ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 1 - 2, 2009
Boston, Massachusetts

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Guy Cole, Jr.
District Judge Karen Caldwell
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 (telephonically)
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
Professor Jeffrey W. Morris, former reporter
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
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the 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
Philip 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/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.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 members.

The Chair welcomed the members, former reporter Jeffrey Morris, and other guests to the meeting. She noted this meeting was in part a celebration of members Judge R. Guy Cole, Jr. and Judge Richard A. Schell, whose terms were ending, and also a welcome to incoming member Judge Karen Caldwell. The Chair said that Mr. Rao had been appointed to a second three-year term and thanked him for his willingness to continue serving.

The Chair also welcomed Judge Rosenthal and Professor Coquillette, chair and reporter of the Standing Committee, and extended special thanks to Professor Coquillette for hosting and coordinating the special open meeting of the Subcommittee on Privacy, Public Access, and Appeals at Harvard Law School on the previous day.

The Chair said that during their terms both Judge Cole and Judge Schell had been valued members and leaders of the Committee. She thanked Judge Cole for his service on the Subcommittee on Attorney Conduct and Health Care, the Subcommittee on Privacy, Public Access, and Appeals, and the Subcommittee on Technology and Cross Border Insolvency; and she thanked Judge Schell for serving on and chairing the Subcommittee on Attorney Conduct and Health Care, as well as serving on the Subcommittee on Privacy, Public Access, and Appeals, and the Subcommittee on Technology and Cross Border Insolvency.

2. Approval of minutes of San Diego meeting of March 26 - 27, 2009.

The minutes were approved without objection.

3. Oral reports on meetings of other committees:

(A) June 2009 meeting of the Standing Committee.

The Chair reported that the Standing Committee had approved the Committee's recommendation that proposed amendments to Rules 2003, 2019, 3001, and 4004, new Rules 1004.2 and 3002.1, and Official Forms 22A, 22B, and 22C be published for comment in August 2009. (At an earlier meeting, the Standing Committee approved publishing for comment in August 2009, the Committee's proposed amendment to Rule 6003).

The Chair also reported that the Standing Committee had approved the Committee's recommendation that proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, new Rule 5012, and Official Form 23 be transmitted to the Judicial Conference for final approval. She said the rule changes were scheduled to go into effect December 2010.

Mr. Wannamaker added that although the Form 23 change was meant to conform to a pending 2010 change to a time period in Rule 1007, an error in the report to the Judicial Conference resulted in the effective date of the form being a year too early. He said that staff had consulted with the Chair and Reporter of this Committee and the Chair of the Standing Committee, and had decided to add a footnote to the form explaining that although the time period change to the form had been approved by the Judicial Conference in September 2009, it would not become effective until December 1, 2010, when the rule is scheduled to take effect.

Further consultations after the meeting resulted in a decision to leave the Form 23 text unchanged until the December 1, 2010, the effective date of the Rule 1007 amendment, in order to avoid potential confusion.

Mr. Wannamaker also explained the need for courts to readopt Interim Rule 1007-I, to incorporate the time amendment changes that had been made to Rule 1007.

The Chair further reported that the Standing Committee had approved the Committee's recommendation of a technical change to a time period (five to seven days) in Exhibit D to Official Form 1 to conform it to the time amendment changes. Mr. Wannamaker added that in the course of updating Exhibit D, staff had discovered another time amendment change (15 to 14 days) that needed to be made to the form. He said that the 15- to 14-days change was added to the version of the form that will go into effect this December, and that an explanation had been added to the forms website.

Mr. Wannamaker said that, just prior to the meeting, he, along with Mr. Scott Myers, Ms. Vanessa A. Lantin and Ms. Camden Burton, reviewed the time periods in all the Official Forms and Director's Forms for conformity with the time amendments to the rules and statutes scheduled to go into effect this December. He said most of the needed changes had been discovered during Ms. Burton's review of the Director's Forms, and would be considered by this Committee at Agenda Item 4(I). He said that, other than the time periods on Exhibit D to Form

1, the only time period in an Official Form that may need to be changed was a provision stating that the effective date of the form "Plan of Reorganization in a Small Business Case under Chapter 11" was the "eleventh business day" following confirmation of the plan (Official Form 25A, § 8.02).

The Chair thanked Mr. Wannamaker and the staff for their efforts in reviewing all the forms on short notice. **She asked the Business Subcommittee to review the time period in Official Form 25A and make a recommendation at the next meeting of whether it should be changed to conform to the time amendments.**

Finally, the Chair reported that the Standing Committee had accepted the Committee's recommendation that Civil Rule 8(c) be amended to delete the requirement that a bankruptcy discharge be pleaded as an affirmative defense.

Judge Rosenthal added that the Standing Committee and the Civil Rules Committee will be conducting a conference next May at Duke Law School focusing on the costs of civil litigation, including issues and costs related to e-discovery. She said that much of the available information on e-discovery is anecdotal and said that the FJC would therefore be conducting a study in advance of the conference to determine how e-discovery is affecting federal civil litigation. She also said that, in light of the Supreme Court's decision in *Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009),* the issue of pleading and its relationship to discovery would be a central theme at the conference.

Draft minutes of the Standing Committee meeting were circulated separately at the meeting.

(B) June 2009 meeting of the Bankruptcy Committee, including status of proposed BAPCPA technical amendments.

Judge Conti reported that the Bankruptcy Committee had discussed two significant issues at its last meeting. She said that the Bankruptcy Committee Chair requested that the FJC perform a study of existing practices of pro se litigants to aid in consideration of a proposed pro se law clerk program. She said that there were many requests for such clerks, and that the study would aid in the proposed next step of establishing a pilot pro se law clerk program.

She said the second issue was a potential "pay-go" issue concerning any the current request of the Judicial Conference for the appointment of new bankruptcy judges. She said the Bankruptcy Committee was concerned that the judiciary might be asked to consider an increase in filing fees to pay for any new appointments. She said the Bankruptcy Committee had discussed the matter and opposed the idea of increasing fees to pay for new judgeships because of the burden it puts on debtors.

Finally, Judge Conti said that the long range planning subcommittee had a long list of

topics under consideration but was focusing on four topics: (1) inter-court relations and court governance; (2) judicial resource issues (including recall, inter-circuit assignments, venue, law clerks, and judicial retirements); (3) bankruptcy appeals; and (4) administrative resource issues (including pro se issues, translation and interpretation issues, technology issues, the fee structure, and shared administrative services).

(C) April 2009 meeting of the Advisory Committee on Civil Rules.

Judge Wedoff reported that Civil Rules Committee approved changes to three rules that had been out for comments. It approved a change to Rule 8(c), removing the requirement to plead discharge in bankruptcy as an affirmative defense, and that it approved the proposed amendments to Rule 26 with minor changes.

Judge Wedoff said that the proposed amendments to Rule 56 were also approved, but with the following changes: (i) removing point-counterpoint; and (ii) changing the wording so that the judge "shall" rather than "should" grant the motion. He added that this Committee would discuss in a later agenda item the need in bankruptcy for a possible variance in the default deadline for filing a motion for summary judgment under revised Rule 56.

Judge Wedoff said the Civil Rules Committee had also formed a subcommittee to look into possible amendments to Rule 45. Judge Rosenthal added that the Committee would also be considering whether, in light of wide-spread use of electronic filing and notice, the provision of Civil Rule 6 that adds three days to deadlines when service is other than personal should be eliminated.

(D) April 2009 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that the restyled evidence rules had been published for comment. She noted that a later agenda item would address whether any of the proposed changes merited special consideration in the bankruptcy context such that the Committee should comment.

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

Judge Perris said she would provide a status report on the CM/ECF working group and the CM/ECF NextGen project later in the meeting in the context of Agenda Item 5(C).

(F) Progress report from the Sealing Committee.

Judge Hopkins said that the FJC was still conducting its study of sealed cases. The Reporter added that, in an initial study, no bankruptcy case had been found that had been entirely sealed. She said that, going forward, the committee would be considering procedures for sealing a case.

(G) Progress report from the Privacy Committee.

The Reporter said the Privacy Committee is a new subcommittee of the Standing Committee. She said that it has met twice and that it is looking at a number of things, including, possible privacy-related amendments to the e-government rules; limiting access to parts of the docket, including plea agreements, in criminal cases; issues related to public access to transcripts and procedures for redacting transcripts; and implementation of privacy policies. She said the Privacy Committee has drafted a survey that will be administered by the FJC, and that there will be a conference at Fordham Law School on April 12, 2010.

Judge Coar noted that an issue of identifiers has come up with respect to claims, and the use of account numbers or social security numbers in the creation of such identifiers. He said the FJC survey may reveal how such identifiers are being used by creditors. **The Chair asked AO staff to make sure that the Privacy Committee and its staff support was aware of recent requests to this Committee by chapter 13 trustees to place a claims identifier directly on the claims form.**

(H) Report on the outcome of the subcommittee best practices review.

Judge Rosenthal said that a best practices guide concerning the use of subcommittees was developed and approved by the Executive Committee of the Judicial Conference after receiving input from all of the committees. She said the guide, included in the agenda materials, was created based on a concern that some committees were relying too heavily on subcommittees. She said that concern was not significant with respect to the rules committees, and that the guidelines developed were consistent with how subcommittees have been used by the rules committees in the past.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Judge Mund's suggestion for a mini Form 22C for debtors who convert from chapter 7 to chapter 13 (Suggestion 09-BK-C)

Judge Wedoff said that the Subcommittee carefully considered Judge Mund's suggestion and that the Reporter had developed a model of what a short version of Form 22 might look like. In the end, he said, the Subcommittee recommended against adopting such a form. He said that some subcommittee members were concerned about the additional complexity the form would introduce in some cases, and that none of the members was aware of any problems that have been presented by requiring debtors in converted cases to complete existing Form 22C.

Judge Wedoff said that subcommittee members also concluded that transferring

information from the previously filed Form 22A to Form 22C is relatively simple, and doing so would prevent the trustee and others from having to refer back to another form to see how the totals were calculated.

After discussing the Subcommittee's recommendation, **the Committee voted against developing a special version of Form 22 for use in conversions from chapter 7 to chapter 13.**

(B) Recommendation concerning possible revision of Schedule C to deal with the extent of a claimed exemption; issues that the Supreme Court will be considering in Schwab v. Reilly (08-538).

Judge Wedoff said the Subcommittee considered, and recommended tabling, a possible revision to the wording in Form 6C to address the extent of an exemption claim by the debtor in light of *In re Reilly*, 534 F.3d 173 (3d Cir. 2008). He said that the primary reason to defer was that the outcome of the Supreme Court's ruling in Schwab could affect the need for a change to the form, and because any proposal made now could be viewed as attempting to influence the Supreme Court's decision. He said that deferral was also appropriate because some subcommittee members were concerned that the proposed language changes would not fix the problem, and because considering the issue during the Advisory Committee's April 2010, meeting (which would likely be after the Supreme Court's decision), would not delay implementation of any proposed change to the form. **The Committee agreed without objection to defer consideration of the proposed change to Form 6C until the April 2010, meeting.**

(C) Recommendations concerning addition of creditor certification to Form 10, the Proof of Claim, prompted by Judge Small's suggestion regarding claims filed by bulk claims purchasers (San Diego Agenda Item 4(D)), and other Proof of Claim issues.

Judge Wedoff said that Consumer Subcommittee had considered several proposed changes to Form 10.

Creditor Certification. Judge Wedoff said that, although the Subcommittee and Committee had previously rejected a suggestion by Bankruptcy Judge Tom Small (E.D.N.C.) to require the creditor to affirmatively assert the timeliness of its claim, there was Subcommittee support for further emphasizing the creditor's duty to carefully review the validity of the claim before filing it. He said that the Subcommittee thought this could best be done by adding a creditor's certification to the form similar to the debtor's certification on Form 1, and he moved to add to the form the underlined language shown in the "Date" box on page 48 of the agenda materials.

Mr. Kohn said that he thought the proposed language imposes a higher standard on the filer than Rule 9011. Other members asked whether the "person" making the affirmation should

be the one who files the form, or the one who completes it, and whether the affirmation was meant to include both the individual signing and the corporate creditor.

Judge Wizmur said there are two sides to the issue: how to get the creditor to exercise due diligence, versus what the individual signing personally knows has been done. She suggested inserting a qualifier like "upon reasonable inquiry" or "to the best of my information and belief," into the certification. Ms. Ketchum suggested "upon information and belief" as a qualifier. Judge Wedoff said that changing from "under penalty of perjury" to "upon information and belief" would bring the certification closer to Rule 11. Mr. Rao favored using some type of oath, rather than the currently proposed "under penalty of perjury."

Some speakers noted that claims are often signed by the creditor's bankruptcy attorney or by a low level employee and suggested that the certification ought to be more focused on the creditor entity, maybe by adding a qualifier such as "the person on whose behalf this claim is filed …". On the other hand, Mr. Lander noted, in a world where it is uncertain who the creditor is, the individual actually signing should be held to have a responsibility of inquiry before filing.

After additional discussion, the Chair said that there seemed to be general support for a certification, but no consensus on the precise language. **The Committee supported the Chair's suggestion that the Subcommittee consider the suggestions made, and that it submit a revised proposed certification in the spring.**

Use of Summaries rather than attaching all writings that support the claim. On the next Form 10 issue, Judge Wedoff noted that there is a conflict between the form and Rule 3001(c) as to whether a summary of the writings upon which a claim is based is a substitute for, or is simply in addition to, the writing itself. As currently drafted, the form indicates that a summary of the writings could substitute for the writings. Rule 3001(c), however, explicitly requires attachment of the writing (the original or a duplicate) and does not address use of a summary at all. Judge Wedoff said that the sense of the Subcommittee was that the complete supporting documents should be supplied, as required by the rule, and that the summary is merely optional. He said the Subcommittee asked for sense of the Committee on the issue and instruction on whether the Subcommittee should review and suggest any changes to the rule or the form.

Dean Ponoroff asked whether the attachment of voluminous documents presented any sort of technical problem. Judge Wedoff said that the Subcommittee had investigated this question and, while there may have been storage problems when CM/ECF was first introduced, that issue no longer seemed to exist.

**After additional discussion, a motion was made, and the sense of the Committee (with one member opposing) was that complete supporting documents should be attached to all claims with an option of providing a summary in addition to the required attachments.** The Chair suggested that, in reviewing whether any clarifying language on Form 10 was needed to convey the sense of the Committee, the Subcommittee consider whether there

should be exceptions for "voluminous" attachments, and if so, under what circumstances a summary would suffice.

Inconsistent use of pronouns. Judge Wedoff said that in attempting to draft the creditor certification, the Subcommittee noted an inconsistent use of pronouns throughout the form, and it questioned how to draft the certification to deal with claims that are filed by the debtor or trustee on behalf of the holder rather than by the holder itself. **After a short discussion, the Committee referred the matter of pronoun use on Form 10 to the Forms Subcommittee to consider possible revisions.**

Following the meeting the Chair, in consultation with the Reporter and Committee staff, determined that the Forms Subcommittee should address all three of the foregoing issues in advance of the April 2010 meeting.

5. Report of the Subcommittee on Forms.

(A) Recommendations on proposed changes to Form 10, the Proof of Claim, concerning annual interest rate.

Judge Perris said that the Subcommittee recommends a change to the interest rate line at box 4, as shown on page 51 of the agenda materials. She said the proposed change would be to add the phrase "(at time case filed)" under the annual interest rate line, and to provide boxes to indicate whether the interest rate is fixed or variable. She said that the Subcommittee had discussed whether the filer should also provide information about how the rate was determined, but decided that such a request would make the form too complicated, and the additional information was unnecessary because it would be available from the attachments or, in the case of certain tax claims, the applicable statute.

Mr. Kohn said the form still presented a problem for tax claims, at least in chapter 13 cases, because the rate due under the statute varies daily, and the relevant calculation date is the plan confirmation date, not the case filing date. Judge Perris responded that, by checking the "variable" box, the claimant signals that the amount must be calculated in some manner and puts the trustee and debtor on notice in a chapter 13 case that the amount must be calculated.

A motion was made to approve the change, as set forth on page 51, along with the corresponding change to instruction 4 on the back of the form, to be held in the bullpen with other pending changes to Form 10. **The motion was approved with one objection.** However, the Forms Subcommittee was asked to revisit placement of the phrase "(at time filed)" when it considered other proposed changes to Form 10 before the next meeting. One suggestion was to center the phrase under "Annual Interest Rate", while another suggestion was to place "Annual Interest Rate_____% (at time case filed) __ Fixed or __ Variable" under the "Value of the Property" line.

(B) Recommendation on Suggestion 08-BK-K by Judges Isgur, Magner, and 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; Judge Shea-Stonum's alternative approach.

Judge Perris said that, in anticipation of the adoption of new bankruptcy rules pertaining to mortgage claims that currently are out for comment, the Subcommittee had developed a drafting committee (consisting of Mr. Rao, Judge Wizmur, Mark Redmiles and Professor Gibson) to propose complementary forms to be used with the rules. She said the drafting committee had only recently been formed and did not have a proposal for this meeting, but that it was evaluating forms currently in use throughout the country, some of which were included at pages 58 to 67 of the agenda materials. Committee members supported the Subcommittee's endeavor and the Chair said she looked forward to a proposal in the spring.

(C) Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris said that since the last rules meeting, the Forms Modernization Project had hired a forms revision expert, Ms. Carolyn Bagin, who was assisting the membership in revising the initial package of forms to be used by an individual debtor to file a bankruptcy case. She said a very preliminary draft of the revised petition and a combined schedule A&B was included in the agenda materials.

Judge Perris said that the Ms. Bagin has proven very helpful in forcing the group to think about how the project will progress. Ms. Bagin spent an initial period of time interviewing project members and other forms users (i.e., clerks, trustees, judges lawyers, U.S. trustees and petition preparers), and compiled a list of concerns about the existing forms, such as users not completing questions with a sufficient level of detail, confusion about terminology, and confusion about what to do when a form does not provide enough room to respond to the question.

Judge Perris said that Ms. Bagin was also working with Beth Wiggins and other staff from the FJC to develop targeted surveys for specific forms users groups to get additional information about problems with the existing forms and to help understand how they are used. She said the surveys should be complete soon and should be going out in time for the results to be considered by the Project group in January 2010 at its next meeting.

Judge Perris said that subgroups were reviewing the draft petition and the combined schedule A/B, and that those forms had already been considerably revised from the versions included in the agenda materials. She said that an initial concern of some project members was striking a balance between making the material on the form more understandable, and still conveying the idea that expert advice is needed. She said that the tone of the draft forms was becoming more formal in the revision process in part because of this concern.

Professor Coquillette said he thought the draft forms were a great improvement and he encouraged the project membership to strive for more understandable language. He commented that, for many debtors, a lawyer is simply not an option, so the forms may be all the explanation they will get.

Judge Perris said another concern was that the introduction of more white space, and more explanatory language, was making the forms longer. She said this doesn't present an electronic storage problem, but bigger petition packages filed "over the counter" in the clerk's office would take longer to scan and to review for information that has to be keyed in. A related problem is that redesigning and reorganizing the forms, to make them more logical to the person filling them out, may make them less well organized and useful for end users.

Judge Perris said that concerns about form length and organization of the information in the forms for different users would be much less significant if technology allows the extraction of information from the forms. To that end, she said the project had been communicating closely with the NextGen working group to develop a list of functional requirements that it believed would be needed to accommodate the modernization project in the next generation of CM/ECF. She noted that the Project's NextGen requirements memo was at page 85 of the materials.

**After discussing the requirements memo, the Committee voted without objection to endorse the principles set forth on page 88 at of the materials with slight modifications, as follows:**

a. Reduce the need for the bankruptcy clerk to manually extract data from forms filed by pro se and other parties not using electronic case upload.

b. Allow judiciary users (e.g. courts, AO, FJC) to easily prepare customized reports for internal purposes, extracting some information from multiple forms.

c. Increase ease of search for and retrieval of information contained in multiple forms.

d. Allow flexibility for expansion of the types and quantity of data collected.

e. Include in NextGen a system that is capable of creating different levels of access to the information from the forms. For example, to the extent that the system allows accessing selected data or reconfiguring the data into custom reports, the system would be capable of limiting who could have such access or reconfiguration capacity, both within the judiciary and as to outside users.

**The Committee also voted to join with the NextGen project in seeking relevant committee approvals for data extraction from the forms, so long as appropriate safeguards are in place to restrict access to the extracted information.**

(D) Oral status report on the revision of Director's Form B240, the Reaffirmation Agreement, and the development of an electronic version.

Judge Perris noted that this project grew out of forms modernization because the existing version of Director's Form B240 was the form most frequently viewed as needing revision. She said that a draft revision has been developed as set forth at page 97 of the materials, and that Mr. Waldron had been working on an electronic version as a pilot for collecting forms information electronically. She said that Waldron/electronic version began with a questionnaire (shown at page 91 of the materials) that, when completed online, would automatically fill in the blanks of both new Official Form 27 and the new Director's Form B240A.

Mr. Waldron explained that some feedback on the proposed electronic version indicated that many vendors have developed software that already automatically completes the form, and their users didn't see a need for his version. He said another difficulty is that much of the information is filled out by multiple parties at various times, making a model that requires completion all at once problematic.

Judge Perris said that the new B240 itself is complete and she recommended asking the director to post it on the public website for immediate use. She said that, because many courts require the use of the existing version, that version should remain on the website for a transitional period. **A motion recommending that the director post the form on the internet, while leaving the older version available for six months after posting, was approved without objection.**

(E) Oral report on proposed new summons form B250F to be used in a foreign non-main proceeding prepared in response to a suggestion by staff attorney Mark Diamond of the Bankruptcy Court for the Southern District of New York that a Director's Form be issued in conformity with Rule 1010(a).

Mr. Wannamaker explained that the form was developed to address the clerk's need for a form summons at the beginning of a chapter 15 case. **Motion to recommend that the Director promulgate the form approved without objection.**

(F) Report on proposed revision of the Certificates of Service on the bankruptcy summons, Director's Forms B250A, B250B, B250C, B250D, and B250E, to conform to Rule 7004 and Fed. R. Civ. P. 4 regarding who may serve process.

Mr. Wannamaker said that the forms were updated to conform the service representations to the Federal Rules to Civil Procedure and Bankruptcy Procedure. **Motion to recommend that the Director promulgate the forms approved without objection.**

(G) Oral report on proposed new discharge form B18RI for individual chapter 11 debtors prepared in response to court requests.

Mr. Wannamaker explained that the form was developed because individual chapter 11 cases were becoming more common. **Motion to recommend that the Director promulgate the form approved without objection.**

(H) Oral report on proposed bankruptcy judgment form B261C, prepared in response to Judge Benjamin Goldgar's suggestion.

Mr. Myers explained that the proposed form was developed at the suggestion of Judge Benjamin Goldgar, and was to be used by the clerk in situations limited to those described in new Rule 7058(b)(1), (scheduled to become effective December 1, 2009). Mr. Myers added that the form was based on the existing district court version (AO 450), with a modification to the caption to indicate it was to be used in the bankruptcy court for adversary proceedings. He said that the Forms Subcommittee had considered creating a multipurpose form that could be used by the clerk under Rule 7058 (b)(1) or the court under Rule 7058(b)(2), and that could also address the clerk's duties under Rule 5003(b). Ultimately, the Subcommittee concluded that a multipurpose form was too complex, and recommended that the Director instead promulgate the simpler version in the agenda materials at page 121. **Motion to recommend that the Director promulgate the form approved without objection.**

(I) Oral report on proposed amendments to Director's Forms B200, B210, B231A, B231B, and B250E, to conform to the December 1, 2009, time-computation amendments to the Bankruptcy Rules.

Mr. Wannamaker explained that the listed forms had been revised to incorporate the upcoming time period changes due to go into effect on December 1, 2009. **Motion to recommend that the Director promulgate the forms as set forth in the materials at pages 122 to 130 approved without objection.**

6. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning Judge Kressel's comments on the last sentence of Rule 1007(k).

Judge Hopkins said that the Subcommittee had carefully considered Judge Kressel's suggestion that the final sentence of Rule 1007(k) be deleted as either substantive or unnecessary. He said the Subcommittee had concluded that while the sentence may be unnecessary, it should be retained, noting that it has been part of the rule for 27 years without objection or litigation. The Subcommittee also thought that the sentence may serve to indicate more succinctly and clearly than does 11 U.S.C. § 503 that the costs of complying with the court's order under Rule 1007(k) may be treated as an administrative expense. **Motion to not**

**eliminate the final sentence of Rule 1007(k) approved without objection.**

(B) Recommendation concerning the suggestions by Judge Mund and Judge Kennedy that Rule 9031 be amended to remove the prohibition on special masters.

The Reporter said that Judge Geraldine Mund (Bankr. C.D. Cal.) and Judge David Kennedy (Bankr. W.D. Tenn.) had submitted suggestions that Rule 9031 be amended or deleted so that special masters could be appointed in bankruptcy cases. In their comments, both judges said that special masters could be a useful resource in some complex chapter 11 cases and adversary proceedings.

The Subcommittee considered the comments, as well as prior deliberations by the Committee on this topic recounted by the Reporter in her August 7 memo in the agenda materials. After discussing the matter, the Subcommittee concluded that no change should be made to Rule 9031.

The Reporter explained that the Committee has previously considered requests to allow the appointment of special masters several times since Rule 9031 was adopted in 1983. Each time it decided not to change the rule. The Reporter said that the initial purpose of the rule may have been reflected in the minutes to the Standing Committee meeting in August 1982, at which time the Committee decided not to permit "bankruptcy judges to appoints special masters" because "this would eliminate an area in which charges of 'cronyism' had previously been leveled at the bankruptcy system." She said the chair of the Committee at that time, Judge Aldisert, also explained that the Committee "felt that bankruptcy judges should be directly involved in cases and should not delegate to masters."

The Reporter added that, although the focus during the promulgation of the rule seemed to be on whether bankruptcy judges should appoint masters, the rule concerns "cases under the Code" and therefore it applies (as do the bankruptcy rules generally) in district courts and bankruptcy appellate panels.

The Reporter said the Committee had addressed the purpose of Rule 9031 at several meetings in the 1990s. While some members suggested that special masters could be useful in appropriate bankruptcy cases and the rule could be amended to authorize their use in limited circumstances, the majority of members recommended no change. The majority noted the history of patronage in bankruptcy system, and concluded that the Bankruptcy Code and Rules had been designed to avoid that problem in part through the prohibition on receivers (under the Code) and special masters (in the Rules). Committee members also questioned whether there was really any need for special masters in bankruptcy cases and whether the Code allows for their compensation out of the estate. Professor Resnick, Reporter to the Committee when the matter was considered in September 1996, raised the further issue of the inefficiency of adding another layer of review to bankruptcy proceedings if findings of fact or conclusions of law were

made by a special master.

In response to a letter from Judge Kennedy suggesting that the size of recent bankruptcy cases justified revisiting the matter, and the publication of two law review articles in favor of amending Rule 9031 to permit special masters, the Committee discussed the issue once again at its September 2002 meeting. The Committee again decided to take no action

The Reporter said that the Subcommittee considered Judge Mund's and Judge Kennedy's suggestions in the context of the past action and reasoning of the Committee, and concluded that the rule should not be amended. First, the Subcommittee noted that the matter has been fully considered by the Committee several times, and that it is sound policy to decline to revisit issues previously decided unless circumstances have changed so as to cast doubt on the prior decision. The Subcommittee did not think there had been any such changes in circumstances since 2002.

The Subcommittee also concluded that, even if Rule 9031 were to be reconsidered, its prohibition on the use of special masters should be retained. Although concerns about "cronyism" may have abated since the rule was adopted in 1983, the bankruptcy judge members of the Subcommittee indicated they did not want the appointment power, and some Subcommittee members worried about the possible return of cronyism if judges were given the authority to appoint special masters. The Subcommittee was also persuaded by concerns noted by the Committee that using special masters would create greater complexity and expense in cases and add another level of decision-making and review to a judicial scheme in which there are already multiple levels of review. One member also questioned the constitutional legitimacy of a delegation of authority twice removed from an Article III judge.

Finally, the Subcommittee doubted whether there is a need for the appointment of special masters in bankruptcy cases. No member was aware of any bankruptcy case in which a court has expressed frustration about the inability to appoint a special master, and the Subcommittee concluded that the use of examiners is a sufficient alternative.

**After discussing the matter the Committee approved a motion to take no further action on the suggestion.**

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 September 30, and plans for further work.

Judge Pauley said that the Subcommittee held its second open subcommittee meeting at Harvard Law School just before this full Committee meeting. He said the meeting was attended by judges from the First and Eighth Circuits' Bankruptcy Appellate Panels, other First Circuit bankruptcy judges, clerks of court, bankruptcy practitioners, and academics. The chair and reporter of the Standing Committee and the reporter for the Appellate Rules Committee also

participated.

Judge Pauley said the attendees engaged in a robust discussion of the proposed changes to the bankruptcy appellate rules both as to the initial set of rules presented in San Diego, and as to the revised version attendees had been asked to review. He added that the general response to a change along the lines of the draft was very positive

Mr. Brunstad gave an overview of the nearly 600 changes he had made to the draft since the spring meeting in San Diego. He said that, while many of the changes were mechanical, such as moving statutory cross references, there were also changes that had required significant thought. Among the changes were additional explanation in the annotations; an attempt to orient the rules more toward electronic filing as the default, with an allowance for paper filing or paper copies of the filings; incorporating rules on direct appeals from the bankruptcy court to the court of appeals; incorporating rules on indicative rulings (previously approved by the Committee, but not yet published for comment); service issues; forms of brief issues; and addressing how to handle and dispose of appeals that settle.

Mr. Brunstad agreed with Judge Pauley that attendees at the open subcommittee meeting were engaged and supported the idea of revising the bankruptcy appellate rules. He said there seemed to be plenty of suggestions for improvements to the current draft, but his sense was that the suggestions would require less complicated revision than those he made to the San Diego version. He noted, however, that the reviewing subgroups still had time to submit written comments.

Judge Pauley said the Subcommittee recommended that the project continue going forward, and requested approval to do so from the full Committee. The Reporter added that if such approval is given, she anticipated drafting a summary of the written subgroup comments for consideration by the Subcommittee, and that she and Mr. Brunstad (who volunteered to continue working with the draft for one more round), would incorporate those comments recommended by the Subcommittee.

Judge Rosenthal said that in considering revisions in anticipation of electronic filing, it would be important to provide a functional rather than prescriptive description of what is needed. She noted that all of the federal rules will have to be adjusted to account for electronic filing, and that this project will likely be the model. The Reporter added that the Committee was working to keep the other rules committees informed, and that coordination with the other committees will continue as the project goes forward. She said that the Subcommittee anticipates that there will be a further report next spring and possibly a written product for the Committee to consider next fall.

**A motion that Judge Pauley's request that the Subcommittee be authorized to continue along the projected timeline as outlined was approved without objection.**

(B) Discussion of whether to continue the indicative ruling amendments (proposed new Rule 8007.1 and the amendment to Rule 9024 as approved at the September 2008 meeting), in the *Bull Pen* and/or to incorporate the amendments into the revised Part VIII rules. (March 2009 agenda item 7(B))

**Motion that Rule 8007.1 and the amendment to Rule 9024 stay in bullpen and be included in the eventual Part VIII package, approved without objection.**

(C) Recommended response to the Appellate Rules Committee's request for views on potential amendment to Appellate Rule 6(b)(2)(A) regarding timing of notice of appeal following ruling of District Court or BAP on motion for rehearing.

The Reporter reviewed the memo and the Subcommittee's recommendation. She said that the Subcommittee agreed with the proposed change as set out on pages 203 and 204 of the materials, but suggested that an additional change as noted on page 205 be considered by the appellate rules committee. **Motion to support the Subcommittee's recommendation to the Appellate Rules Committee approved without objection.**

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

No matters assigned.

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

No matters assigned.

10. 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. (March 2009 agenda item 7(B))

Judge Wedoff said that the Standing Committee approved an amendment to Civil Rule 56 that is scheduled to go into effect December 1, 2010. He noted that Rule 56 is currently incorporated in whole in bankruptcy adversary proceedings and contested matters, and the Committee should consider whether a modification is needed for bankruptcy once the new civil rule goes into effect.

Judge Wedoff explained that subsection (b) of proposed Rule 56 establishes a default deadline for filing summary judgment motions at 30 days after the close of discovery. Because of the speed with which bankruptcy issues are heard -- including contested matters such as motions for relief from stay -- the default deadline in the proposed rule would not come into

effect in many situations, allowing a timely summary judgment motions to be filed shortly before a scheduled evidentiary hearing. Because subsection (a) of the proposed rule again states that the court "shall grant summary judgment" if the motion is meritorious, a bankruptcy court could consider itself bound to continue a scheduled evidentiary hearing to allow consideration of any timely filed summary judgment motion.

Judge Wedoff said a more meaningful default deadline for bankruptcy purposes might be based on the date set for the evidentiary hearing rather than the close of discovery, and he recommended that the Consumer Subcommittee consider such a revision and provide a recommendation at the next meeting.

Judge Perris noted that, whatever the Committee ultimately decides to do, since Rule 56 is scheduled to go into effect before a change to 7056 could be made, a memo should be distributed to all bankruptcy courts highlighting how the new rule works in bankruptcy so that the courts can take steps to modify local rules or judges can create scheduling orders to prevent summary judgment motions from being filed on the eve of a hearing.

**The Chair referred the matter to the Consumer Subcommittee for further consideration and for a recommendation at the spring meeting.**

11. Discussion of whether the time limits in Rule 7054(b) should be changed to conform to Civil Rule 54 and the new time computation provisions.

The Reporter said that Rule 7054(b) had been overlooked during the review of bankruptcy time periods with respect to the time amendments that will go into effect this December. She said a five-day period and a one-day period were possibly affected. She recommended changing the five-day time period to seven days, as was done to all other five-day time periods.

The Reporter said the existing one-day time period in the rule was for the clerk to provide notice of taxing costs. She said that period could remain the same, or be changed to seven or 14 days. The Reporter explained that the Committee had deliberately not changed the one-day period in Rule 9006(d), and that prior actions might be a basis for not changing the one-day period in 7054(b), particularly since there has never been a request to change the period in the past. On the other hand, the Civil Rules Committee did change the parallel period in Rule 54(d) from one day to 14 days, because it concluded that the one-day period "was unrealistically short."

Judge Rosenthal said she thought that the bankruptcy rule ought to continue to parallel the civil rule unless there was bankruptcy reason for a different time period. Judge Wizmur agreed. After additional discussion, the Chair suggested that the question of whether the one-day period is too short in bankruptcy could be referred to the Bankruptcy Clerk's Advisory Group and the Bankruptcy Judges Advisory Group, and the Committee could decide whether to

recommend the change at it next meeting. Mr. Waldron said that he could also survey the clerks on the issue.

**A motion was made, seconded and approved without objection to: recommend changing the five-day period to seven days, and to defer consideration of changing the one-day period to 14 days until the spring meeting, so that the views of the BCAG, the BJAG and Mr. Waldron's survey of the clerks could be considered. The proposed changes will remain in the bullpen until the spring, and the Committee agreed that publishing any proposed changes for comment in the fall would be necessary only if it decides to recommend changing the one-day period to 14 days.**

12. Guidelines for the use of standing orders.

The Reporter said the Committee assembled an ad hoc group of bankruptcy judges to consider whether the guidelines proposed for use of local rules presented any special problems in bankruptcy cases. She said the only issue the judges thought might need further clarification in bankruptcy would be the use of a standing order instead of a local rule in situations where a statutory or rule provision applies "unless the court orders otherwise." She said the initial question before the Committee is whether a local rule would amount to an order in such a situation.

Judge Rosenthal said all circuit courts that have looked at the issue have concluded that a local rule *does* satisfy an "unless the court orders otherwise" provision. Because the case law seems to support use of a local rule to satisfy the "unless the court orders otherwise," she said it would be preferable to use local rules in such situations across all the federal courts. She also said that the transmittal letter that would accompany the guidelines could specifically state that a local rule satisfies the "unless the court orders otherwise" situation.

Judge Wedoff asked how many circuits have adopted the principle that a local rule has the same effect as a court order, and he noted that the language in Rule 56 provides for *either* a court order or local rule, so he questioned whether they were really the same. Judge Rosenthal said the Seventh, Third and Fifth Circuits had all considered the issue and concluded that a local rule satisfies the "unless the court orders otherwise" provision. She noted that there was a dissent in one of the Fifth Circuit cases, based on the Rule 56 language raised by Judge Wedoff. The majority in that case, however, concluded that while it is true that local rules and orders are different, in the context of "unless the court orders otherwise" a local rule suffices because all local rules are adopted by court order.

**The Chair asked for a vote on the "Sense of the Committee" that the "guidelines for the use of standing orders should be disseminated as proposed so long as the transmittal letter contains a statement clarifying that a local rule satisfies the unless the court orders otherwise situation." The Committee approved the "Sense of the Committee" statement without objection.**

Discussion Items

13. Discussion of impact of the restyled Evidence Rules on bankruptcy matters and recommendation on a response to the restyling.

The Reporter said that the Evidence Rules Committee had finished its restyling project and that the proposed rules were now out for comment. She asked whether any member thought that there was a need for the Committee as a whole to comment on the changes.

Judge Wedoff said he believed that the Committee should only comment "as the Committee" on changes that affect bankruptcy. He thought individual members could and should make any general comments individually. The Committee agreed with this approach.

The Reporter said that the only issue she identified that might work differently in bankruptcy dealt with admissions by an "opposing party." Judge Perris suggested the possibility of substituting "adverse party," but Professor Ponoroff said that "party opponent" (the phrase currently used in the evidence rules) has not seemed to cause problems in bankruptcy and he questioned whether the restyled phrase "opposing party" would be any more likely to do so. **A motion to make no comment on the restyled evidence rules carried without objection.** The Chair added that she would report back to the Evidence Committee that this Committee was grateful for the opportunity to comment, but that it found no bankruptcy-specific issues.

14. Oral report on the status of pending legislation, including authorizing modification of certain home mortgages in chapter 13 cases and legislation liberalizing exemptions for debtors with medical problems.

Mr. Wannamaker reported that he spoke with the AO's Office of Legislative Affairs and that none of pending bankruptcy legislation, including a bill for technical amendments, appeared likely to pass or even be considered soon.

15. 11 U.S.C. § 521(i) update.

The Reporter said that although the circuit courts are starting to address § 521(i), the cases are breaking toward not enforcing automatic dismissal and finding that the bankruptcy court has discretion to retain the case after the 45th day. She said that courts seemed most likely to invoke this type of discretion in cases where the debtor is attempting to use the statute as a sword to escape the hardships of bankruptcy. She added that so long as the courts seemed to breaking in favor of finding the that statute allows discretion, and concluding that "automatically dismissed" is not really automatic, it would be hard to develop a rule to implement automatic dismissal.

After a short discussion, **a motion was made and the Committee voted without**

**opposition to continue monitoring the case law on 11 U.S.C. § 521(i).**

Information Items

16. Rules Docket.

Mr. Wannamaker explained that the Rules Docket was meant to help the membership keep track of ongoing comments and suggestions to the rules and asked members to email him with any suggestions for changes or updates.

17. Notice to local courts concerning reviewing Interim Rule 1007-I in light of the upcoming time computation amendments to Rule 1007.

Discussed by Mr. Wannamaker at Item 3(A).

18. Bull Pen.

The proposed amendments to Official Form 10, approved at the March 2009 meeting, remain in the bull pen pending incorporation of additional proposed changes to Form 10 discussed at Items 4(C) and 5(A).

Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at the September 2008 meeting and recopied at Item 7(b), remain in the bull pen, but will be incorporated into the rewrite of Part VIII rules.

The decision to recommend changing the five-day period in Rule 7054(b) to seven days (discussed at Item 11) was added to the bull pen pending a decision in the spring about the one-day period in the same rule.

19. Oral report on the preparation of a definitive set of Bankruptcy Rules.

Mr. Ishida explained that for a number of historical reasons, there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Office of the Law Revision Counsel of the House of Representatives, which prepares and publishes the other federal rules of practice, procedure, and evidence, has never compiled and published the Bankruptcy Rules. The bench, bar, and public have adapted to this anomaly by consulting the bankruptcy rules published by commercial and nonprofit organizations. Mr. Ishida said that this has been a workable solution, but is not ideal and has created problems over the years.

This past summer, Mr. Ishida said, at the request of the Committee and with considerable help from a group of summer interns over months of intense effort, the Administrative Office compiled an authoritative version of the Bankruptcy Rules. He said the project was

accomplished by painstakingly comparing five commercial and nonprofit versions of the bankruptcy rules using the electronic comparison tools in Word and WordPerfect. He said that whenever a discrepancy arose in the rules being compared, the official source documents were checked -- either the orders of the Supreme Court or Congressional legislation -- to resolve the discrepancy. Each step in the process was verified and documented, and the final product underwent a stringent editorial, proofreading, and legal review process by AO staff.

Mr. Ishida said that most of the work was done by, and credit goes to, the interns that were involved in the project. On behalf of AO staff, he extended his heartfelt gratitude and thanks to: Ms. Katie Mize (lead intern), Ms. Heather Williams and Ms. Danielle White. On behalf of the Committee, the Chair added her thanks for the work of the interns and AO staff.

Mr. Ishida said the review process was nearly done, and that upon completion, the rules would be transmitted to the Office of the Law Revision Counsel with a request that they be published as the official version of the Federal Rules of Bankruptcy Procedure. He said they would also be published on the courts' public website.

20. Future meetings.

The spring 2010 meeting will be at the Windsor Court Hotel, New Orleans, April 29 - 30, 2010. Suggestions for possible locations for the fall 2010 meeting were solicited.

21. New business.

None.

22. Adjourn.

Respectfully submitted,

Stephen "Scott" Myers