ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 26 - 27, 2009
San Diego, California

(Minutes)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
District Judge David H. Coar
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge Judith H. Wizmur
Dean Lawrence Ponoroff
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
District Judge Thomas Zilly, former chair
Bankruptcy Judge Thomas Small, former chair
Professor Jeffery W. Morris, former reporter (attended telephonically)
Professor Alan Resnick, former reporter and former member
Bankruptcy Judge Christopher M. Klein, former member
G. Eric Brunstad, Jr., Esquire, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Administrative Office
Stephen “Scott” Myers, Administrative Office
Robert J. Niemic, Federal Judicial Center

Phillip S. Corwin, Butera & Andrews

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda was published, is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new members.

The Chair welcomed the members and guests to the meeting. She noted this meeting was in part a celebration of former member Judge Irene Keeley, former member Eric Brunstad and former reporter, Professor Jeffery Morris, all of whom finished up their formal service to the Committee at the fall meeting in Denver. The Chair said Judge Keeley, unfortunately, could not attend the meeting, and expressed her regrets. Mr. Brunstad was in attendance and Professor Morris was able to attend telephonically. The Chair thanked both of the former members and the former reporter for their dedicated and effective Committee service. Finally, the Chair welcomed former chairs Judge Tom Small and Judge Tom Zilly and former reporter Professor Alan Resnick, and thanked them for participating in the Special Open Meeting of the Subcommittee on Privacy, Public Access, and Appeals, held the day before this meeting, to discuss revision of the Bankruptcy Appellate Rules.

2. Approval of minutes of Denver meeting of October 2-3, 2008.

The minutes were approved without objection.

3. Oral reports on meetings of other committees:

(A) January 2009 meeting of the Committee on Rules of Practice and Procedure, including status of Time Computation changes.

The Chair reported on the work of the Committee on Rules of Practice and Procedure (the Standing Committee). She said that the Standing Committee accepted the Committee's recommendation to publish for comment amendments to Rule 6003 that would make clear that notwithstanding the rule's requirement that the relief specified in the rule cannot be entered until 21 days after a petition has been filed, such relief may have a retroactive effective date. She said some of the Standing Committee members had questions about the proposed revisions to Forms

22A and 22C substituting "number of persons" and "family size" for certain references to "household" and "household size" on those forms. She said the Consumer Subcommittee would address those concerns at agenda item 4(C)(1).

(B) November 2008 meeting of the Advisory Committee on Appellate Rules.

The Chair said that the Appellate Rules Committee was considering a proposed amendment to Appellate Rule 40 that would clarify the applicability of the 45-day period for filing a petition for rehearing a case that involves a federal officer or employee.

The Chair said another issue under review was how to handle problems that arise when an appeal taken before entry of a judgment that requires a separate document under Civil Rule 58 is followed by a post-judgment motion that is timely only because of the failure to enter the judgment in a separate document. She said that the Appellate Rules Committee was not considering a rule amendment at this time, but that it would instead seek to improve the awareness of the separate document requirement. Another possible solution discussed would be to create a prompt in CM/ECF for judges and clerks to have the judgment set out in a separate document.

(C) January 2009 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Conti gave the report. She said the Bankruptcy Committee was apprised of progress in the ongoing case weight study and the current staffing of bankruptcy judges. She said the Bankruptcy Committee also considered retirement benefits for bankruptcy judges and magistrate judges who are elevated to Article III judges. The issue was how many years of bankruptcy judge service could be applied to the calculation of service as an Article III judge. She said the recommendation was to count five years of bankruptcy service.

(D) November 2008 meeting of the Advisory Committee on Civil Rules and hearings on proposed Civil Rules amendments, including the proposed amendments to Civil Rule 56.

Judge Wedoff gave the report. He said that the major issues were proposed amendments to Rule 56 and Rule 26 that had been published for comment, and that had been the subject of public hearings. He said that the upshot of the hearings was widespread approval of the proposed amendments to Rule 26, and challenges to two of the propose changes to Rule 56.

Judge Wedoff said one of the challenges to proposed Rule 56 concerned a provision that requires, unless the court orders otherwise, that the movant include a brief statement of material facts that are asserted to be undisputed. Under the proposal, the respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing it in part. Judge Wedoff said that, in the end, the recommendation was to remove this "point-counterpoint" proposal.

The other Rule 56 issue was the result of a broad restyling of the civil rules in 2007. Under the 2007 restyling project, instances of the word "shall" throughout the civil rules were replaced with "must," "may," or "should," based on case law applying to the rule. With respect to restyled Rule 56, "should" replaced "shall" in 2007, as in "The judgment … *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Judge Wedoff said that the Civil Rules Committee considered many comments from the bar that the change implied that a judge has more discretion in granting the motion than the case law supports. After considering a change from "should" to "must," the recommendation was to go back to "shall."

(E) October 2008 meeting of the Advisory Committee on Evidence.

Judge Schell said the Evidence Committee has completed the final third of its restyling project, and that it plans to recommend publishing all the restyled rules this summer.

The Chair thanked Judge Schell and announced that Judge Wizmur would be the new liaison to the Evidence Committee.

(F) Bankruptcy CM/ECF Working Group.

Judge Perris said that the CM/ECF Working Group continues to review and prioritize the many modifications requests it receives.

(G) Progress report from the Sealing Committee.

The Reporter gave the report. She said that all cases filed in 2006 had been had been reviewed. She noted that no bankruptcy cases have been sealed in their entirety over that timeframe. She said the Sealing Committee would next move to "phase three" of the project which would be to review the cases that have been sealed.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning modifications to the proposed amendment to Rule 3001(c) and new Rule 3002.1 concerning post-petition mortgage fees in chapter 13 cases, which were tentatively approved at the Denver meeting, in light of additional suggestions.

The Reporter gave the report. She said that at the fall meeting in Denver, the Committee approved a preliminary draft of amendments to Rule 3001(c), and a new Rule 3002.1, for publication this coming fall. She said that the Subcommittee considered informal comments on the Denver draft and that it recommended two changes to proposed Rule 3002.1 before publishing. She said the first recommended change, shown at page 26 of the agenda book,

would slightly modify the procedure in subsection (e) of the Rule. **A motion to approve Rule 3002.1(e), as revised at page 26 of the agenda book, carried without objection.**

The Reporter said the Subcommittee also agreed with a comment that the proposed 30-day deadline in subsection (c) of Rule 3002.1 for a creditor to provide notice of post-petition charges was too short, and it recommended extending the time-frame to 180 days. The Reporter said the proposed change was shown at page 29 of the agenda book.

Judge Klein asked whether changing the time period in subsection (c) to 180 days would prohibit closing the case until that time period ran. Judge Wedoff said the change would not affect case closing because subsection (e) of the Rule requires that the creditor must provide a statement after plan payments have been completed that no outstanding payments remain due under the agreement. **After additional discussion, a motion reapproving Rule 3002.1(c), as revised at page 29 of the agenda book, passed without objection.**

Professor Resnick suggested several word changes to the proposed Rule 3001(c) amendments to clarify that those amendments applied only in cases involving individual debtors. **After discussing Professor Resnick's suggestions, the Committee reapproved its recommendation to publish proposed Rule 3001(c), subject to review by the Style Subcommittee, as set out at pages 35-37 and including the language added to (c)(1) shown at page 83 (Agenda Item 4(D) of the materials), with the following changes: add "consumer" before "credit" at line 7 on page 83; change the heading for (c)(2) on page 35 to "Additional Requirements in a Case of an Individual Debtor"; begin (c)(2) with "In a case in which a debtor is an individual:"; and change (c)(3) to (c)(2)(D) and remove the caption for that subparagraph.**

The Committee also approved a conforming change to Form 10 as set out at pages 84 and 85 of the agenda book with the addition of the word "consumer" after "revolving" on line 6.

(B) Recommendation concerning modification of Rule 4004 to authorize extending the time to file an objection to discharge in light of potential "gap period" issues. See, e.g., Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008).

The Reporter explained that at the October 2008 meeting, the Committee asked the Consumer Subcommittee to consider whether, in light of the Seventh Circuit's Zedan decision, there is a need to amend Rule 4004 to address the situation in which there is a gap between the deadline for objecting to discharge and the actual entry of the discharge order. If a trustee or creditor learns during that gap period of fraud committed by the debtor, a literal reading of the current rule and § 727(d) of the Code precludes both an objection to discharge (because it would be untimely) and the revocation of the discharge once it is entered (because knowledge of the fraud would have been obtained *before* the entry of the discharge).

The Reporter said the Subcommittee carefully considered the matter over the course of two conference calls and that it recommended changing the rule. She said the Subcommittee

suggested two options for how Rule 4004(b) might be amended to address the gap issue, both of which were set out in the agenda materials beginning at page 56.

After discussing the alternatives, the Committee voted to recommend publishing option 1 (pages 56-57 of the Agenda materials, with the following change: add "The motion must be filed promptly after the movant discovers the facts on which the objection is based."

(C) (1) Report concerning response to questions raised by the Standing Committee on the use of the terms "household" and "family" on Official Forms 22A and 22C.

Judge Wedoff said that at the October 2008 meeting, the Committee approved a recommendation to publish proposed changes in the means test forms – 22A and 22C – to eliminate in certain lines references to "household size" and replace that term with "number of persons" or "family size," and to include an instruction to count the "number of persons … that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support."

Judge Wedoff said that when the recommendation was brought before the Standing Committee, a member asked whether there could ever be a situation where the debtor could claim someone as a "dependent" who could not be claimed as an exemption on the debtor's tax return. In light of the Standing Committee question, the Chair asked the Consumer Subcommittee for clarification before submitting the request to publish the proposed changes for comment.

Judge Wedoff explained that the Bankruptcy Code allows for deduction from current monthly income for the debtor's "dependents" -- *see*, § 707(b)(2)(A)(ii)(I), -- but that it does not define "dependants." Accordingly, the means-test forms allow for a definition that is broader than the IRS definition.

Moreover, the IRS itself recognizes that there are situations in which someone may be a "dependent" for purposes of the expense allowances even though that person is not allowed as an exemption on the taxpayer's current income tax return. The IRS Manual's discussion of both national and local expense standards states that there may be "reasonable exceptions" to the general rule that "the total number of persons allowed for determining family size should be the same as those allowed as exemptions." The examples the Manual gives are "foster children or children for whom adoption is pending." IRS Manual 5.15.1.7, 5.15.1.9 (05-09-2008). Judge Wedoff said that the Subcommittee therefore concluded that the wording of the instruction was appropriate.

The Chair said that this explanation and the recommendation to publish would be conveyed to the Standing Committee.

(2) Report concerning consideration of a possible amendment to Form 22C in reference to the calculation of disposable income in chapter 13 cases.

Judge Wedoff said that Subcommittee considered whether Form 22C should be amended to reflect decisions questioning its calculation of "projected disposable income" under § 1325(b)(1)(B) of the Bankruptcy Code. He said the term is not defined by the Code, and that there is a circuit split as to its meaning, with one line of cases holding that the form correctly bases projected disposable income on the pre-filing six month average of the debtor's income, and a second line holding that the post-filing changes in the debtor's income must he taken into account.

Judge Wedoff said that the Subcommittee recommended no change to the form at this time for at least two reasons: First, he noted that Schedule I already provides information about "actual" income at the time of filing that would allow for determination about projected disposable income without a change to Form 22. Second, because the case law is in flux, any change in the form might signal (incorrectly) that the Committee is taking a position. After discussing the matter, the Committee agreed that a change was not appropriate at this time.

(3) Recommendation concerning possible revisions to the instructions on Forms 22A, 22B, and 22C regarding the reporting of regular payments by another person or entity for the household expenses of the debtor or the debtor's dependents.

Judge Wedoff said that the Subcommittee recommended a technical change to the means test forms to avoid double counting in the income of joint debtors "any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose." He said the forms contain blanks in each column for reporting such income in joint cases, and that the Subcommittee recommended adding at the relevant line of each form an instruction clarifying that the income should only be reported in only one column. **A motion to amend Forms 22A, 22B, and 22C, as described at page 68 of the agenda book, was approved without objection.**

(4) Recommendation as to whether Form 22A should require the filing of means test information where only one debtor in a joint case is exempt from the means test presumption.

Judge Wedoff said that there are currently three exclusions from the means test presumption of abuse established by § 707(b)(2) of the Bankruptcy Code, dealing with (1) disabled veterans, (2) debtors who do not have primarily consumer debts, and (3) certain current or former members of the National Guard and reserves called to active duty or involved with homeland defense activities (a new exclusion added by the National Guard and Reservists Debt Relief Act of 2008, effective December 19, 2008).

The Committee amended Form 22A on an emergency basis in December 2008 to implement the National Guard/reservist exclusion. Prior that change, Form 22A did not expressly deal with the question of whether a particular exclusion should apply to the spouse of

an excluded debtor in a joint case. In reviewing the statutory language for the National Guard/reservists exclusion, however, the Committee concluded that the exclusion was "personal" to the debtor and added an instruction that required the debtor and the debtor's spouse to complete separate forms if the exclusion was applicable to only one of them.

Because the 12/08 version of Form 22A was revised on an emergency basis, the Committee only considered changes necessary to implement the National Guard/reservist exclusion. In the case of the other two exclusions, the form continued the practice established when BAPCPA went into effect in 2005 of allowing joint debtors to complete a single Form 22A if the exclusion applied to either one of them.

After adoption of the 12/08 version of Form 22A, the Consumer Subcommittee was asked to consider, in a more deliberate fashion, the question of how the exclusions from means testing should be treated in joint cases.

Judge Wedoff said that all three exclusions from means testing were established by different statutory language, so the Subcommittee considered them separately. After extensive analysis (described in pages 69-76 of the agenda materials), the Subcommittee concluded that each of the statutory exclusions was identified by ambiguous language that could support either limiting the exclusion to the debtor or extending it to the debtor's spouse. Accordingly, the Subcommittee recommended that an instruction be added to the form that would allow, but not require, separate filings by spouses in joint cases for each of the exclusions. He said the Subcommittee offered two alternative formulations of an instruction that would implement the proposed change.

After discussing the Subcommittee's recommendation, the Committee voted to recommend publishing for comment the first of the two alternatives on page 75 of the agenda materials, with one dissent.

(D) Report on Judge Thomas Small's Suggestion 08-BK-J that Rule 3001 be amended to facilitate identification of stale claims and inadequately documented claims filed after the bulk transfer of consumer debts.

The Reporter said that the Subcommittee designated a working group to consider a problem identified by Judge Small of inadequate documentation of bulk claims. She said the working group identified three issues for consideration: (1) should bulk claim purchasers be required to provide more or different evidence in support of their claim; (2) should some or all creditors be required to state whether a claim is timely under the relevant statute of limitations; (3) what should be the consequence of a creditor's failure to comply with Rule 3001?

With respect to more, or additional, evidence, the working group concluded that because the terms for open end credit agreements change frequently, a filer should be required to attach the last account statement sent to the debtor prior to the filing of the bankruptcy. The working group recommended publishing a change to Rule 3001(c) that would effect this requirement, as set forth on page 83 of the agenda materials. **The Committee approved this recommendation,**

along with the conforming changes to Form 10 shown on pages 84-85, in the context of Agenda Item 4(A).

The working group considered, but was unable to come to a consensus concerning a rules amendment specifically requiring that evidence of any assignment be attached to the proof of claim, with two members arguing that requiring filing of the last account statement should adequately identify the creditor in most situations.

The working group considered, but did not recommend, requiring creditors to state whether a statute of limitations defense is applicable to their claim because: (1) it would shift the burden of proof on the matter; and (2) members thought that there were too many factors involved in a statute of limitations defense to affirmatively certify whether it is applicable. In discussing this issue, committee members agreed with the reasoning of the working group.

Judge Wedoff said the working group thought that the new sanctions provision of Rule 3001(c) recommended at agenda item 4(A) probably went as far as the Bankruptcy Code allows for non-compliance in the filing requirements for a proof of claim.

In response, Judge Small said that he agreed that the proposed sanctions would be helpful, but he did not think they get to the heart of the problem: that the debtor would be required to expend resources to object to the claim before any sanctions could come into play. He suggested instead that the rules could be amended to state that the failure to attach a writing to a claim form would mean that no claim had been filed, and that it could be disregarded.

Other members questioned this approach, and suggested instead that the filer be required to certify on Form 10 the accuracy of the claim with language similar to the debtor's certification on Form 1. **Because the certification issue had not previously been discussed by the Subcommittee, the Chair directed Judge Wedoff and the Subcommittee to consider the issue and to report back at the October meeting**.

(E) Recommendation concerning Judge Keith Lundin's Suggestion 08-BK-L to amend Rule 2003 to provide a procedure for holding open a meeting of creditors to allow a chapter 13 debtor additional time to file tax returns with the taxing authorities.

Judge Wedoff said that the Subcommittee considered a procedure proposed by Judge Lundin to amend Rule 2003 to "hold open" a meeting of creditors under § 1308(b) of the Bankruptcy Code in order to allow a chapter 13 debtor additional time to file tax returns with taxing authorities. He said that the Subcommittee concluded that the issue could best be addressed by amending existing Rule 2003(e), which governs adjournments, to require the filing of notice of an adjournment. The Subcommittee reasoned that "holding open" a meeting, the term used in § 1308(b), is the same as an "adjournment."

Judge Wedoff added that, under the Subcommittee's proposed amendment, the "presiding official" would be required to file a notice specifying the date and time to which a meeting is adjourned, which would have the effect of creating a new deadline for filing the tax returns.

Judge Wedoff also noted that the amendment, if adopted, would be consistent with case law in the First Circuit that a trustee's attempt to adjourn the § 341 meeting for an unspecified time period does not "hold open" the meeting.

Mr. Kohn suggested a better procedure would be a new rule (2003.1) specifically addressing "holding open" under § 1308(b), and requiring the trustee to explain the need to hold open the meeting to file the tax returns. **After additional discussion, the Committee recommended publishing Rule 2003(e), as set forth at pages 101-102 of the agenda materials, except that the word "notice" was replaced with "statement."**

5. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning the suggestion by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association that Rule 2019 be repealed and suggestions by the National Bankruptcy Conference and other commentators that the rule be retained and/or expanded.

Judge Hopkins reviewed the position of Loan Syndications and Trading Association, and the Securities Industry and Financial Markets Association that Rule 2019 be repealed, in contrast to the position of National Bankruptcy Conference and others that the disclosures required by the rule be expanded. He said the Subcommittee carefully considered the arguments for repealing the rule, but that ultimately decided in favor of more rather than less disclosure. He said that the Subcommittee recommends publishing for comment a proposed expansion of the rule as set out at pages 117 to 123 of the agenda materials.

The Reporter explained that the proposed revision was a complete restyling of Rule 2019, and that it expanded both the types of groups required to disclose something, as well as what must be disclosed.

Professor Resnick said that requiring disclosure from an "entity that represents more than one creditor" could be over-inclusive, and thought it should be limited to representations of more than one creditor or equity security holder "acting in concert." He noted that he thought the current rule had the same problem of over-inclusiveness.

The Reporter responded that the Subcommittee intended to require Rule 2019 disclosure even if the representation wasn't in concert, so that a law firm representing more than one creditor in a bankruptcy case would be required to disclose such representation, even if the creditors had completely different types of claims. **A motion to approve proposed Rule 2019 for publication, as set forth at lines 117 to 123, with one stylistic correction pointed out by Judge Hopkins, and subject to further restyling by the Style Subcommittee, carried with one objection.**

(B) Recommendation concerning the suggestion by Judge Wedoff and former panel trustee Philip Martino that a streamlined procedure be created for the approval and payment of certain types of administrative expenses.

Judge Hopkins said the Subcommittee considered the suggestions from Judge Wedoff and Mr. Martino for a streamlined procedure for certain administrative expenses, such as compensation for a chapter 7 trustee in a case that is converted to chapter 13. He said the Subcommittee ultimately concluded that using a proof-of-claim-like process (along with deemed allowance) was not consistent with the Bankruptcy Code's requirement under § 503 of a request for payment and court authorization after notice and a hearing. Accordingly, the Subcommittee recommended no change. **After a short discussion, the Committee accepted the Subcommittee's recommendation of no change.**

6. Report of the Subcommittee on Forms.

(A) Proposed revision of Director's Form B240, the Reaffirmation Agreement; proposal for development of an electronic version.

Judge Perris said that in response to many comments received in connection with the Forms Modernization Project's requests for input about the current forms, the Forms Subcommittee decided to try revising director's form B240 (the reaffirmation agreement). She said that Subcommittee was also experimenting with a possible electronic implementation as a "test run" of how using conditional logic in filling out a form might improve the accuracy of the information collected.

She said that the revised version of B240 was set out at page 174 of the agenda materials. She noted the following differences with respect to the current version: it is shorter; and it integrates the agreement and the statutory disclosures in a way such that prevents its use with user-prepared agreements. She said the Subcommittee considered but decided not to create a second version of disclosure statements to be used with user-prepared agreements.

Jim Waldron said he was working on an electronic version of the revised form that contained conditional logic so that the user would be directed to complete only the relevant portions of the form. He gave a short demonstration of an incomplete version of the electronic form.

Judge Perris said that the Subcommittee had three questions for the Committee:

(1) Should it proceed with the revision of Form B240 as set out in the materials? **The Committee supported going forward.**

(2) Should the Subcommittee create a second form of disclosures to be used with a user-prepared reaffirmation agreement? **The Committee did not support creating a second form of disclosures.**

(3) Should the Subcommittee continue to develop a technological implementation of the form? **The Committee supported the effort.**

(B) Recommendation on suggestions by the courts in the Southern District of New York and the Eastern District of Pennsylvania that a space be added to Official Form 10 to designate what portion of the claim is a general unsecured claim.

Mr. Wannamaker said that he spoke to the courts that made the request and that revision of the form was no longer needed because planned CM/ECF changes will accommodate the problem. **The Committee accepted the recommendation that no change be made.**

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

(A) Oral report on the special open subcommittee meeting on revision of the Part VIII rules held March 25, 2009, and plans for further work.

Judge Pauley said that the participants at the Subcommittee's open meeting supported a significant revision and restyling of the current Part VIII rules. He said that some participants suggested going beyond making the bankruptcy appellate rules more "FRAP"-like because, at least with respect to electronic filing, the Federal Rules of Appellate Procedure themselves seemed outdated. Judge Pauley said he thought that overall the special open meeting was a success, and he thanked the staff of the AO for the work they put in to set up the meeting.

The Reporter agreed that the meeting was a success, and that the discussion was very valuable. She said the participants divided up into small groups to provide specific rule comments, and that the Subcommittee intended to gather those comments and use them to refine Mr. Brunstad's draft over the summer in preparation for the next open meeting in the fall.

The Chair and Judge Rosenthal said they would invite the reporter and chair of the Appellate Rules Committee to the planned fall open meeting in Boston. They expected that there would be further discussion at that time of whether there should be a coordinated effort by all the advisory committees to update rules to take better advantage of electronic filings.

Mr. Brunstad said he thought that there was uniform agreement that restyling was worthwhile. He said there was more limited support for some of the FRAP innovations and his sense was that that the Subcommittee would look at them on a "innovation by innovation" basis.

Judge Pauley asked for the sense of the Committee about whether the Subcommittee should continue on this project. **There was unanimous support for the Subcommittee's continuation of this work.**

(B) Discussion of whether proposed new Rule 8007.1 and the proposed amendment to Rule 9024 on indicative rulings should be submitted for publication as approved at the October meeting or held for submission as part of the revision of the Part VIII rules.

Judge Pauley said the Subcommittee recommended holding proposed new Rule 8007.1 and the proposed amendment to Rule 9024 in the Bull Pen for now and incorporating them into a full revision of the appellate rules if appropriate. **The motion was seconded and approved without objection.**

8. Report by the Subcommittee on Technology and Cross Border Insolvency. (Judge Coar)

Judge Coar said that the Reporter prepared two memos concerning new proposed Rule 1004.2, one at pages 276-281 of the agenda materials, and the other distributed at the meeting. He said that, as published, the new rule provides in subdivision (b) that the U.S. trustee or a party in interest may challenge the center of main interests ("COMI") designation made in a chapter 15 petition. The rule provides that this challenge must be made by motion "filed no later than 60 days after the notice of the petition has been given to the movant under Rule 2002(q)(1)."

Judge Coar said that the Subcommittee had been persuaded by comments that the proposed 60-day time period for challenging COMI designation was too long, and that a challenge should be filed before the hearing on the petition for recognition is held. He said the Subcommittee recommends providing some flexibility to the seven-day deadline proposed in the Reporter's memorandum at page 278 of the materials by replacing the sentence that begins on line 5 with : "Unless the court orders otherwise, the motion shall be filed no later than seven days before the date set for the hearing on the petition for recognition."

Judge Coar said that the Subcommittee did not recommend that a subdivision (c) be added to proposed Rule 1004.2, as discussed on pages 279 through 278 of the agenda materials. He said the Subcommittee concluded that § 1517(d) of the Code, which allows modification or termination of recognition, does not require a rule setting a deadline for seeking such relief and that the flexibility provided by the statute is preferable to an absolute deadline. **The Committee agreed with the Subcommittee's reasoning and recommended republishing Rule 1004.2 as set forth on pages 278-279 of the agenda materials replacing the sentence beginning on line 5 with: "Unless the court orders otherwise, the motion shall be filed no later than seven days before the date set for the hearing on the petition for recognition."**

The Subcommittee also considered a comment from Judge Samuel Bufford that the notice provisions in proposed Rules 1004.2(b) and 5012, and the proposed amendment to Rule 5009, be expanded to include all secured creditors and at least the 20 largest unsecured creditors. Judge Coar said that Judge Bufford's proposed extended service list was similar to the list included in several chapter 15 specific rules on the same topic that he submitted to the Committee's for consideration in January 2006.

Judge Coar said that, as published, proposed Rules 1004.2(b), 5009(c), and 5012 incorporate the same list that Rule 2002(q) prescribes for notice of the hearing on the petition for recognition. The Committee Note to Rule 2002(q) explains the absence of creditors on the service list as follows:

> There is no need at this stage of the proceedings to provide notice to all creditors. If the foreign representative should take action to commence a case under another

chapter of the Code, the rules governing those proceedings will operate to provide that notice is given to all creditors.

Judge Coar said the Subcommittee was aware that the Committee's original decision about who should receive notice of the hearing on the petition was based on the desire to avoid unnecessary cost and burden. He said the Subcommittee was not aware of any complaints or judicial challenges to the notice provisions of Rule 2002(q) since it went into effect as an interim rule in 2005 and that it therefore recommended no changes to the service lists of rules published last August. **The Committee also agreed with the Subcommittee's recommendation not the service lists for proposed new Rules 1004.2 and 5012, or the amendment to Rule 5009(c).**

9. Report of the Subcommittee on Attorney Conduct and Health Care.

Judge Schell said that there was no business for the Subcommittee since the last Committee meeting.

10. (A) Recommendations concerning action in response to comments received on proposed new Rules 1004.2 and 5012, and proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, which were published in August 2008.

The Reporter reviewed the comments to the rules published in August, 2008. She noted that the Committee had already considered the comments related to new Rule 1004.2, as well as Judge Bufford's comment concerning the service list for Rules 1004.2(b), 5009(c), and 5012, at Agenda Item 8. She said there were also comments on Rules 1019, 4004, 5009, and 7001. She recommended that all of the "no comment" rules (Rules 1007, 1014, 1015, 1018, and 9001), be approved as published.

Rule 1019. The Reporter said that Mr. Martin P. Sheehan, a chapter 7 panel trustee, on behalf of himself and the National Association of Bankruptcy Trustees ("NABT") submitted a comment supporting the proposed new period in Rule 1019 for a trustee to object to exemptions after a case is converted to chapter 7, but opposing the exception for cases converted more than a year after confirmation as "arbitrary."

The Reporter said that the Committee imposed the one-year restriction in the rule to strike a balance between competing considerations. On the one hand, providing a new objection period removes an incentive a debtor may have to strategically file a chapter 13 case (where creditors and the trustee may have little incentive to object to exemptions) and convert to chapter 7 after the exemption period runs. On the other hand, a case converted to chapter 7 after a substantial period of time is much less likely to have been initiated as a chapter 13 case simply to avoid scrutiny of claimed exemptions, and finality of exempt status in chapter 13 at some point prevents unfairness to a debtor who has improved the property in reliance on the exemption.

Because the one-year restriction represents a fair compromise between these countervailing considerations, the Reporter recommended approving Rule 1019 as published. The Committee agreed with the Reporter's recommendation.

Rules 4004 and 7001. The Reporter recounted the related proposed amendments to Rules 4004 and 7001. The published amendments to Rule 7001 divided the rule into subdivisions (a) and (b), and included in proposed subdivision (a)(4) that that certain objections to discharge – those specified in subdivision (b) – would not be treated as adversary proceedings. New subdivision (b) stated that an objection to discharge under § 727(a)(8), (a)(9), or 1328(f) is commenced by motion and is governed by Rule 9014. The proposed amendment to Rule 4004(a) provided a deadline for filing motions under Rule 7001(b), and the 4004(c)(1)(B) amendment referred to motions as well as complaints objecting to discharge.

Bankruptcy Judges Robert Kressel and Robert Grant, and former reporter Professor Alan Resnick all expressed the view that the content in proposed Rule 7001(b) is misplaced because it deals with contested matters. In light of those comments, the Reporter redrafted that rules as set forth at pages 270-273 of the materials, by removing the (a) and (b) designations, in Rule 7001, providing a "motion carve-out" for §§ 727(a)(8), (a)(9), and 1328(f) at Rule 7001(4), and moving the substance of published 7001(b) to Rule 4004. **The Committee discussed the Reporter's drafts, and approved them, as set forth in the materials with minor changes, including adding a sentence to the committee note of Rule 7001 that the discharge objections carved out at Rule 7001(4) are governed by Rule 4004(d). The Committee determined that the rules as revised should be sent to the Standing Committee for final approval without the need for republication.**

Rule 5009. The Reporter said that Judge Grant had also commented that proposed 5009(b) would place an unnecessary burden on the clerk. The proposed amendment would require the clerk to notify the debtor that the case will be closed without a discharge unless the statement of completion of a personal financial management course is filed within the time limit specified in Rule 1007(c). Judge Grant said that the notice reminder should simply be included with the other deadlines in the § 341 notice.

The Reporter acknowledged that the new requirement would place an additional noticing burden on the clerks, but she thought the practice was already fairly common. She said that after receiving Judge Grant's comment, she asked Jim Waldron, the Committee's clerk liaison, to survey the clerks to determine whether the requirement would be unduly burdensome. Mr. Waldron reported back that most clerks reported a practice similar to proposed Rule 5009(b) and did not think it was burdensome. Because Rule 5009(b) would merely make such notices uniform, the Reporter recommended approving the rule as published. **The Committee agreed with the Reporter's recommendation, and approved the amendment to Rule 5009 as published.**

The Committee also approved the remaining "no comment" rules (Rules 1014, 1015, 1018, and 9001), as published.

(B) Technical amendment to Official Form 23 to conform to proposed amendment to Rule 1007(c).

The Reporter said that Rule 1007(c), published for comment in August 2008, and just approved by the Committee in the previous agenda item, will change the deadline for a chapter 7 debtor to file a statement of completion of a personal financial management course from 45 days to 60 days after the first date set for the meeting of creditors. She said that, if approved by the Standing Committee, the Judicial Conference and the Supreme Court, and if Congress does not act to the contrary, the change will go into effect December 1, 2010. She therefore recommended a conforming amendment be made to Official Form 23. **The Committee agreed, and recommended that a conforming amendment be made to Official Form 23 (changing the 45 day reference in the form to 60 days), effective December 1, 2010, the same day as the proposed change to Rule 1007(c) is schedule to take effect. Because the change is conforming, the Committee recommended that it be made without publishing for comment.**

11. Recommendation on time computation changes to Rule 4001(d)(2) and (3) which were overlooked in the package of time computation changes submitted earlier and approved by the Judicial Conference at its meeting in September 2008.

The Reporter said that time periods Rule 4001(d)(2) and (3) should have been included in the package of time computation amendments approved by the Judicial Conference in September 2008, but were overlooked. She recommended that the changes be approved without publication, to go into effect December 1, 2010 (the earliest date practical under the Rules Enabling Act). **The Committee agreed, and recommended the time period changes to Rule 4001 as set out at pages 286-287 of the agenda materials.**

12. Oral report on proposed amendment to Civil Rule 8(c) to delete the requirement that a bankruptcy discharge must be pleaded as an affirmative defense.

Judge Wedoff and Mr. Kohn presented alternative views as to whether the discharge in bankruptcy should be removed as an affirmative defense from the list in Civil Rule 8(c).

Mr. Kohn was in favor of keeping the defense in the Rule 8(c) list to discourage debtors from sandbagging, that is, waiting until late in the post-bankruptcy debt collection litigation to seek determination of whether the debtor's liability for the obligation was actually discharged. He said that requiring assertion of the issue as an affirmative defense ensured that it would be litigated early in the case.

Mr. Kohn said his primary concern was with respect to claims such as certain tax claims or student loan debts where there was a good faith basis for assuming that the claim had not discharged. In at least those cases, he said, the debtor should be required to affirmatively state at the beginning of subsequent litigation that he or she believes the debt was discharged in a previous bankruptcy. He suggested some alternative language in Rule 8(c) or Rule 60 to deal with claims that were "clearly" discharged to prevent the possibility that the debtor would lose the discharge simply by failing to plead the defense.

Judge Wedoff said that the affirmative defense requirement should be removed from Rule 8(c) because the discharge is a statutory grant under § 524 of the Bankruptcy Code that the

debtor simply cannot waive. Professor Resnick agreed, noting that § 524(a)(1) says the discharge "voids" any judgment "whether or not discharge [of the debt] is waived." Mr. Brunstad also agreed, asserting that as currently drafted, Rule 8(c) essentially operates to shift the burden to the debtor to "prove" a prior debt was discharged in bankruptcy.

After additional discussion, a motion that the Committee advise the Civil Rules Committee to recommend removing the bankruptcy discharge from the list of affirmative defenses in Civil Rule 8(c) was approved with one dissent (Mr. Kohn).

13. Report concerning the proposed amendment to Civil Rule 56 and the possible need for a Bankruptcy Rule amendment in light of the Civil Rule amendment's impact on the timing of summary judgment motions in contested matters and adversary proceedings.

Judge Wedoff suggested that the Committee may need to consider revising Rule 7056 in anticipation of a proposed change to Civil Rule 56 that requires that a motion for summary judgment may be filed at any time until 30 days after the close of discovery. The suggestion was discussed but no vote was taken because the Civil Rules Committee has not yet proposed new Rule 56.

Discussion Items

14. Oral report on status of the Bankruptcy Forms Modernization Project.

Mr. Myers said that the Forms Modernization Project has retained Carolyn Bagin, a forms expert, to help it streamline its evaluation of the existing bankruptcy forms, develop recommendations for making the forms more user-friendly and less error-prone, and to take advantage of modern technology. He said that the Project's technology subgroup became convinced that a forms revision expert would be very helpful after meeting last fall with representatives of the IRS and the U.S. Census Bureau who have utilized such experts. The Administrative Office solicited bids from three forms experts on behalf of the Project, and Ms. Bagin was selected. Judge Perris added that Ms. Bagin will participate in the Project's next group meeting at the end of June in Washington D.C.

Judge Perris said that the Project's analytical subgroup continues to move forward with its evaluation of the data requested by the current Official Forms. The subgroup has broken down Official Bankruptcy Form 1 (the petition), Official Form 6 (the schedules), Official Form 7 (the statement of financial affairs), and Official Forms 22A-C (the means test), into their constituent elements, classified each element into certain categories (i.e., income, expenses, assets, etc.), and put the elements in a large spreadsheet so that they can be sorted by category. This process will make it easier to identify information duplication or overlap and to aid in eventual restructuring of the forms so that information is requested in a more structured and understandable fashion.

15. Oral report on planning for the future of the CM/ECF system.

Judge Perris said the project is now called "next gen" and that three user groups have been identified (clerks, chambers, and external users). She said that these three groups will be tasked with providing the underlying requirements the next generation of CM/ECF and that the clerks group is now underway identifying their requirements. She added that the chambers and external users groups will be starting up shortly.

16. Oral report on withdrawal of suggestion 08-BK-G by the Executive Office for United States Trustees to amend Rules 1017(e) and 4004(c).

The Reporter said that Mr. Redmiles has withdrawn the EOUST's suggestion.

17. Oral report on the status of legislation authorizing modification of certain home mortgages in chapter 13 cases and requiring notice to the debtor and trustee of fees, costs, or charges which arise from the mortgages and are incurred while the case is pending.

Mr. Wannamaker discussed pending legislation that, if passed, would affect mortgage fees and charges in chapter 13 and would allow bankruptcy judges to modify (cram down) the debtor's home mortgage in chapter 13. He said the current legislation includes certain reporting requirements, primarily of the GAO, and the Administrative Office was discussing options that would facilitate tracking of cases that include a cram down. He said that because the legislation would require the debtor to certify taking certain steps before attempting to cram down a home mortgage in chapter 13, that the Administrative Office would be able to identify cram down cases by tracking the filed certifications. He said that the Administrative Office anticipates there will need to be an Official Form of debtor certifications if the legislation passes. The Reporter said that such an Official Form would likely be taken up by the Forms Subcommittee on an expedited basis. She added that, if passed, the legislation would also affect this Committee's proposed rule changes concerning fees and charges in chapter 13, and those rules would have to be revisited.

18. Suggestion 08-BK-K by Judges Marvin Isgur, Elizabeth Magner, and Jeff Bohm to create two new forms to address problems related to claims secured by a debtor's home – an addendum to the proof of claim which sets out the full loan history and a calculation of the mortgage arrearage and a second form which serves as a payment change notice.

The Chair referred the suggestion to the Forms Subcommittee for consideration in the context of the Committee's recommendation at Agenda Item 4(A) to publish new Rule 3002.1, and amendments to Rule 3001(c).

19. Oral report on status of request by the Committee on Codes of Conduct for review of disclosure by the parties in connection with contested matters and other bankruptcy litigation in order to facilitate conflict screening.

The Reporter said that the Committee is still awaiting renewal or revision of the request.

20. Oral report on planning for review of the restyled Evidence Rules.

The Chair said the Committee would be divided into thirds for review of the three parts of restyled rules after the Standing Committee approves the rules for publication. Individual members will provide comments to the Reporter, the Chair and staff by mid-July and a conference call will be scheduled for late July with each group. The Reporter will then prepare a consolidated memorandum for consideration by the Committee at its fall 2009 meeting, and the Reporter will then transmit comments, as revised, to Evidence Committee.

21. Oral report on new privacy rules review project.

Judge Rosenthal said the privacy rules project is the second phase of a project that began when electronic filing began. She said now that electronic filing is universal, it is time to review the privacy rules in light of problems that have developed. To that end, the Standing Committee has established a Privacy Subcommittee composed of members and the reporters from each of the rules advisory committees, and of members of the Committee on Court Administration and Case Management.

The Privacy Subcommittee will review and report on whether the existing privacy rules are adequate and whether access is adequate. Judge Rosenthal added that the reformulation of the Privacy Subcommittee at this time is fortuitous because public interest groups have begun to audit court files to determine whether privacy is adequately protected.

The Chair announced that Judge Coar will be the Bankruptcy Rules Committee representative on the Privacy Subcommittee.

22. Oral report on Suggestion 09-BK-A, by Michael Fritz for revision of Schedule D.

The Reporter reviewed the suggestion of Michael Fritz, Bankruptcy Administrator for the Middle District of Alabama. Mr. Fritz suggests that Schedule D would be more useful to the court, the BA/UST and creditors if the debtor was required to disclose the contract interest rate, payment amount, and remaining length of the note for all secured debt.

The Reporter asked Committee members whether there was support for referring the suggestion to the Forms Subcommittee for further consideration. Judge Perris said that the suggestion goes to an issue that the forms modernization project membership is currently debating. She said that the Bankruptcy Code itself does not address the specifics of what must be disclosed about the debtor's financial affairs. Rather, that information seems to have developed over time, after specific requests, without much consideration for the overall burden involved in completing a bankruptcy filing. She said that in reviewing the current schedules, project members have concluded that a certain amount of detail is necessary, and desirable. She added, however, that requesting additional data increases the complexity of the forms, and makes filling them out more difficult.

Other members questioned whether the additional information was necessary in all cases, and suggested that it could be requested, if needed, later in the case. **After additional discussion, the Committee decided to take no further action at this time.**

Information Items

23. Rules Docket.

Mr. Wannamaker asked members to let him know if they thought any changes were needed to the rules docket.

24. Oral report on the response to the Executive Committee's request that Conference Committees review the draft Best Practices Guide to Using Subcommittees of Judicial Conference Committees and report on the status of subcommittees.

Judge Rosenthal reported that the Standing Committee timely made its submission to the Executive Committee, and that there did not seem to be any objection to the current approach to using subcommittees practiced by the Rules Advisory Committees.

25. Status of notice to local courts concerning the need to review local rules in light of the upcoming time computation amendments.

Mr. Rabiej said the time computation rules have been approved by the Supreme Court, and have been delivered to Congress, and that congressional judiciary staff was moving forward with the necessary bills to amend 29 statutes that would be affected by the changes. Judge Rosenthal added that a letter would soon go out to chief judges telling them of the need to update their local rules.

26. *Bull Pen*:

Proposed amendments to Rule 3001(c), Rule 9024, Form 22A, and Form 22C; and proposed new Rules 3002.1 and 8007.1, all of which were approved at the last meeting and placed in the Bull Pen, have been addressed in the manner discussed in the agenda items above. As a result, only Rules 9024 and 8007.1 will remain in the Bull Pen pending further review of the bankruptcy appellate rules.

27. Future meetings:

> September 30, 2009, Part VIII special open subcommittee meeting at Harvard Law School, followed by October 1-2, 2009, Committee meeting at the Langham Hotel in Boston.

The Chair asked members to email suggestions for the location of the spring 2010 meeting.

28. New business:

No new business.

29. Adjourn.

Respectfully submitted,

Stephen “Scott” Myers