris -- Thanks for sharing your thoughts about this agenda item with us before the meeting. I agree with your suggested revision to 9033(e) to give the district court authority to extend the time for filing objections.

I'm not sure whether I agree with the second proposed change. Maybe something should be added to the committee note that warns appellants that resting on their briefs may not always constitute making sufficiently specific objections. If they elect to do so, however, the district court can decide which issues are subject to de novo review.

On the BAP issue, I agree with Judge Bernstein that this rule doesn't need to address it. The need for such a rule somewhere else rests on what seems to be an unlikely scenario: party doesn't consent to b. ct. adjudication; b.ct. determines it can enter final judgment; party that failed to consent loses and wants to argue on appeal that it was entitled to Art. III court; that party as appellant fails to elect to have appeal heard by Art. III court. Since Arkison makes clear that the district court can provide the Art. III adjudication to which a party was initially entitled by treating the judgment as proposed findings and conclusions, there does seem to be a strong waiver issue if the party appeals to the BAP. I looked to see if any of the BAP local rules address this issue, like several district courts do, and didn't see any such rules (other than a recognition of the right of a BAP to transfer an appeal to a district court "to further the interests of justice or for any other reason the BAP deems appropriate" (1st and 9th Cir. BAPs)).

Your suggestions should engender a good discussion at the meeting (my time estimate will probably be off). I think it would be good for you or Scott/Bridget to circulate your views to the Committee before the meeting.

Elizabeth