ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of Sept. 14, 2023
Washington, D.C. and on Microsoft Teams

The following members attended the meeting in person:

Circuit Judge Daniel A. Bress
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Marcia Krieger
Bankruptcy Judge Catherine Peek McEwen
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq.
District Judge George H. Wu

The following members attended the meeting remotely:

District Judge Jeffery P. Hopkins
Debra L. Miller, Esq.
Professor Scott F. Norberg
District Judge J. Paul Oetken

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
Senior District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Circuit Judge William J. Kayatta, liaison from the Standing Committee
H. Thomas Byron III, Administrative Office
S. Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
Bridget M. Healy, Administrative Office
Allison A. Bruff, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Zachary Hawari, Rules Law Clerk
Carly E. Giffin, Federal Judicial Center

Nancy Whaley, incoming Committee member
Rebecca Garcia, National Association of Chapter 13 Trustees

The following persons also attended the meeting remotely:

Professor Daniel R. Coquillette, consultant to the Standing Committee
District Judge Joan H. Lefkow, incoming Committee member
Bankruptcy Judge Laurel M. Isicoff, Liaison to the Committee on the Administration of the Bankruptcy System
Susan A. Jensen, Administrative Office
Teri Johnson, Law Office of Teri E. Johnson
Crystal Williams

Discussion Agenda

1. Greetings and Introductions

Judge Rebecca Connelly, chair of the Advisory Committee, first introduced Senior Inspector Dante Salazar of the Judicial Security Division, who provided a brief security announcement. Judge Connelly then welcomed the group and thanked everyone for joining this meeting, including those attending virtually. She thanked the members of the public attending in person or remotely for their interest. Two members of the Committee are attending their last meeting of the Committee, and Judge Connelly thanked District Judge Marcia Krieger and Debra Miller for their service. Joining the Committee as new members at the next meeting will be District Judge Joan H. Lefkow and Nancy Whaley, and she welcomed them. She also acknowledged the presence of observers both in person and remotely.

Judge Connelly then reviewed the anticipated timing of the meeting and stated that there would be a mid-morning break and another break for lunch. In-person participants were asked to turn on their microphones when they spoke and state their name before speaking for the benefit of those not present. Remote participants were asked to keep their cameras on and mute themselves and use the raise-hand function or physically raise their hands if they wished to speak. She noted that the meeting would be recorded.

2. Approval of Minutes of Meeting Held on March 30, 2023

The minutes were approved.

3. Oral Reports on Meetings of Other Committees

(A) *June 6, 2023, Standing Committee Meeting*

Judge Connelly gave the report.

(1) Joint Committee Business

(a) *Pro Se Electronic-Filing Project*

Professor Catherine Struve provided the Standing Committee a status report on inquiries made by Dr. Tim Regan of the Federal Judicial Center and herself with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. One of the primary areas of inquiry was whether there is any reason to require traditional service by self-represented litigants on other litigants who already receive notices of electronic filing. The districts that exempt self-represented litigants from paper service found that it added no additional burden on the courts' clerk's offices. Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF, and Professor Struve reported on the results of that question. The general consensus was that the benefits outweighed the risks.

(b) *Presumptive Deadline for Electronic Filing*

Judge Bates provided the Standing Committee a status report on consideration of a suggestion to change the filing deadline from midnight local time to an earlier time. The Standing Committee has reconstituted a joint subcommittee that previously considered this suggestion some years ago to consider it again in light of the decision by the Third Circuit to adopt a local rule making the deadline earlier in the day.

(c) *District-Court Bar Admission Rules*

Judge Bates reported on this item. Several of the advisory committees received a proposal on a unified bar-admission rule. A joint subcommittee – which includes representation from the Bankruptcy Rules Committee -- has been formed to review the proposal over the next year or two.

(2) Bankruptcy Rules Committee Business

The Standing Committee gave final approval to the Restyled Bankruptcy Rules and three other rules and one form, and approved two rules and six official forms for publication.

Final Approval

Restyled Bankruptcy Rules

The Standing Committee gave final approval to the fully restyled bankruptcy rules.

Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), and conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423

The Standing Committee gave final approval to amended Rule 1007 which replaces the requirement that an individual debtor in Chapter 7 and Chapter 13 cases file a statement on an official form (Form 423) describing completion of a course in personal financial management with a requirement that the course provider's certificate of course completion be filed. Amendments to Rules 4004, 5009, and 9006 to replace references to a "statement" of completion with references to a "certificate" of completion were also approved. Official Form 423 was abrogated because it no longer served any purpose.

Rule 7001 (Types of Adversary Proceedings)

The Standing Committee gave final approval to the amendment to Rule 7001 to exclude from the list of adversary proceedings actions filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

Rule 8023.1 (Substitution of Parties)

The Standing Committee gave final approval to new Rule 8023.1 which governs the substitution of parties when a bankruptcy case is on appeal to a district court of BAP.

Official Form 410A (Mortgage Proof of Claim Attachment)

The Standing Committee gave final approval to an amendment that requires that the principal amount be itemized separately from interest.

Approval for Publication for Public Comment

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case)

The Standing Committee approved for publication for public comment amendments to the rule that are responsive to the public comments made on proposed amendments published for comment in 2021. A judge member of the Standing Committee raised concerns about the revised provision for noncompensatory sanctions in (h)(2). After much discussion, Judge Connelly agreed to delete that provision and take it back to the Advisory Committee for further consideration. The third sentence in the last paragraph of the committee note was also struck for purposes of publication.

Rule 8006(g) (Request for Leave to Take a Direct Appeal to the Court of Appeals After Certification)

The Standing Committee approved for publication for public comment an amendment to Rule 8006(g) to make clear that any party to an appeal may request direct appeal to a court of appeals.

Official Forms Related to Rule 3002.1

The Standing Committee approved for publication for public comment Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, which are the companion official forms to proposed amended Rule 3002.1.

Information Items

Judge Connelly, Professor Gibson, and Professor Bartell also reported on four information items.

(a) Update concerning suggestion to require complete redaction of social security numbers from filed documents.

(b) Update concerning suggestion to adopt a national rule addressing debtors' electronic signatures.

(c) Update on suggestions regarding the deadline for filing a certificate evidencing completion of the required course of personal financial management

(d) Update on proposed amendment to Rule 1007(h) to require disclosure of postpetition assets

(B) ***Meeting of the Advisory Committee on Appellate Rules***

The Advisory Committee on Appellate Rules is scheduled to meet on Oct. 19, 2023.

(C) ***Meeting of the Advisory Committee on Civil Rules***

The Advisory Committee on Civil Rules is scheduled to meet on Oct. 17, 2023.

(D) ***June 8-9, 2023, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

The Bankruptcy Committee met in June in Boston. The next meeting will be in December in Washington, D.C.

(1) **Changing in Personnel**.

Judge Connelly has been replaced as liaison from the Advisory Committee, and the Bankruptcy Committee looks forward to working with the new liaison. In addition Judge Darrow will be stepping down as chair of the Bankruptcy Committee on September 30. Judge Darrow, like her predecessors, has been a tremendous advocate for the Bankruptcy System. District Court Judge William Osteen will be taking over as chair of the Bankruptcy Committee on October 1. Judge Osteen has been a member of the Bankruptcy Committee for several years and the committee looks forward to his leadership.

(2) **Legislative Proposal Regarding Emergency Authority and Proposed Rule 9038**

The Bankruptcy Committee has been updated on the status of Rule 9038, the rule that will address emergency measures that may be taken by the courts and is on track to go effective on December 1. The Bankruptcy Committee appreciates the Rules Committee's work on this important effort.

Just as the Rules Committee was considering rules amendments under the CARES Act to deal with future emergencies, in spring 2020, the Bankruptcy Committee developed a legislative proposal to extend statutory deadlines and toll statutory time periods during the pandemic, which the Judicial Conference adopted. Unfortunately, Congress did not take any action on the legislative proposal, and on recommendation from the Bankruptcy Committee, the Conference rescinded the legislative proposal in March 2021.

Now that the national emergency related to COVID-19 has ended and many bankruptcy courts have resumed full, unrestricted operational status, the Bankruptcy Committee will consider a broader legislative proposal, which would provide a permanent grant of authority to extend statutory deadlines and toll statutory time periods during an ongoing emergency and could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. Just like the narrower proposal that was tied to the COVID-19 emergency, the permanent grant of authority would not extend to the Bankruptcy Rules.

At its June meeting, the Bankruptcy Committee directed staff to further research and analyze the issues related to this potential legislative proposal so that the Committee can consider the proposal at the December meeting and determine whether to recommend that the Judicial Conference pursue it in Congress. If the Committee moves forward with this proposal, it will coordinate closely with the Rules Committee to ensure that there is no conflict or overlap.

(3) **Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees**

On recommendation of the Bankruptcy Committee, the Judicial Conference approved a proposal to seek legislation to amend the Bankruptcy Code to (1) make chapter 7 debtors' attorney fees due under a fee agreement nondischargeable; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees. This legislative proposal seeks to address concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys. The AO transmitted the legislative proposal to Congress in November 2022 and again in July 2023 to coincide with the start of the new Congressional session.

The proposal continues to be reviewed by Congressional staff, and several members of the Bankruptcy Committee have met with members of Congress to answer questions raised in connection with this proposal. If Congress enacts amendments to the Code based on this position, it is anticipated that, at a minimum, conforming changes to the Bankruptcy Rules would be required.

(4) **Proposed Rule Amendments Related to Remote Public Access to Witness Testimony**

The Bankruptcy Committee continues to monitor the status of the work of the Committee on Court Administration and Case Management (CACM) on remote public access to court proceedings.

This week the Judicial Conference approved a policy to expand remote audio access beyond the pre-Covid policy. It permits judges presiding over civil and bankruptcy cases to provide the public live audio access to non-trial proceedings that do not involve witness testimony. CACM recommended this revised policy change with the endorsement of the Bankruptcy Committee and the Committee on the Administration of the Magistrate Judges System. The Bankruptcy Committee stands by to assist the Rules Committee on any rule changes or modifications that such policy change might warrant.

The Bankruptcy Committee is interested to see how the Advisory Committee proceeds with the suggestion from the National Bankruptcy Conference to change the standard for allowing remote testimony in contested matters. The Bankruptcy Committee is very interested in the future of remote public access to court proceedings and remote witness testimony in certain types of proceedings.

(5) Potential Comment to Tab 5B (Application for Payment of Unclaimed Funds)

At its June meeting, the Bankruptcy Committee approved revisions to its best practices relating to unclaimed funds, also proposed by the Unclaimed Funds Expert Panel, along the same lines as the revisions made as a suggestion to the Advisory Committee and on the agenda for the meeting. A new best practice is intended to reduce fraudulent applications filed by persons who

assert that they are a successor claim holder—when in fact they are not—by encouraging bankruptcy courts to require proof that the application was sent to any previous owners of the claim. This will help ensure that the previous owner of a claim has an opportunity to dispute the claimant's ownership interest and that the bankruptcy court is not forced to investigate ownership issues.

The Bankruptcy Committee tweaked the new best practice, by adding language to the provision stating that if the applicant didn't send a copy of the application to previous owners, the applicant must have "enclosed a statement explaining why Applicant was not able to do so." There are scenarios where a bankruptcy judge might determine that service is not necessary, even though the applicant was *able* to do so. For example, where succession is based on a merger, and there are documents that show that the old entity (old-co) is now a new entity (new-co) by reason of the merger, the judge might determine that it's not necessary to serve old-co (because new-co is essentially the same entity as old-co, just with a new name). Therefore, they added the language "or an explanation why doing so is not necessary" after the phrase "not able to do so."

The Bankruptcy Committee suggests making a similar tweak in the suggested modifications to Form 1340 being considered by the Advisory Committee and to Section II.C.d of the Instructions in the new certificate of service section.

The Bankruptcy Committee looks forward to continuing to collaborate and work together with the Advisory Committee in the future.

Judge Connelly thanked Judge Isicoff, and announced to the Advisory Committee that Judge Harner would be the new liaison to the Bankruptcy Committee.

Subcommittee Reports and Other Action Items

4. **Report by the Consumer Subcommittee**

(A) ***Reconsideration of Proposed Rule 3002.1 Sanctions Provision***

Judge Harner and Professor Gibson provided the report.

At the spring Advisory Committee meeting, amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence) were approved for republication. The recommendation was presented to the Standing Committee at its June meeting, and the Standing Committee approved the amendments for republication with one deletion. In subdivision (h), the proposed amendments would have expressly authorized courts to award "in appropriate circumstances, noncompensatory sanctions." The impetus for the inclusion of the amendment was the Second Circuit's 2-1 decision in PHH Mortg. Corp. v. Sensenich *(In re* Gravel*)*, 6 F.4th 503 (2021), in which the court held that "[p]unitive sanctions do not fall within the 'appropriate relief' authorized by Rule 3002.1." Several bankruptcy courts have disagreed with the Second Circuit and have concluded that the rule does authorize the award of punitive damages. After lengthy discussions, Judge Connelly suggested that the

Advisory Committee should further consider the sanctions provision and withdrew that amendment, and the related committee note. The Standing Committee approved the remainder of Rule 3002.1 for republication.

The Subcommittee was asked to reconsider the noncompensatory sanctions provisions in light of the Standing Committee comments, and did so at its August 7 meeting. The Subcommittee decided to keep the issue on its agenda, but wait and see how the case law develops rather than seeking to reintroduce an additional sanction provision to subdivision (h). The Subcommittee does not see any urgency about consideration of this issue, and immediate amendment to subdivision (h) would likely require yet another republication of all of Rule 3002.1, which the Subcommittee considers undesirable.

There were no comments or questions from the Advisory Committee.

(B) ***Continued consideration of proposed amendment to Rule 5009(b) (Suggestions 22-BK-D and 23-BK-K)***

Judge Harner and Professor Gibson provided the report.

Last summer the Subcommittee began considering a suggestion submitted by Professor Laura Bartell (22-BK-D) to change the timing of the notice to chapter 7 and 13 debtors under Rule 5009(b), which reminds them of their need to file a statement of completion of a course on personal financial management. Since that time Tim Truman, a chapter 13 trustee, has submitted a related suggestion (22-BK-K) to change the deadline for chapter 13 debtors to file the statement.

The Subcommittee received feedback on those suggestions at last spring's Advisory Committee meeting, and took those comments into consideration in arriving at its recommendation.

The Subcommittee recommends an amendment to Rule 1007(c) to eliminate the deadline for filing a certificate of course completion issued by the provider of a course in personal financial management. The Bankruptcy Code requires only that the course be taken before a discharge can be issued. The Subcommittee does not want debtors to be denied a discharge merely because they do not meet a deadline imposed by the rules for submitting their certificate.

Second, assuming that amendment is approved, references to the deadline would be deleted in amendments to Rule 9006(b) and (c).

Professor Struve raised a question of whether, by removing the deadline, we are allowing courts to adopt a local rule imposing a deadline. Professor Gibson said that if the national rule has removed any deadline, it would be inconsistent with the national rule for a court to impose a deadline by local rule, but she does not know what the enforcement mechanism would be for eliminating conflicting local rules. Professor Coquillette said that the issue of inconsistency

between a local rule and national rule has been addressed before. He said that imposing a deadline when the national rule has none creates an inconsistency. There have been such situations, and local rules have been abrogated as a result. Challenges have been brought by a judge within that district or circuit.

Judge Harner said that perhaps there should be a deadline, i.e., the closing of the case. Professor Struve supported a linkage between Rules 1007(c)(4) and 5009, by requiring that debtor must file the certificate within the time specified in any notice under Rule 5009(b). Judge McEwen said that there is a deadline imposed by the Code for closing the case. Judge Connelly said that the rule does not tell the court when to close the case, only what the condition is to close the case. Ken Gardner said there is no requirement to close the case but that is a procedural matter. If there is an extension of time to file the certificate, the case would not be closed. Judge Harner asked if we linked the deadline to the notice in 5009, would that provide adequate certainty to the clerks for closing the case. Ken Gardner said it would. Professor Bartell expressed the view that imposing any deadline was inconsistent with the decision of the Subcommittee.

Professor Gibson then described the proposed amendments to Rule 5009(b) approved by the Subcommittee to require two reminder notices rather than just one and setting the dates for sending those notices for Chapter 7 cases (45 days after the petition is filed and 90 days after the petition is filed) and for Chapter 13 cases (45 days after the petition is filed and 60 days before the case will be closed). The second notice would state that the case can be closed without entering a discharge if the certificate is not filed within 30 days after the notice's date (for a Chapter 7 case) or within 60 days after the notice's date (for a Chapter 13 case)

Professor Gibson first noted that she had made a change in the first paragraph of the committee note to the proposed amended Rule 5009(b). Instead of the words "must get the case reopened," she inserted "must seek to have the case reopened" to reflect the fact that some courts do not permit reopening cases to file a certificate of course completion.

Judge Harner expressed discomfort with the timing of the second notice for chapter 13 cases (60 days before the case closing), suggesting that it should be sent if the certificate had not been filed by the time of plan completion. There was discussion of that suggestion, and concern expressed by Jenny Dolan and others that whether a plan had been completed might trigger litigation. Judge Kahn thought a better objective standard would be the filing of the trustee's final report. The Advisory Committee agreed to replace "at least 60 days before the case closing" with "at the time the chapter 13 trustee has filed a final report and final account" in revised Rule 5009(b)(3)(B).

Judge Kahn suggested that the notices contemplated by Rule 5009(b) might be appropriate for a bankruptcy form. Judge Harner agreed that the Forms Subcommittee should consider that suggestion.

Judge Connelly asked whether the timing for the second notice in a chapter 7 case (90 days after the petition is filed) would work in a case in which the Section 341 meeting of

creditors is held 21 days after the petition is filed (as permitted by Rule 2003(a)) and the 60 day period after that date expires under Rule 4004(a) so that the court is directed to grant a discharge under Rule 4004(c)(1). This could be fewer than 90 days after the filing date. Ken Gardner said that it is extremely unlikely that a meeting of creditors would be held 21 days after filing, but there is nothing in the proposed rule that precludes the clerk from sending the second notice earlier than 90 days after the filing date. In those rare cases, the clerk's office could so. Ramona Elliott expressed the view that the rule would work better if the period was tied to the date of the meeting of creditors because tying it to the petition date may make the period too long.

Judge Harner suggested adding the words "and the clerk has not yet sent a second notice" after the words "within 90 days after the petition is filed" in proposed Rule 5009(b)(3)(A). Ken Gardner supported that addition.

Judge Harner suggested that, rather than deleting Rule 1007(c)(4), language stating that there is no deadline for the filing of a financial management certificate might be inserted, but the case may be closed without discharge if the certificate is not filed within the periods specified in Rule 5009(b)(3).

Judge Kahn expressed concern about cases being left open indefinitely, but Ken Garner said that the case will be closed if the conditions for discharge are not met. The court retains discretion on how quickly that will happen. He emphasized that closing is not the issue – the issue is discharge.

It was suggested that instead of simply eliminating Rule 1007(c)(4), the provision be shown as "Abrogated" to make clear the intention to remove the deadlines for filing the financial management certificate. There was support for this approach, because it avoids having to renumber subsequent sections of Rule 1007(c). There was also discussion of making it clear in the committee note that the decision to eliminate the deadlines was intentional; subsequent discussion resulted in proposed language to be inserted in the last sentence of the committee note to Rule 1007(c)(4) that reads "…, but the rule no longer imposes—and the Committee rejected—an earlier deadline for doing so."

With those changes, the Advisory Committee recommended the revised Rules to the Standing Committee for publication.

(C) ***Continued consideration of proposed amendments to Rule 1007(h) (Suggestion 22-BK-H)***

Judge Harner and Professor Gibson provided the report.

Judge Catherine McEwen has submitted a suggestion to require the reporting of a debtor's acquisition of postpetition property in the chapter 11 case of an individual or in a chapter 12 or 13 case. Judge McEwen noted that Rule 1007(h) (Interests Acquired or Arising After Petition) requires the filing of a supplemental schedule only for property covered by § 541(a)(5)—that is, property acquired within 180 days after the filing of the petition by bequest,

devise, or inheritance; as a result of a property settlement with a spouse or a divorce; or as beneficiary of a life insurance policy. Not included within Rule 1007(h) are other postpetition property interests that become property of the estate under § 1115, 1207, or 1306.

This suggestion was considered by the Subcommittee last winter, and at the spring Advisory Committee meeting, the Subcommittee recommended that no action be taken on it. Following the Advisory Committee's discussion of the suggestion, it was referred back to the Subcommittee for further consideration.

The Subcommittee now recommends to the Advisory Committee an amendment to Rule 1007(h) that would explicitly allow the court to require the debtor to file a supplemental schedule to list property or income that becomes property of the estate under § 1115, 1207, or 1306. The subcommittee declined to recommend a national rule that would impose a duty of disclosure.

Judge McEwen proposed that the last sentence of the committee note be eliminated, because it expressed views on the types of rules a court should adopt. Judge Harner agreed – she thought the rule should permit the law to develop, and the less direction given the better for that process. Professor Gibson agreed to remove the last sentence of the committee note.

Judge Bates suggested that the first sentence of the committee note should be modified to change "amended to authorize a court to require" to "amended to clarify that a court may require" to avoid suggesting that the courts do not currently have that authority. His suggestion was adopted.

The Advisory Committee approved the proposed amendments to Rule 1007(h) for publication.

(D) ***Consider Suggestion 23-BK-B to require disclosure of corporate ownership statements in contested matters.***

Judge Harner and Professor Bartell provided the report.

Michael Gieseke, Staff Attorney for the Office of Chapter 12 & 13 Bankruptcy Trustee Kyle L. Carlson in Barnesville, MN, suggested adoption of a new rule requiring all non-governmental corporations in contested matters to make the same disclosures with respect to their corporate ownership as is currently required for a corporation that is a party to an adversary proceeding in Rule 7007.1.

Rule 7007.1 was intentionally limited to adversary proceedings because of the difficulties that would be created were it applicable to contested matters. In addition, the presiding judge may direct that Rule 7007.1 should apply in any particular contested matter in which disclosures are warranted.

The Subcommittee recommended that no action be taken in response to this suggestion and the Advisory Committee decided to take no action.

5. Report by the Forms Subcommittee

(A) *Consider Comment BK-2021-002-0022 concerning amendment to Official Form 410S1 (Notice of Mortgage Payment Change)*

Judge Kahn and Professor Gibson provided the report.

After publication in 2021 of proposed amendments to Rule 3002.1 and implementing forms, John Rao filed a comment suggesting an amendment to existing Form 410S1. The amendment would reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit ("HELOCs"). He suggested changes to include disclosure of the one-time next payment that includes the reconciliation amount under Rule 3002.1(b)(3)(C) and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). The comment was treated as a suggestion and was considered by the Subcommittee at its summer meeting.

The current Form 410S1 has three parts plus a signature box – Part 1: Escrow Account Payment Adjustment; Part 2: Mortgage Payment Adjustment; and Part 3: Other Payment Change. The Subcommittee recommends for publication amendments modifying the form by creating a new Part 3 for the Annual HELOC Notice. It would solicit the information required by proposed Rule 3002.1(b)(2). The following direction would be added under "New total payment" at the top of the form: "For HELOC payment amounts, see Part 3." Existing Part 3 would become Part 4.

Because the process for amending official forms is one year shorter than the period for amending rules, the amendment to Official Form 410S1 could be published for comment in 2024 and, if approved, go into effect at the same time as the proposed amendments to Rule 3002.1, which were published for comment in 2023. The Advisory Committee approved the amendments for publication.

(B) *Consider Endorsement of Proposed Changes to Director's Form 1340 (Suggestion 23-BK-I)*

Judge Kahn and Professor Bartell provided the report.

The Unclaimed Funds Expert Panel of the Financial Managers Working Group submitted a suggestion for amendments to Form 1340 (a Director's Form by which an applicant may seek payment of unclaimed funds), and to the instructions accompanying that form. The concern expressed by the Expert Panel was that fraudulent applications may be filed by persons who assert that they are a successor claim holder when in fact they are not. The proposed amendments would, among other things, require notice to be given to the owner of record and all other prior owners of the claim when the claim has been transferred, assigned, purchased, obtained by merger or acquisition, or another means of succession.

There were five changes suggested to the Form itself, and four suggested changes to the instructions. The Subcommittee accepted some of the proposed changes and rejected others, and recommended the revised form to the Advisory Committee for its approval and submission to the Administrative Office to make the changes.

Professor Cathie Struve suggested another change to the form and one to the instructions. In Part 2 of the form, second bullet point, she suggested adding the word "other" before the words "previous owner(s)" to be consistent with the instructions. In Part 2 of the form, third bullet point, and in the instructions, paragraph II(d)(2) on certificate of service, she suggested adding the word "Applicant" before "has enclosed a statement." She also noted duplicate language in the second bullet point of Part 2 of the form and suggested deleting "the names of" before "the Owner of Record."

Judge Isicoff had previously reported that the Bankruptcy Committee recommended a small change to the form and instructions to insert the words "or an explanation why doing so is not necessary" after the words "was not able to do so" in part 2, third bullet point, of the form and in paragraph II(d)(2) on certificate of service in the instructions. The Advisory Committee agreed to those changes.

Judge McEwen asked why there is a notary form rather than an option to make a declaration under penalty of perjury. Professor Bartell and Judge Kahn noted that this is not a change in the amended form, and they are not in a position to address why the original form was drafted in that manner.

The Advisory Committee approved the revised form and instructions and directed the Administrative Office to implement them.

(C) ***Possible reconsideration of Proposed Amendments to Official Forms 309A and 309B***

Professor Gibson provided the report.

At its fall meeting in 2022, the Advisory Committee approved for publication an amendment to part 9 (Deadlines) in Form 309A and 309B to set out the deadline to file the financial management course certificate and alert the debtor that the debtor must take an approved course about personal financial management and file with the court the certificate showing completion of the course unless the provider has done so.

Because the Consumer Subcommittee was considering whether the deadline in Rule 1007(c)(4) for filing the certificate of course completion should be eliminated, the Advisory Committee did not seek publication for public comment in June 2023. The Consumer Subcommittee has now recommended, and the Advisory Committee has approved, amendments to rule 1007(c)(4) eliminating a deadline for filing the certificate. As a result, the Subcommittee must consider whether to recommend withdrawal of the proposed amendments to Forms 309A and 309B or recommend a revision of the proposed amendment that eliminates any reference to a

deadline. The Subcommittee will make its recommendation at the spring 2024 meeting of the Advisory Committee.

6. **Report of the Technology, Privacy and Public Access Subcommittee**

(A) ***Continued Consideration of Suggestion 22-BK-I to Require Redaction of the Entire Social Security Number from Public Court Filings, Including the Last Four Digits of the Number***

Professor Bartell provided the report.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be "scrubbed of personal information before they are publicly available." Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number ("SSN") from court filings, have been filed as a suggestion with each of the Rules Committees. The Bankruptcy Rules suggestion has been given the label of 22-BK-I.

At its last meeting the Advisory Committee agreed with the recommendation of the Subcommittee to defer consideration of the suggestion until the Federal Judicial Center completed its pending studies that would update the 2015 FJC privacy study and gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings.

Since the last Advisory Committee meeting, the FJC has informed the Subcommittee that the privacy study will be limited to an examination of whether filings are complying with existing privacy rules. They will not study whether there have been any privacy breaches based on the redacted SSN because such a study is not feasible. In light of that information the Subcommittee still thinks the FJC privacy study may be useful in determining the extent to which disclosure of SSNs actually occurs, and whether those disclosures are made in the bankruptcy forms themselves or in documents that are attached to the forms by debtors, creditors and their attorneys. The Subcommittee also wishes to consider whether creditors actually need the last four number of the redacted SSN on all court filings where it is currently required by rule but not by statute.

Some information is going to be solicited in connection with Suggestion 23-BK-D regarding the need for full captions on Rule 2002 notices. The Subcommittee also wishes to consider whether there are benefits to the debtor if some bankruptcy filings, such as the discharge form, include the truncated SSN. The Subcommittee will be continuing to gather information to inform a recommendation on the suggestion at a future meeting.

Deb Miller stated that she had already begun the process of reaching out to various creditor groups, and they are looking forward to providing information.

(B) ***Consideration of Suggestions 23-BK-D and 23-BK-J to amend restyled Rule 2002(o) (currently 2002(n)) to eliminate the requirement that all notices given under Rule 2002 comply with the caption requirements set forth in Rule 1005***

Professor Bartell provided the report.

A suggestion was made by the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the eighth Circuit joined, suggesting that Rule 2002(n) (restyled Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

The clerks of court stated that the caption requirements "are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice" but also noted that bankruptcy courts in the Eighth Circuit routinely only provide the Rule 1005 captions only on the Notice of Bankruptcy Case (Official Forms 309A-I) and thereafter use the shorter caption.

The same concern was expressed at the time the rule was amended in 1991, and the Advisory Committee at its meeting of March 15-16, 1990, unanimously declined to provide for Rule 2002 notices to use the short caption rather than the Rule 1005 caption, agreeing with the reporter that "some creditors rely on the social security number to identify the debtors."

But no empirical research was done at the time, and if creditors have no need for the full caption after the notice of meeting of creditors, the suggestion might have merit. Deb Miller offered to create a survey (with the help of Jenny Doling) to canvas some creditor groups to try to ascertain whether they need the full caption on all Rule 2002 notices. After the Subcommittee receives the results of that survey, it will consider the suggestion further.

(C) ***Consider suggestion 23-BK-C from the National Bankruptcy Conference dealing with remote testimony in contested matters***

Professor Bartell provided the report.

The National Bankruptcy Conference submitted proposals to amend Rules 9014 and 9017 and create a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

The suggestion proposes to eliminate the incorporation by reference in Rule 9017 of Fed. R. Civ. P. 43 (which generally requires witnesses' testimony to be taken in open court unless the court permits remote testimony "for good cause in compelling circumstances"), so it would no longer be applicable "in a bankruptcy case." Instead, new Rule 7043 would make Civil Rule 43 applicable in adversary proceedings. Rule 9014, dealing with contested matters, would be amended in two respects. First, it would make Civil Rule 43(d) (dealing with interpreters) applicable to contested matters and insert language identical to Civil Rule 43(c) (dealing with evidence on a motion). Second, it would delete the language requiring that testimony in a

contested matter be taken in the same manner as testimony in an adversary proceeding and instead insert language that mirrors Civil Rule 43(a) with the exception that the standard for allowing remote testimony would be "cause" rather than "good cause in compelling circumstances."

Professor Struve pointed out that in the committee note the words "advisory proceedings" should be "adversary proceedings."

Tom Byron questioned whether some mention of the change from "good cause" to "cause" should be made in the committee note. This is a restyling convention, and is not intended to change the meaning of the phrase. After some discussion, it was agreed that the following language should be inserted in the committee note: "Consistent with the other restyled bankruptcy rules, the phrase "good cause" used in Fed. R. Civ. P. 43 has been shortened to "cause" in Rule 9014(d)(1). No substantive change is intended."

The Advisory Committee supported the proposed amendments as a substantive matter. But Judge Bates asked if this is the first step towards a broader push for remote hearings in bankruptcy cases. Several Advisory Committee members stated that it was not. Rather, it is a carefully tailored response to a serious issue of access to justice, especially for pro se litigants and small business owners who must provide information in connection with a bankruptcy case and cannot afford to take off from work or to travel long distances to the court. There is no suggestion that the rule would be expanded to adversary proceedings. Even for contested matters, the presumption is that all testimony will be live and in court, and any change from that requires a request and judicial permission.

Judge Bates noted that there is pressure by some parties to expand video conferencing in federal court, and a CACM subcommittee is looking at the issue more broadly and will be reporting at its meeting in December. He suggested that the proposed rule amendments not be presented to the Standing Committee at its January meeting, but instead be held until the Advisory Committee can coordinate with CACM and get input as to whether these amendments cause any problems. Tom Byron stated that he has already been consulting with CACM staff, and the coordination can continue in preparation for the December CACM meeting.

Judge Bates also asked whether the Advisory Committee anticipates public reaction to these amendments saying that they do not go far enough to provide remote opportunities to the litigants. Judge Kahn thought there might be such a reaction, although the Judge Connelly was not so sure. Most bankruptcy practitioners recognize that evidence must be taken in a courtroom. This rule does not change that; it addresses a discrete problem. Judge Krieger agreed that in bankruptcy there is not a big appetite for remote hearings. The bankruptcy courts are likely to let other courts take the lead on this issue.

Dave Hubbard cautioned that the amended rules make it very important to determine whether a particular proceeding is an adversary proceeding or a contested matter. He said that sometimes parties bring an action as a contested matter when it actually should be an adversary proceeding, and if this rule becomes effective the agencies are not likely to let that slide.

Judge Harner suggested approving the proposed amendments, subject to coordination with CACM. Judge Krieger suggested deferring consideration of the amendments until the spring meeting, given that they could still be published if they are presented to the Standing Committee at its June meeting and delay would help with coordination efforts. The Advisory Committee voted to defer consideration of the amendments until its spring meeting.

7. **Report of the Business Subcommittee**

(A) ***Consider Suggestion 23-BK-F from the National Bankruptcy Conference regarding the method of voting in Chapter 9 and 11 cases under Rule 3018(c)***

Professor Gibson provided the report.

The National Bankruptcy Conference (NBC) proposes an amendment to Rule 3018(c) to authorize courts to treat as an acceptance or rejection of a plan in chapter 9 and chapter 11 cases a statement of counsel or other representatives that is part of the record in the case, including an oral statement at a confirmation hearing.

The problem addressed by the suggestion is the failure of the IRS and certain other federal and state agencies that are repeat players in bankruptcy cases to submit ballots either accepting or rejecting a proposed plan, even when they have no objection to the plan. Courts differ on whether failure to reject the plan is a deemed acceptance. The problem is particularly acute in Subchapter V cases, because if a creditor in an impaired class by itself does not submit a ballot, the plan becomes nonconsensual even if the nonvoting creditor supports confirmation. The plan then must be confirmed under § 1191(b) with a less favorable discharge available under § 1192.

The Subcommittee considered why the IRS and other agencies decline to vote. It is thought that the process for determining how a federal agency will vote on a reorganization plan is a complex one. For example, under § 1126(a) of the Bankruptcy Code, the decision whether to accept or reject the plan on behalf of the United States when the United States is a creditor or equity security holder must be made by the Secretary of the Treasury. Obtaining that decision might be time-consuming, especially if there is more than one federal agency involved in the case. The agency may also be reluctant to take a position on the plan as a whole rather than just its own treatment, so may be willing only to say that it does not oppose confirmation rather than stating that it supports the plan.

If the federal government is not willing to accept the plan at any time, including orally at the confirmation hearing, the proposed amendment may not make any difference. But the Subcommittee did agree with the NBC that if a nonvoting creditor stated on the record or stipulated its acceptance of the plan, even if it did not submit a ballot by the deadline for voting, its action should constitute a valid acceptance. It is possible that courts may view the statements made by the representatives of federal agencies to constitute acceptances under the amended

rule. Therefore, the Subcommittee recommended an amendment to Rule 3018(c) for publication which would allow an acceptance (or the change or withdrawal of a rejection) to be made in a statement on the record, including an oral statement at the confirmation hearing or a stipulation, made by an attorney for or an authorized agent of the creditor or equity security holder.

Judge McEwen agreed that the reasons suggested why agencies do not vote on plans is probably accurate. Dave Hubbard agreed that the current rule is too formalistic, but expressed worry about the impact of the amended rule in non-subchapter V cases, especially when there are last minutes changes to the plan of reorganization that might have serious consequences, such as third-party releases and exculpatory clauses. He emphasized that creditors are not legally required to vote, and they may have good reasons for declining to do so.

Ramona Elliott stated that the proposal is animated by subchapter V cases. Subchapter V has a mechanism for confirmation without acceptance, and the ABI Task Force on Subchapter V is looking at this very issue. There may be other available approaches to solving the problem. But this amendment is not likely to do so. Government agencies may still decline to accept a subchapter V plan.

Damian Schaible stated that he understands why creditors should be able to change their votes, and he supports that. But he doesn't think this is going to change agency policy. The merit of the proposed amendments is to permit a change of vote on the record as part of settlements at the confirmation hearing without further formal proceedings. This would not eliminate the requirements for revoting if there was a material change to the plan.

Judge McEwen stated that this amendment gives courts the flexibility to do what they are doing now. If there was a substantive change to the plan, there would be reballoting.

Judge Isicoff noted that the issue arises not only in subchapter V cases. She said she has these issues in single asset real estate cases all the time. The bank doesn't oppose the plan but refuses to sign a ballot that votes in favor of the plan. It is not limited to various government agencies. Lawyers have apologetically explained this to her at confirmation hearings.

Judge Kahn noted that Congress explicitly declined to treat failure to vote as an acceptance in the Small Business Reorganization Act, and these amendments do not do that. The amendments allow an affirmative statement on the record that the creditor supports confirmation to be treated as acceptance. Silence is not acceptance, and affirmative refusal to approve is not acceptance.

Mr. Schaible stated that these amendments do not solve the problem that motivated the National Bankruptcy Conference to make the suggestion, but they are useful for other purposes.

Professor Struve suggested a stylistic change. In Rule 3018(c)(1)(B) she suggested changing the words "that is" to "in a statement that is" and deleting the words "in a statement that is" at the beginning of (i).

It was also suggested that the committee note include language stating that "nothing in this rule is intended to create an obligation to accept or reject a plan."

The Advisory Committee approved both changes, and by a 12-to-1 vote approved the amended Rule 3018(c) for publication for public comments.

8. **Reporter Memo**

(A) ***Recommendation from Professor Bartell concerning Suggestion 23-BK-E recommending legislative and rule amendments to address contempt proceedings***

Professor Bartell provided the report.

An attorney in Baltimore, Maryland, Joshua T. Carback, submitted a "proposal for reforming judicial rules governing contempt proceedings." He proposed an amendment to Section 105(a) of the Bankruptcy Code to expressly allow bankruptcy courts to issue orders for civil and criminal contempt. If such a statutory change is made, he proposed amendments to Bankruptcy Rule 9020 to incorporate a new Fed. R. Civ. P. 42 governing civil contempt that would be similar to Fed. R. Crim. P. 42, which would also be amended "to eliminate unnecessary criminal contempt statutes and trim unnecessary contempt provisions in other criminal rules."

Because the Advisory Committee is not the proper venue for proposals to amend the Bankruptcy Code, and all proposed rule amendments are dependent on a statutory change to the Code, Professor Bartell recommended no action on the suggestion.

The Advisory Committee agreed to take no action on the suggestion.

9. **Update on the Work of the E-filing Deadline Joint Subcommittee**

Professor Struve gave the report.

The Joint Subcommittee was tasked with considering a suggestion made in 2019 by now-Chief Judge Michael Chagares of the U.S. Court of Appeals for the Third Circuit (and then chair of the Advisory Committee on Appellate Rules) to all the advisory committees that consideration be given to amending the rules to provide that the current midnight electronic filing deadline be rolled back to an earlier time, such as when the clerk's office closes in the respective court's time zone.

The Joint Subcommittee considered information received from the FJC in 2022 about actual filing patterns that shows that about 80% of filings in federal bankruptcy, district and appellate courts were made between 8 a.m. and 5 p.m. The Joint Subcommittee also considered the new Third Circuit rule (effective July 1, 2023) that moved the presumptive deadline for most electronic filings in that court of appeals from midnight to 5 p.m. The new rule evoked strong negative reactions from the bar. An internal Department of Justice survey of attorneys also

elicited negative comments, and one Subcommittee member reported similar reactions within that member's law firm.

After careful discussion at its meeting in August, the Joint Subcommittee unanimously voted to recommend that no action be taken on the suggestion, and that the Joint Subcommittee be disbanded. The Joint Subcommittee has on its docket Suggestion 19-BK-H, and the Advisory Committee must decide what to do with that suggestion.

The Advisory Committee decided to take the suggestion off its agenda.

10. **Update on the Work of the Pro-Se Electronic Filing Working Group**

Professor Struve gave the report.

The working group has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program. Professor Struve had hoped to be able to circulate a set of proposed rule amendments designed to eliminate the requirement of paper service on those receiving NEFs in time for the fall advisory committee meetings.

When the working group had its virtual meeting last week, the group seemed supportive of the concept. But the group felt that the proposed sketch of the possible amendment that she provided to the working group requires a rather significant re-draft. Therefore she is not circulating anything written to the advisory committees, because further work will be needed before the draft is ready for advisory-committee consideration.

However, the basic ideas that are under consideration among the reporters, as to service and perhaps also as to filing, are the following:

On service, in addition to eliminating the requirement of paper service on those receiving NEFs, the new idea would be to perform a more general overhaul of the service provisions with a view to making some other adjustments to reflect modern practices – in particular, to reorder the treatment of service so as to first discuss service by means of the NEF and then, only after that, to discuss other means of service that would be used when serving people who do not receive NEFs. She suggested that we might also consider a simpler description of service by means of the NEF, that would say something like, "the court's sending of the NEF counts as service" (precise wording still to be determined). The rules might also address the treatment of documents that are to be served but not filed with the court, perhaps by setting a presumption that service can be done by email to the email address that the court uses for NEFs. Further drafting is necessary before we can proffer these proposals concretely for each advisory committee to consider.

Ken Gardner said that one of the issues he is confronting is regarding the claims docket. The clerk's office gets two addresses on the claims form, one for notice and one for service. When they give the service list to the attorneys to serve anything under Rule 2002, for example, that list is inaccurate in many courts because the BNC has something behind the scenes that allows courts, if there is a nationally-filed address, to reconcile that and send the notice to the correct address. But if there is a different address on the claim form, it is possible that it won't be reconciled with the nationally-filed address because the attorney does not send through the BNC. One could revise the claim form to remove the second address, but otherwise we have to recognize that this is happening for attorneys who are trying to serve something. The BNC software is not shared with the clerks' offices because it is proprietary. This is a big issue for courts that should be considered by the Working Group. The attorneys cannot rely on the creditor matrix.

On filing, the new potential idea would be to consider the possibility of drafting a rule that would disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. The idea would be that even if a court generally disallows CM/ECF access for self-represented litigants, it should make reasonable exceptions to that policy. This idea is still in the nascent stages, and the reporters still need to hash out how the details might work. It is not clear whether this is an area where a uniform approach should be adopted across all rules, or one Advisory Committee should proceed ahead of the others. But Professor Struve welcomed suggestions on how to draft such a provision that would alleviate the CM/ECF-access skeptics' concerns.

11. New Business

There was no new business.

12. Future Meetings

The spring 2023 meeting has been scheduled for Apr 11, 2024, in a location to be announced.

13. Adjournment

The meeting was adjourned at 2:20 p.m.