ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 30 – October 1, 2010
Santa Fe, New Mexico

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge David Coar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
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 Lee H. Rosenthal, chair of the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge James A. Teilborg, liaison from the Standing Committee
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter 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
Molly Johnson, Federal Judicial Center
Elizabeth Wiggins, Federal Judicial Center
Philip S. Corwin, Butera & Andrews
David Melcer, Bass & Associates

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/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new chair, Judge Wedoff, new committee member, Professor Morrison, and new liaison, Judge Lefkow; acknowledgment of the service of Judge Coar and Dean Ponoroff.

The Chair welcomed Judge Wedoff as the incoming chair and Professor Morrison as the Committee's newest member. She also welcomed new liaisons from the Bankruptcy Committee, Judge Joan Humphrey Lefkow, and from the FJC, Ms. Molly Johnson. She thanked outgoing members Judge David Coar and Dean Lawrence Ponoroff for their service.

The Chair also asked for a moment of silence to honor Francis Szczebak, former chief of the Bankruptcy Judges Division, who unexpectedly passed away on Saturday, September 18, 2010.

2. Approval of minutes of New Orleans meeting of April 29-30, 2010.

The New Orleans minutes were approved with minor changes noted by Judge Wedoff and Mr. Kohn.

3. Oral reports on meetings of other committees.

(A) June 2010 meeting of the Committee on Rules of Practice and Procedure.

The Reporter said that all recommendations from the Committee were accepted with a minor wording change to Rule 7056. The Chair added that so far only one comment has been received on the rules published for comment, and she noted that the hearing dates, if needed, would be January 7 in San Francisco and February 4 in Washington D.C.

(B) June 2010 meeting of the Committee on the Administration of the Bankruptcy System.

The Chair gave the report. She said the primary topic of interest for this Committee was the Bankruptcy Committee's support of the current judgeship bill. Based on the results of the last additional needs survey conducted in 2008, the judiciary submitted a request to Congress for 13 additional bankruptcy judgeships, conversion of 22 existing temporary judgeships to

permanent status, and extension of two temporary judgeships. She said that one bill incorporating the bankruptcy judgeship requests has passed the House, and has been reported favorably by the Senate Judiciary Committee. She said another judgeship bill, which included an Article III judgeship request as well as the bankruptcy judgeship request, has also been reported favorably by the Senate Judiciary Committee. The Chair said both bills await Senate floor action.

(C) Upcoming Meeting of the Advisory Committee on Civil Rules.

Judge Wedoff said that although the Civil Rules Committee has not met since this Committee's last meeting, it did hold its conference on the civil rules and the cost of litigation at Duke Law School in May, and that it would discuss that conference at its meeting this fall.

(D) Upcoming October 2010 meeting of the Advisory Committee on Evidence.

Judge Caldwell said that at its next meeting, the Evidence Committee will consider changes to its restyled rules suggested by the Standing Committee.

(E) Upcoming October 2010 meeting of the Advisory Committee on Appellate Rules.

The Reporter said that at its next meeting the Appellate Rules Committee will be considering Rule 6 and direct bankruptcy appeals to circuit courts. She said that this Committee will work closely with the Appellate Rules Committee concerning the proposed revisions to Part VIII Rules, and that the two Committees will overlap their meetings this spring in San Francisco.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the work of the Forms Modernization Project at Agenda Item 11.

(G) Progress report from the Sealing Committee.

The Reporter said that the Sealing Committee has completed its work. She said that the Committee found very few instances where entire cases are sealed and it concluded that there is no need for new national rules regarding sealing.

(H) Progress report from the Privacy Committee.

The Reporter said that the Privacy Committee has concluded that existing rules seem to adequately protect privacy and it does not plan to recommend any rule changes. She said that it did recommend, however, that the FJC conduct random annual reviews of files to check for party compliance with the rules and to make sure privacy identifiers are being redacted. It will also

recommend more education about the redaction rules to make sure parties are not unnecessarily seeking information that will later need to be redacted, and it will ask the AO to monitor technology advances that will assist in identifying information that should be redacted.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendations concerning Suggestion (09-BK-H) by Judge Margaret Dee McGarity and Suggestion (09-BK-N) by Judge Michael E. Romero (both on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 3007(a) to provide for disposition of objections to claims by negative notice and to clarify the proper method of serving objections to claims.

Judge Wedoff said that the Subcommittee supported Judge McGarity's suggestion to clarify that Rule 3007(a) allows a negative notice procedure for objections to proofs of claim. He said that the Subcommittee was prepared to recommend amending the rule (to allow for negative notice) at the last committee meeting, but withdrew its recommendation to consider Judge Romero's related observation that the rules are unclear as to whether Rule 3007 governs service of an objection to claim, or just notice of the objection and hearing date.

After discussing the suggestions, the Subcommittee recommended amending Rule 3007(a) as set forth in the materials to clarify that an objection may be granted after notice and an *opportunity* for a hearing (i.e., on negative notice). The Subcommittee also concluded that except for the federal government, service of an objection to claim should be allowed to be made on the name and address provided by the creditor on the proof of claim, and therefore recommended amending the rule as set forth in the materials to clarify that Rule 3007 governs both service and notice of objections to claim.

In discussing the Subcommittee's recommendation, one member pointed out that Rule 7004(h) contains detailed service requirements concerning insured depository institutions that are applicable in adversary proceedings and in contested matters. Because an objection to a claim is a contested matter, he thought either Rule 7004(h) would need a carve-out for claims objections, or that the proposed change to Rule 3007(a) would need a carve-out for objections to claims filed by insured depository institutions. The member said additional research might be needed before the Committee took a vote, however, because he thought that Rule 7004(h) was added by Congress. Several members suggested that the Subcommittee research the issue to ensure that the proposed change would not make the rule inconsistent with any congressional enactment.

Two members questioned the Subcommittee's decision to shorten the response time from 30 to 21 days, and suggested that if a multiple of seven days is preferred that it be 28 days. Another member questioned why the rule allowed for local variation with respect to the shortened time period. Judge Wedoff responded that the Subcommittee thought that a default

period of 30 days (or 28) was longer than needed, but noted that the rule allowed for a longer period if necessary. He said that local variation was already widespread under the current rule and seemed to be working well. **After additional discussion, the Committee voted to approve the negative notice provision. It asked the Subcommittee to recommend in the spring whether a carve-out is needed for federal deposit institutions, and to consider further whether the response time period should be 21, 28 or 30 days.**

(B) Recommendation concerning Suggestion (09-BK-J) by Judge William F. Stone, Jr., to amend Rules 9013 and 9014 to require that the caption of a motion that initiates a contested matter set forth the name of every person whose interests would be directly affected by the relief sought.

Judge Wedoff said that the Subcommittee carefully considered Judge Stone's suggestion during its August 2 conference call, and that it recommends the Advisory Committee take no further action on the suggestion. He said that in the early 1980s many bankruptcy courts required (as Judge Stone suggests) that motions be captioned in a way similar to Official Form 16B, requiring respondents' names as well as a motion number. The courts also organized the motions, responses, and subsequent papers in separate motions folders, rather than in the case file. The practice was largely abandoned as unnecessary and burdensome, however, after the courts' electronic docketing systems such as BANCAP and NIBS became sophisticated enough to link motions and related papers on the docket.

Given the widespread abandonment of this type of caption, the Subcommittee recommended that any decision to require naming the parties in the caption of certain motions be left to local courts. The Subcommittee also thought that Judge Stone's concerns were addressed in part by Official Form 20A, Notice of Motion or Objection. The form contains a clear warning in bold lettering that the recipient's rights are at risk and directs the recipient to talk with an attorney and file a response within a specified time period.

One member said that requiring the respondent's name in the caption could be helpful if that meant it would also be reflected in the docket. But Mr. Wannamaker said that the docket is not controlled by rule, and that motion captions are not necessarily reflected on the docket. He said there are standard dictionary events such as "objection to claim" but that it's up to the filing attorney to decide how much detail to add to the docket event. Another member said that the docket is meant to be transactional, and that too much detail would make the transactional information harder to find. **A motion to take no further action carried without objection.**

(C) Recommendation concerning Suggestion (09-BK-I) by Dana C. McWay (on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group) to amend Rule 1007(b)(7) to allow providers of personal financial management courses to file statements of individual chapter 7 and chapter 13 debtors' completion of the course.

Judge Wedoff said that Dana McWay, the clerk of the Bankruptcy Court for the Eastern District of Missouri, submitted suggestion 09-BK-I on behalf of the NextGen Clerk's Office Functional Requirements Group ("FRG"). He said that the FRG proposes that approved providers of personal financial management courses be allowed to notify the court of the debtor's completion of the course, rather than requiring – as Rule 1007(b)(7) now does – the debtor to file Official Form 23. Judge Wedoff said that Subcommittee agreed with the suggestion for permissive filing by providers – so long as the debtor retained ultimate filing responsibility. The Subcommittee therefore recommended that Rule 1007(b)(7) and the preface and instructions to Form 23 be amended as set forth in the agenda materials.

In discussing the suggestion, one member recommended a change to the committee note, on page 103, so that the second sentence reads: "Course providers approved under § 111 of the Code may be permitted to file this notification …". **The Committee approved the proposed change to Rule 1007(b)(7), as set forth on page 103 of the materials and with the proposed change to the committee note. It recommended that the rule change be published for comment in August 2011. It also approved the related changes to B23, to be published for comment in August 2012.**

(D) Recommendation concerning Comment (09-BK-032) by attorney William J. Neild that Official Forms 22A and 22C be revised to allow individual debtors to deduct expenses for telecommunication services to the extent they are necessary for the production of income and not reimbursed by the debtor's employer.

Judge Wedoff said that the Subcommittee agreed that the Forms 22A and 22C do not currently allow employed individuals to deduct business expenses. The Internal Revenue Manual, however, allows the deduction of extra telecommunication expenses if they are incurred for the production of income. The Subcommittee therefore recommends a change to line 32 of Form 22A and 37 of Form 22C, as shown on page 108 of the materials. Because the change is small, the Subcommittee recommends that the change be held in the bullpen until other changes to the forms are recommended. **The recommendation was approved without objection.** [Note, as a result of the recommendation at Agenda Item 5A below, the Committee recommended publishing the proposed telecommunication changes in August 2011].

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

(A) Report on what changes, if any, should be made in Official Form 22C as a result of the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), in which the Court rejected a purely "mechanical" approach to the calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b)(1)

The Reporter said that under *Lanning*, the debtor's Current Monthly Income ("CMI") is

the presumptive starting point of calculating "Projected Disposable Income" (PDI), but that in unusual cases, the bankruptcy court can taking into account known or virtually-certain-to-occur changes to income and expenses.

The Reporter said that in considering *Lanning* the main concern of the Consumer and Forms Subcommittees (the Joint Subcommittee) was whether to change Official Form 22C, and/or Schedules I and J, to require the debtor to report changes in income (and by analogy expenses) that were likely to occur during the applicable commitment period of the chapter 13 plan. She said that a majority of the Joint Subcommittee supported the recommendation at page 116 of the materials, which added a new line 61 to Form 22C.

The Joint Subcommittee's recommended amendment to Form 22C would require above-median debtors to report any change in income that has occurred or is virtually certain to occur during the applicable commitment period (three to five years). The Reporter explained that in making its recommendation, the Joint Subcommittee had to resolve several issues that the *Lanning* decision does not clearly address: (1) whether all chapter 13 debtors, or just above-median debtors, should be required/allowed to report known or virtually-certain-to-occur changes to income; (2) whether a similar approach should be taken with respect to expenses; (3) given that above-median-income debtors report some expense deductions based on IRS standards rather than actual expenses, whether changes to actual expenses matter; (4) whether the form should provide some guidance regarding "known or virtually certain" changes by limiting requested disclosure to those changes likely to happen in limited time period after the form is completed, such as six months or a year; (5) if only above-median debtors – whose expenses are determined under IRS standards – are required to complete proposed line 61, should below-median debtors, whose actual income and expenses are used in computing disposable income, be required to provide similar information about projected changes on Schedules I and J.

(1) Should the proposed change to Form 22C be limited to above-median debtors?

Judge Wedoff explained that CMI has three roles in chapter 13: (i) determination of the applicable commitment period – five years for above median debtors and three years for below median debtors; (ii) how expenses are calculated – using IRS standards for above-median debtors, and judicially determined standards for below-median debtors; and (iii) to calculate disposable income for above-median debtors. He said the Joint Subcommittee's proposal was limited to above-median debtors because as currently designed Form 22C only calculates disposable income for above-median debtors (by subtracting IRS standards from CMI). Calculating expenses for below-median debtors would complicate Form 22C, and he recommended that if the Committee determined that *Lanning* required form changes for below-median debtors, such changes be made to Schedules I and J.

(2) Should changes in expenses be addressed?

The Reporter explained that because the issue in *Lanning* concerned changes in income,

that the opinion's discussion of changes in expenses was *dicta*. The Joint Subcommittee concluded, however, that it doesn't make sense to address known or virtually certain changes in income without also addressing similar changes in expenses.

(3) Given that IRS standards are used for many of the expenses reported by above-median debtors, how should reporting changes in actual expenses be handled?

The Joint Subcommittee recommended that the debtor list changes to the actual expenditures reported in Part IV that are virtually certain to occur during the applicable commitment period. With respect to the amounts reported in Part IV that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life – such as the addition of a family member or the surrender of a vehicle – should be reported.

(4) Over what time period should the forms request changes?

Without elaboration, *Lanning* considers changes that have happened by the time of confirmation or are virtually certain to happen. The Joint Subcommittee's recommended amendment would require reporting any change that is virtually certain to change during the commitment period, which for above-median debtors is generally five years. Some members were in favor of a shorter time period, while others thought that the phrase "virtually certain" is inherently self-limiting, and that putting a time limit in the form doesn't add any clarity. One member suggested a one-year forward-looking time frame because 11 U.S.C. § 521(a)(1)(vi) already requires the debtor to report changes in income and expenses that are reasonably anticipated to occur a year after the petition is filed.

(5) Should Schedules I and J be changed in addition to or instead of changing Form 22C to account for *Lanning*?

Some members thought changes to Form 22C could be avoided because Schedules I and J already require reporting actual income and expenses as of the petition date (which would pick up changes that "have occurred" as of the petition date), and also require the debtor to report any changes to income and expenses "reasonably anticipated to occur" within a year of the filing of the form. Other members said that even if anticipated changes are reported on Schedules I and J, that information would still need to be transferred to Form 22C to determine plan feasibility, because PDI for above-median debtors requires using IRS categories for some expenses. Also Form 22C does not include some categories of the debtor's income, such as social security income. **The Committee voted 6 to 4 in favor of addressing *Lanning* in Form 22C instead of Schedules I and J.**

After additional discussion, **the Committee voted without objection to require that only above-median debtors be required to disclose changes in income and expenses that have occurred or are "virtually certain to occur" within one year of the petition date. Thus**

the Committee voted to recommend publishing for comment in August 2011 the Subcommittee's proposed line 61, as set out at pages 114-15 of the materials, with the following change: the phrase "during your applicable commitment period" was replaced with "during the 12-month period following the date of the filing of your petition."

> (B) Report on what changes, if any, should be made in Schedule C (Official Form 6C) as a result of the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), in which the Court dealt with the extent of a claimed exemption.

The Reporter explained that in *Schwab* the Supreme Court held that an objection under § 522(*l*) of the Bankruptcy Code and Fed. R. Bankr. P. 4003 is not required in order for a trustee to challenge the debtor's valuation of exempt property and thereby permit the estate to recover any value exceeding the claimed exemption amount. She said that the Joint Subcommittee considered several possible changes to Schedule C in response to *Schwab* but had not reached a consensus. Instead, it settled on three alternatives for the Committee to consider.

Alternative A. No change is needed because the *Schwab* court has explained how to complete the form if the debtor intends to exempt her entire interest (by claiming as exempt "full fair market value (FMV)" or "100% of FMV"). Supporters of this approach said that instructions to the form could provide a road map for exempting the debtor's entire interest. Joint Subcommittee members opposed to this approach were concerned that not all debtors read the instructions, and that the form is not currently designed to prompt filers to put anything other than a dollar amount in the valuation column.

Alternative B. Change header of "value of claimed exemption" column to "extent of claimed exemption" and give the debtor two checkbox options: "Debtor's interest in the property limited to $___" or "Debtor's entire interest in the property, not limited in amount." Joint Subcommittee members opposed to this approach noted that it may create problems with capped exemptions and how wild card exemptions are being used.

Alternative C. Keep the valuation column, but add a column that indicates whether the debtor's entire interest is being exempted. Subcommittee members favoring this option thought it reflected the *Schwab* holding by giving the debtor an option to clearly exempt his entire interest in the property, while also requiring the listing of an exemption amount that would allow the trustee to understand how the debtor was attempting to allocate any wildcard exemption.

Joint Subcommittee members suggested that regardless of the alternative chosen, an instruction might be added informing the debtor that claiming the entire value is appropriate only if the exemption is not capped or claiming it is otherwise consistent with Rule 9011.

In discussing the alternatives, several members continued to support Alternative A (no change) because the Supreme Court has already explained how to fill out the existing version of the form. Supporters of this approach would, however, update the instructions to reflect the

Schwab decision.

Several other members supported Alternatives B or C because those alternatives included – on the form – language making clear the debtor's intent to exempt his entire interest in the property. There was some dispute, however, about whether the phrase "debtor's entire interest in the property" would clearly convey the debtor's intent to exempt the property itself, or if the phrasing in *Schwab*, "Full fair market value of the property" should be used instead. Some members favored Alternative B over Alternative C because it forced the debtor to either claim his entire interest in the property, or a specific amount.

Supporters of Alternative C favored adding a column to deal with whether the debtor intended to exempt her entire interest in the property. Alternative C supporters said retaining a separate "value of claimed exemption" column was necessary to make clear how the debtor intended to allocate wildcard exemptions. Those opposed to Alternative C said that, as in *Schwab*, a problem would arise when the debtor's interest in property (i.e., the equity) turned out to be worth more than the dollar amount the debtor exempted in "value" column. The form doesn't tell the court or the trustee whether the value column or the "entire interest" column should control.

After additional discussion, the Committee took two votes. In the first vote, **the Committee eliminated Alternative B. In the second vote, the Committee recommended Alternative C, 8-4. The Joint Subcommittee was directed to revise Alternative C to determine which column controls when the "entire interest" column is checked, and the debtor's interest is greater than the dollar amount the debtor lists for the exemption.**

6. Report of the Subcommittee on Forms.

(A) Recommendation concerning amending Official Form 1 to implement proposed new Rule 1004.2 (Petition in Chapter 15 Cases).

Judge Perris said that new Rule 1004.2, scheduled to go into effect December 1, 2011, requires a chapter 15 petition to "state the country where the debtor has the center of its main interests ... [and] also identify each country in which a foreign proceeding by, regarding, or against the debtor is pending." She said the Subcommittee recommended the proposed version of Official Form 1 in the materials (pages 131-34) to accomplish this new requirement. The Subcommittee recommended approval without publication. **The Committee recommended that the revised Form 1 be approved without publication with an effective date to coincide with the scheduled effective date of proposed Rule 1004.2: December 1, 2011.**

(B) Recommendation concerning amending Official Forms 9A-I to reflect the proposed amendment of Rule 2003(e) (effective December 2011) and stylistic changes.

Judge Perris said the Subcommittee recommends one substantive change and a number of stylistic changes to all versions of Official Form 9. She said that a pending amendment to Rule 2003(e), scheduled to go into effect December 1, 2011, will require the presiding official at a meeting of creditors who wishes to complete the meeting at a later date to file a statement specifying the date and time to which such a meeting is adjourned. She said all versions of Form 9, however, incorporate the current wording of Rule 2003(e), which states the meeting "may be adjourned ... by announcement at the meeting of the adjourned date and time without further written notice."

To conform Forms 9A – I to the pending change in Rule 2003(e), the Subcommittee recommends revising the explanation of "Meeting of Creditors" on the back of each form to state that the "meeting may be continued and concluded at a later date specified in a notice filed with the court." Because the proposed revision would simply conform the forms to revised Rule 2003(e), the Subcommittee concluded that publication for comment was unnecessary. She said that because all versions of the form need to be revised, the Subcommittee also recommends several stylistic changes described in the agenda materials. **After a short discussion, the Committee approved the forms as set forth in the agenda materials and recommended that the changes go into effect without publication on December 1, 2011.**

(C) Report by Mr. Myers on revision of Director's Form 200, to account for pending change to Bankruptcy Rule 1007(c). **(Oral addition to agenda)**

Mr. Myers said that on December 1, 2010, unless Congress acts to the contrary, a pending change to Bankruptcy Rule 1007(c) will increase the time a chapter 7 debtor has to file the statement of completion of financial management course (Official Form 23) from 45 to 60 days after the first day set for the meeting of creditors. He said this change requires an update to the last item on page one of Director's Form B200. He explained that the change was ministerial and was illustrated in a one page handout distributed at the meeting, which shows the change from 45 to 60 days. He said that because the change applies to a director's form, committee action is not required.

(D) Report by Mr. Wannamaker on need to update Interim Rule 1007-I to reflect the pending December changes to Rule 1007(c), and the need to correct a pending discrepancy between subparagraphs (a)(2) and (c). **(Oral addition to agenda)**

Mr. Wannamaker said that 45- to 60-day time period change in Rule 1007(c) described in Agenda Item 6(C), would also need to be incorporated into subsection (c) of Interim Rule 1007-I, a local rule adopted by courts to address temporary waivers of the presumption of abuse that apply to certain service members as a result of the National Guard and Reservists Debt Relief Act of 2008. He recommended informing the courts of the need to update Interim Rule 1007-I by memo, similar to what was done when the time-amendment changes in 2009 required changes Interim Rule 1007-I. **The Committee supported the recommendation.**

Mr. Wannamaker said that in reviewing Interim Rule 1007-I to conform it to Rule 1007, he discovered an unrelated oversight in the pending amendments to Rule 1007. In December, Rule 1007(a)(2) will shorten from 14 to seven days after the order for relief the time a debtor in an involuntary case has to file the mailing matrix (i.e., the list used by the clerk to provide notice of the Section 341 meeting of creditors and equity security holders). This 14-day deadline is repeated (but was not amended) in Rule 1007(c). Mr. Wannamaker said the discrepancy could be fixed by deleting the phrase "the list in subdivision (a)(2)" from subsection (c), but that the earliest this could occur through the regular rules process was December 2012. A temporary fix could be put into place immediately, however, by deleting the suggested language from subpart (c) of the interim rule.

The Committee approved removing the phrase "the list in subdivision (a)(2)" from subsection (c) as a technical amendment to Rule 1007, with a scheduled effective date of December 1, 2012. Initially, the Committee also approved removing the suggested language from subsection (c) of Interim Rule 1007-I, but that decision was reversed after the meeting because it would confuse the purpose of the interim rule, which is simply to provide a procedure to implement the National Guard and Reservists Debt Relief Act of 2008.

7. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning Suggestion 09-BK-J by Judge William F. Stone, Jr., to provide rules and an Official Form to govern applications for the payment of administrative expenses.

Judge Wizmur said the Subcommittee considered Judge Stone's request and agreed that the Code and Rules provide very little detail about how to seek payment of administrative expenses. Generally, section 503 of the Code provides only that an entity may "file a request for payment of an administrative expense…" and that the administrative expense shall be allowed "after notice and a hearing." Although the legislative history for § 503(a) contemplates that the bankruptcy rules "will specify the time, the form, and the method of such a filing." S. REP. NO. 95-989, at 66 (1978), there has never been a national form or rule for filing administrative expenses requests.

Judge Wizmur said that the Subcommittee does not have a recommendation at this time, but proposes instead to survey court clerks about existing local rules, practices, and forms, and the scope of procedures that currently exist at the local level for the payment of administrative expenses. After considering the results of the survey, the Subcommittee proposes to report its recommendation to the Committee at the spring 2011 meeting. **Motion for the Subcommittee to gather further information and report at the spring 2011 meeting carried without opposition.**

(B) Recommendation concerning Suggestion 10-BK-D by Judge Raymond T.

Lyons to delete Bankruptcy Rule 9006(d).

Judge Wizmur explained that Judge Lyons believes that Rule 9006(d), which provides default rules for serving motions, is superfluous, misplaced, and likely to create confusion. Judge Lyons suggested that the rule is superfluous because local rules have been developed and replace the defaults in most courts, and is misplaced because Rules 9013 and 9014 generally address motion practice. He suggests that the scheduling of motions and responses should be left to local practice and deleted from the national rule.

The Subcommittee considered the suggestion and concluded that Rule 9006(d) should be retained as a default, even given the existence of local rules and procedures governing motion practice, because some districts do not have their own rules specifying the time for filing motions and supporting and opposing affidavits. The Subcommittee agreed with Judge Lyons, however, that Rule 9006(d) and Rules 9013 and 9014 should have better cross-references.

The Subcommittee also concluded that, to better serve as a default rule for motion practice, the coverage of subdivision (d) should be expanded to address the timing of the service of any written response to a motion, not just opposing affidavits. The Subcommittee recommends changes to Rule 9006(d) and Rules 9013 and 9014 as set forth in the agenda materials at pages 170-72. **Motion to approve the Subcommittee's recommendation, and to publish for comment the proposed amendments to Rule 9006(d), and Rules 9013 and Rules 9014 in August 2011, approved with the following stylistic changes:** Rule 9006(d) – insert a period after "motion" on line 8, delete the word "and," and finish the sentence as "Except as otherwise provided in Rule 9023, ~~opposing affidavits~~ any written response may be served not later than one day before the hearing, unless the court ~~permits them to be served at some other time~~ orders otherwise; Rule 9013 – change "by" to "under" on line 7; and Rule 9014 – change "by" to "under" on line 3, "opposition" to "response" on line 5, and "period prescribed by" to "determined under" on line 6.

(C) Recommendation concerning suggestion by Deputy Clerk Debbie Lewis, a legal management advisor in the Southern District of Florida, to provide an official form or rule for corporate and partnership debtors filing schedules of current income and expenditures.

Judge Wizmur said that Debbie Lewis, the legal management advisor for the Bankruptcy Court for the Southern District of Florida, contacted staff at the Administrative Office concerning the need for corporations and partnerships to file schedules of current income and expenses under the Bankruptcy Code and Rules, and the consequences of their failure to do so. She questioned whether the clerk's office could overlook the failure of a corporation to file income and expense schedules, and suggested that the failure would be less likely if official income and expense forms were developed for non-individuals.

Judge Wizmur said that the Subcommittee carefully considered the applicable Code and

rule sections. It concluded that, like an individual, a partnership or corporation is required to file a schedule of current income and expenses. The consequence of the failure to file those schedules is different, however. If the debtor is an individual, the case will automatically be dismissed in 45 days. If a corporation or a partnership fails to file the schedules, however, the case cannot be dismissed unless a party in interest (in a chapter 11 case) or the U.S. trustee (in a chapter 7 case) seeks that relief, and then only after notice and a hearing. The Subcommittee concluded that these different consequences, and the need for a motion in a partnership or corporation case before court action can occur, explain why the deficiency notice is needed in an individual case but not in a partnership or corporation case.

The Subcommittee considered whether a rule or form amendment is needed to encourage compliance with this filing requirement by non-individual debtors. Mr. Redmiles said that U.S. trustees do not perceive this matter to present a problem because they already receive the income and expense information they need from the monthly operating reports filed by non-individual debtors.

The Subcommittee concluded that there is no need to take any further action on this issue. Because compliance with § 521(a) and Rule 1007(b) by non-individual debtors has not been identified as a problem needing a rule or form solution by U.S. trustees or creditors, the Subcommittee concluded that implementation of the filing requirement can continue to be left to local rules and practices. **A motion to take no further action was approved.**

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

Judge Pauley gave a brief overview of the Part VIII revision project. He explained that former member Eric Brunstad proposed a complete rewrite of Part VIII rules at the spring 2008 meeting so that they would more closely track the style and changes that have been made to the Federal Rules of Appellate Procedure (FRAP) over the years. Mr. Brunstad submitted an initial draft of the revised Part VIII rules at the fall 2008 meeting in Denver. To encourage comment from the bench and bar, the Subcommittee held two open subcommittee meetings in conjunction with the spring and fall 2009 Committee meetings in San Diego and Boston. Judge Pauley said that many of the comments received at the open subcommittee meetings have been incorporated into the draft.

At the spring 2010 meeting in New Orleans, the Committee asked the Subcommittee to proceed with its consideration of a comprehensive revision of the bankruptcy appellate rules and endorsed the following goals for the revision:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure (FRAP).
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.

- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners that have produced differing judicial interpretations.
- Modernize the Part VIII rules to reflect technological changes – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

The Reporter said that over the summer she and the Subcommittee updated the draft revision with the Committee's goals in mind, and they are now asking for feedback on some of the drafting issues that arose, and on some of the new practices in the proposed rules. A copy of revised Rules 8001 - 8012, with draft committee notes, was distributed at the meeting.

The Reporter said that the current draft incorporates some overarching stylistic choices. For example, the term "appellate court" is defined in Rule 8001 to mean either the BAP or district court depending on which court the appeal went to, which makes it easier to talk about appellate courts in later rules. Whenever "clerk" is mentioned, however, it is prefaced with the relevant court – bankruptcy, BAP, district, or court of appeals – to avoid confusion.

The Reporter noted that Rule 8002 continues to deal with timing because the statute refers to the rule by number.

She said that Rules 8003(d) and 8004(c) change current practice by "docketing" the appeal in the appellate court as soon the notice of appeal is transmitted (rather than after the record is complete). In reviewing Rules 8003 and 8004, one member commented that in some instances the clerk is directed to "transmit" the notice of appeal and in other places "transmit a copy" of the notice of appeal. The suggestion was to use just "transmit."

The Reporter said that proposed Rule 8005(c) provides a new procedure for resolving disputes about whether an election to have an appeal heard by the district court is valid. Under the proposal, a party challenging the election would have to file a motion in the district court. The Reporter said that the committee note included language clarifying that the rule does not prevent the bankruptcy court or BAP from determining the validity of the motion on its own motion. Several members supported this approach.

One member questioned the need for a separate document under proposed Rule 8005 to elect to have an appeal heard by the district court, and suggested that the district court election could simply be included in the notice of appeal. He thought that the separate-document requirement could be a trap for the unwary. Another member argued that the separate-document requirement was to prevent appellants from inadvertently appealing to the district court in circuits that have BAPs. There was some discussion of how a separate document is defined in the electronic-filing age, and a member suggested that the rule could refer to a document filed separately from the notice of appeal.

The Reporter asked the Committee for thoughts on whether the Subcommittee should make further attempts to incorporate the appellate rules by reference (similar to the Civil Rules' incorporation in part VII of the Bankruptcy Rules) or whether they should continue the present process restating relevant appellate rule provisions. She said that one practical consideration in favor of the present process of restating the appellate rules was to account for technological changes that have not yet been addressed in the appellate rules – one of the goals of the revision project.

Some members were in favor of incorporation to the extent possible because it would make it less likely that the two sets of rules would diverge in the future. Other members favored repetition simply because it allows for refinement of the rules in the bankruptcy context, and because it would spare users from having to consult two sets of rules in order to understand bankruptcy appellate procedure. The Committee recommended that the Reporter solicit feedback from the Standing Committee in January. The Committee also agreed that it would be helpful to illustrate the differences in approach by presenting a side-by-side comparison of a rule revised according to each method.

The Reporter said that the next step would be to complete the draft. She explained that the Committee's spring meeting in San Francisco will overlap with the appellate rules committee meeting and that the two committees will meet jointly for half a day. She said that originally the goal had been to gain approval of the Standing Committee for an August 2011 publication. Given the scope of the project, however, and the significant time that will be required for the styling process and the Standing Committee's consideration of the rules, it is probably more realistic to aim for a projected publication date in August 2012. She noted that these timing and process issues can be discussed with the Standing Committee at its January 2011 meeting.

9. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

The Chair said that there would be no report because that there was no activity by the Subcommittee over the past term.

10. Oral Report of the Subcommittee on Attorney Conduct and Health Care.

The Chair said that there would be no report because that there was no activity by the Subcommittee over the past term.

11. Oral report on status of the Bankruptcy Forms Modernization Project [Includes report on CM/ECF Working Group and CM/ECF NextGen Project].

Judge Perris said that the CM/ECF Working Group continues to meet and consider modification requests for the current generation of CM/ECF. She said that version 4.1 will be rolling out next and that it will include "e-orders" and new reports.

Judge Perris said the CM/ECF NextGen is still in the requirements stage of the process, but that the project is on target to complete this phase by February 2011. She said that the next phase will be to prioritize implementation, and to write code.

Judge Perris said that since the Committee's spring meeting, the FMP has made significant progress in reformatting and rephrasing the questions in an initial filing package of forms to be used by individual debtors in bankruptcy, and has now completed initial drafts of most of those forms. She said that at its summer meeting, the FMP approved a tentative project time line for completing and testing the individual-debtor filing package, drafting forms for individuals that will be used later in the case, and for beginning the business filing package.

Beth Wiggins and Molly Johnson spoke about the project timeline, noting that it projects testing of the individual-debtor filing package next year and sets a goal for publishing the package for comment in the fall of 2012. Ms. Wiggins and Ms. Johnson explained that this process would include a prepublication testing phase next year that would include soliciting feedback from representatives of professional organizations, software providers, a group of career law clerks, a group of "occasional" attorney filers, and lay people. They said that prepublication versions of the individual filing package would likely be presented to the Committee at the fall 2011 and spring 2012 meetings, with a request to approve formal publication for comment in the fall of 2012.

Judge Perris added that concurrent with the prepublication phase of the individual-filing package, the FMP would continue revising individual debtor forms and would also begin drafting the entity-filing package.

Judge Perris said that the FMP also continues to work with the NextGen CM/ECF Project to promote functional requirements it believes should be included in the future version of CM/ECF. Those functional requirements include the ability to store information in data form and retrieve the data in user-specified reports. Significant numbers of judicial users have identified court needs for such capabilities. The requirements also include capacity to control users' access to data, to ensure that CM/ECF will continue to operate in conformity with Judicial Conference privacy and access policies.

Discussion Items

12. Oral report on the new Strategic Plan for the Federal Judiciary approved by the Judicial Conference at its meeting in September.

The Chair briefly reviewed the Strategic Plan for the Federal Judiciary that was approved by the Judicial Conference at its September meeting. She said the Strategic Plan was organized around seven issues that affect the judiciary's mission and core values. She said the issues of most interest to the Committee were probably Issue 1: Providing Justice; Issue 4: Harnessing

Technology's Potential; and Issue 5: Enhancing Access to the Judicial Process. She encouraged members to review the plan and keep its goals and strategies in mind as the Committee develops its work in the future.

Information Items

13. Report on the status of bankruptcy-related legislation.

Mr. Wannamaker updated the Committee on pending and recently enacted bankruptcy-related legislation.

14. Oral update on opinions interpreting section 521(i).

The Reporter said that the bankruptcy courts are still divided on whether "automatic" means automatic, but that the trend at the circuit level (First and Ninth) and recently in the Sixth Circuit BAP is that the bankruptcy court has discretion to retain the case after the 45th day. She said that so long as the courts seemed to breaking in favor of finding the that statute allows discretion, it would be hard to develop a rule to implement automatic dismissal.

15. ***Bull Pen***.

As a result of decisions at this meeting and prior meetings, the following proposed changes are in the bull pen: Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting. Until proposed publication in August, 2012, the Rule 1007-related changes to Form 23 discussed at Agenda Item 4C.

16. **Rules Docket**.

Mr. Wannamaker said the Rules Docket was in the materials and that it reflects that the Committee has been very busy. The Chair thanked Mr. Wannamaker for maintaining the Rules Docket so that it reflects the status of all the work the Committee has in play.

17. **Future meetings**:

> Spring 2011 meeting, April 7-8, 2011, at the Fairmont Hotel in San Francisco, California. The Chair asked members to make suggestions for possible locations for the fall 2011 meeting to the incoming chair, Judge Wedoff.

18. **New business**.

Members thanked Judge Swain for her dedication, stewardship, and leadership as the Chair of this Committee over the past three years.

19. **Adjourn**.

Respectfully submitted,

Stephen “Scott” Myers