MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 11, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 29 and 30, 2014, in Charleston, South Carolina. The draft minutes of that meeting appear in Appendix B to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and bankruptcy organizations. It also received and discussed updates on several ongoing projects.

The Advisory Committee is presenting one action item at this meeting—an amendment to Rule 1001 to bring it into conformity with Civil Rule 1. Part II of this report discusses that amendment. In addition, the report provides information about other rule and form amendments considered at the fall meeting. Part III provides an overview of the comments that have been received to date on the proposed official form for chapter 13 plans and implementing rule amendments, which were republished in August. Part IV reports on the status of the Forms Modernization Project and plans for its implementation. Finally, Part V discusses the

Committee's consideration of several proposals referred by the Standing Committee's Subcommittee on CM/ECF.

II. Action Item—Rule 1001 for Approval For Publication

Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding," while Civil Rule 1 states, "[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The pending amendment to Rule 1, which is expected to become effective on December 1, 2015, revises the current rule to state, "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee Note explains that "Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."

The Advisory Committee concluded that for purposes of consistency, we should revise Rule 1001 to track the language of Rule 1. The amendment to Rule 1 was part of the Duke Rules Package, and the other rule amendments in that group—to Civil Rules 4(m), 16, 26, 30, 31, 33, 34, 36, and 37—will automatically become part of the Bankruptcy Rules because those rules are made applicable in adversary proceedings. Moreover, deviation from the civil rule's language could give rise to a negative inference that the bankruptcy rule differs in the extent to which it encourages cooperation.

In considering whether to amend Rule 1001 to include the pending amendment to Rule 1, the Committee noted that the bankruptcy rule has never been amended to reflect the 1993 amendment to Rule 1, which added the words "and administered" to the last sentence. The Committee concluded that the language of the 1993 amendment should also be included in Rule 1001 so that the command of the two rules will be the same ("construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding").

The Advisory Committee unanimously recommends that the proposed amendment to Rule 1001, which is set out in Appendix A, be approved for publication.

III. Comments on the Proposed Chapter 13 Plan Form (Official Form 113) and Related Rule Amendments

The Advisory Committee has been at work for several years on a chapter 13 plan form project. The project has produced a proposed Official Form 113 for chapter 13 plans and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009. The plan form and rule amendments were first published in August 2013 and generated a large number of comments. Based on those comments, many of which were critical, the Advisory Committee made significant changes to the plan form and sought approval to republish it and the rule amendments. The Advisory Committee also received approval to ask for public comment on the question whether the rule amendments should be adopted even if the form is not adopted. The form and rules, together with that request for comment, were published in August 2014.

The plan form and rules have generated fewer comments so far than did the initial round of publication in 2013. To date, only seven comments have been received (compared to approximately two dozen received by the same point last year). We have not yet received any comments addressing the question whether the rule amendments should proceed even if the plan form is not adopted.

With respect to the rule amendments, we have received a number of comments criticizing the proposed amendment to Rule 3002. Under the current rule, creditors must file a proof of claim no later than 90 days after the meeting of creditors under Code § 341. Under the proposed amendment, creditors would have to file their proof of claim 60 days after the order for relief (which means the petition date in the vast majority of bankruptcy cases). Three comments—two of them using substantially similar language—express the view that creditors should be allowed to file their proof of claim 90 days after the order for relief, because a 60-day time frame does not give creditors sufficient time. A chapter 13 trustee in Kansas submitted a comment criticizing a different aspect of the proposed change to Rule 3002. The current rule gives a single time period for filing a proof of claim, with no extra time to file supplemental materials for the claim. The amended rule would give a mortgage creditor 60 days to file its initial proof of claim but allow an additional 60 days to file supporting documents required by Rule 3001(c)(1) and (d) (namely, written mortgage documents and documents evidencing that the creditor's security interest has been perfected). In the commenter's view, giving the mortgage creditor an additional 60-day period to file supporting documents will delay confirmation of many chapter 13 plans.

With respect to the plan form itself, the comments submitted so far are mixed. The trustee in Kansas and a group of trustees in the Central District of California raised specific concerns about various parts of the form. Bankruptcy Judge Robert E. Grant (N.D. Ind.) submitted a comment reiterating the position taken by judges of his district that the Code does not permit a court to mandate the use of a particular form, national or otherwise, for chapter 13 plans. In contrast, Bankruptcy Judge Keith Lundin (M.D. Tenn.) submitted a lengthy comment endorsing the Advisory Committee's proposed plan form. Judge Lundin predicts that there will be opposition to the proposed form and rule amendments based on adherence to "local culture"

in chapter 13 practice. He urges the Advisory Committee to consider the costs of deferring to local preferences, including the inefficiencies produced by wide variations in the way the same information is presented in different courts. In Judge Lundin's estimation, adoption of the plan form and rule amendments is long overdue and "will be a huge improvement in Chapter 13 practice."

The Advisory Committee has also received two requests so far to testify at a public hearing about the plan form and rule amendments. In addition, we understand that different groups of bankruptcy judges are soliciting signatures on two different letters, one supporting the plan form and one opposing it, with the intent of submitting the signed letters as comments.

The Advisory Committee expects to receive many more comments near the close of the public comment period. After the close of the public comment period, we intend to circulate comment summaries to the full Advisory Committee before the spring meeting agenda book is finalized, and make some preliminary decisions, based on the nature and volume of comments received. Among the options we will consider are whether we should recommend: (1) moving forward with final adoption of the plan form and rules, (2) making further significant adjustments to the package to address specific comments, or (3) proceeding in an incremental fashion by first issuing the plan form as a Director's Form, rather than as an Official Form.

IV. Update on the Status of the Forms Modernization Project

The Advisory Committee is approaching the conclusion of its multi-year forms modernization project ("FMP") to revise many of the Official Bankruptcy Forms. The dual goals of the FMP are to improve the bankruptcy forms so that questions are clearer and answers more accurate, and to improve the interface between the forms and available technology. Among other things, the Judiciary's CM/ECF system ("NextGen") should be able to extract data from the modernized forms so that each clerk's office or chambers could produce customized reports containing the desired data in any desired format.

The Advisory Committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. The first group of forms was published for comment in August 2012, and four of those forms (fee waiver and fee installment forms, and income and expenses schedules) went into effect on December 1, 2013.

In August 2013, appellate forms and most of the modernized forms for individual debtor cases were published, and revised means test forms were republished. The Standing Committee gave its final approval to this second group of forms at the May 2014 meeting. On December 1, 2014, the appellate forms and the means test forms went into effect. The Standing Committee held the other individual debtor forms in abeyance to allow them to go into effect simultaneously with the modernized forms for non-individual debtor cases.

The third group of modernized forms, including the ones for non-individual debtor cases, was published in August 2014. So far no comments have been submitted in response to this publication. The Advisory Committee will review any comments that are submitted at its spring meeting. If the Advisory Committee approves the forms, it will seek the Standing Committee's final approval of the third group at the May 2015 meeting. At that point, if approved, we will be ready to send the non-individual debtor forms as well as the previously approved individual debtor forms to the Judicial Conference for approval, which would give the forms a December 1, 2015, effective date.

At our September meeting, we learned that there might be delays in upgrading the NextGen system to allow the bankruptcy courts to use the data in these bankruptcy forms to prepare customized reports. We also heard concerns that the issuance of the modernized forms could impact a pilot project that allows pro se debtors to input bankruptcy information directly into the court system (eSR/Pathfinder), which is in use at three bankruptcy courts. Based on recent discussions with the Case Management Systems Office of the Administrative Office, we are cautiously optimistic about both issues. The chief of the Case Management Systems Office has indicated that the technology necessary for the bankruptcy courts to extract data from the modernized forms and write customizable reports should be ready by December 2015. The chief also indicated his intent to support the eSR/Pathfinder project in a timely manner.

Even if our optimism turns out to be unwarranted, the Advisory Committee anticipates that it will ask the Standing Committee in May to approve the release of the individual and non-individual modernized forms on schedule. The modernized forms are far superior to the existing ones for both bankruptcy practitioners and pro se debtors, and we expect only a brief delay (if any) for the technology to catch up. Because the Advisory Committee has been preparing the bankruptcy community and software vendors for the release of the new forms for several years, there seems to be no reason to delay implementation even though the full benefit of the new forms may not be immediately achievable.

There remains one small group of modernized forms (Official Forms 25A, 25B, 25C, and 26) that has not yet been published. The Advisory Committee intends to seek the publication of this last group at the May 2015 Standing Committee meeting.

V. Consideration of Proposals Referred by the Subcommittee on CM/ECF

At the fall meeting, the Advisory Committee considered three matters referred by the Standing Committee's Subcommittee on CM/ECF.

(1) One issue, prompted by possible action by the Civil Rules Committee, is whether there should be a national rule mandating the use of electronic filing, subject to certain exceptions.

(2) A second set of issues is whether to have a national rule allowing electronic service of documents after the summons and complaint without obtaining the consent of the person served and whether to allow a notice of electronic filing to replace a certificate of service.

(3) The third issue the Advisory Committee considered is whether the Bankruptcy Rules should contain a rule that would provide that references to paper documents and to physical transmission include electronically stored information and electronic transmission.

Required Electronic Filing. Bankruptcy Rule 5005(a)(2) provides that local rules may "permit or require" electronic filing, whereas Civil Rule 5(d)(3) provides that local rules may "allow" electronic filing. Both rules, however, go on to provide that a "local rule may require electronic filing only if reasonable exceptions are allowed." The Advisory Committee understands that the Civil Committee intends to consider a possible amendment to Rule 5(d)(3) to create a national requirement for electronic filing, subject to an exception for good cause and ones imposed by local rule. The Advisory Committee voted to wait to see what action the Civil Committee takes before considering whether Rule 5005(a)(2) should be similarly amended.

Electronic Service Without Consent. The Advisory Committee also discussed other possible amendments to Rule 5 under consideration by the Civil Rules Committee. We understand the Civil Rules Committee is considering the following amendments: (i) amending Rule 5(b)(2)(E) to eliminate the consent requirement for the use of electronic service and (ii) amending Rule 5(d)(1) to allow a notice of electronic filing to take the place of a certificate of service. Bankruptcy Rule 7005 adopts Civil Rule 5 for adversary proceedings, and there is not a separate bankruptcy rule that addresses these service issues. Therefore any amendment to Rule 5 would become applicable in bankruptcy adversary proceedings unless the bankruptcy rule were amended to deviate from the civil rule. The Advisory Committee voted to defer further consideration of the matter until the Civil Committee decides whether to propose any amendments.

Amendment of Rules to Accommodate Electronic Filing and Information. The final issue referred by the CM/ECF Subcommittee was whether the various federal rules should be amended to have them more fully reflect the ubiquity of electronic filing and transmission of court documents. The CM/ECF Subcommittee asked each of the Advisory Committees (other than Evidence) to consider the following template for a rule that would expand the meaning of various terms to include electronically stored information and electronic transmission:

Rule ___. Information in Electronic Form and Action by Electronic Means

a) Information in Electronic Form: In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

b) Action by Electronic Means: In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

> accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The Advisory Committee noted that, if such a rule were proposed, we would need to consider whether to make exceptions to either provision in order to require some documents to be in written form or some actions to be accomplished by physical delivery and whether we should add terms in addition to "filing" and "sending" in subdivision (b). Bankruptcy Rule 5005(a)(2) currently states that a "document filed by electronic means in compliance with a local rule constitutes a written paper for the purposes of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code." The Advisory Committee referred the CM/ECF Subcommittee's template to its Subcommittee on Technology and Cross Border Insolvency for consideration of whether the current provision in Rule 5005(a)(2) is sufficient, whether it should be expanded to cover documents that are not filed (as in subdivision (a) of the template) and to cover actions referred to in the rules (as in subdivision (b) of the template), and whether we should add exceptions to either provision.

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APPENDIX

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Appendix A

PROPOSED AMENDMENT TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 1001. Scope of Rules and Forms; Short Title

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word "administered" is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

The addition of the phrase "employed by the court and the parties" emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

* New material is underlined; matter to be omitted is lined through.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 29-30, 2014
Charleston, S.C.

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert J. Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Stuart M. Bernstein
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
Matthew Troy, Esquire
David A. Lander, Esquire
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Professor Daniel Coquillette, reporter for the Standing Committee
Jonathan Rose, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees
Bankruptcy Judge John E. Waites, liaison from the Committee on the Administration of the Bankruptcy System
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Scott Myers, Esq., Administrative Office
Bridget Healy, Esq., Administrative Office
Molly Johnson, Senior Research Associate, Federal Judicial Center
Michael T. Bates, Senior Company Counsel, Wells Fargo
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, National Association of Bankruptcy Trustees
Patricia Ketchum, consultant to the Committee

James Wannamaker, consultant to the Committee
Michael McCormick, McCalla Raymer LLC, Atlanta, GA

Introductory Items

1. Greetings and expression of appreciation

Judge Eugene Wedoff opened the meeting and expressed his appreciation to those members leaving the Committee, including Judge Elizabeth Perris, Michael St. Patrick Baxter, and David Lander. Judge Sandra Ikuta thanked Judge Wedoff for his service to the Committee, and Judge Wedoff thanked the group for their work, specifically noting the work by Judge Perris on the Forms Modernization Project (FMP).

Judge Wedoff welcomed new members Judge Stuart Bernstein, Judge Dennis Dow, Judge A. Benjamin Goldgar, Jeffery Hartley, and Thomas Mayer. Finally, he noted that Judge John Waites was attending the meeting in place of Judge Erithe Smith to report on the work of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

2. Approval of minutes of Austin meeting of April 22-23, 2014.

The minutes of the meeting of April 22-23, 2014 were approved.

3. Oral reports on meetings of other committees:

(A) May 2014 meeting of the Committee on Rules of Practice and Procedure

Judge Wedoff noted that the draft minutes from the May 2014 Standing Committee meeting were included in the agenda materials at Tab 3A. All of the recommendations from this Committee were approved by the Standing Committee. The non-individual forms were approved for publication, along with the revised version of the chapter 13 plan form and related rules, the chapter 15 petition and related rules, Official Form 410A (attachment to the proof of claim form), and amended Bankruptcy Rule 9006(f) to eliminate the three-day extension of service for electronic service. These were published in August 2014.

(B) Intercommittee - CM/ECF Subcommittee.

The Reporter updated the Committee on the work on the subcommittee. The subcommittee is reviewing whether the national rules should be amended to make electronic filing mandatory, rather than leaving the decision up to local rules. She advised that Bankruptcy Rule 5005 authorizes local rules to require electronic filing and all districts have exercised this authority, but because Bankruptcy Rule 7005 refers to

Civil Rule 5, the Committee should review Bankruptcy Rule 7005 if Civil Rule 5 is amended to mandate electronic filing subject to local rules exceptions. The subcommittee is also looking at whether the requirement of consent should be eliminated from rules allowing electronic service; however, such a change is likely to have little practical impact on bankruptcy practice since registration with the CM/ECF system is deemed to constitute consent to electronic service.

The Reporter stated that the Committee on Court Administration and Case Management (CACM) asked the subcommittee to look at the issue of whether a notice of electronic filing (NEF) can be considered the equivalent of a certificate of service**.** If this change is made, the Committee should consider whether there are any amendments required to the bankruptcy rules as a result. Judge Elizabeth Perris noted a caveat with allowing the NEF as proof of service, stating that it would increase the work for bankruptcy courts because it would require judges to check various places to determine if service was properly completed.

The Reporter concluded that the final issue being considered by the subcommittee is whether electronic alternatives should be added to any definitions in the rules regarding transmitting or filing documents. The Committee discussed the specific issues that could impact bankruptcy courts if this change was adopted. The Chair referred the matter to the Subcommittee on Technology and Cross Border Insolvency for further consideration.

(C) June 2014 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Waites reported on the June 2014 Bankruptcy Committee meeting. He stated that the Bankruptcy Committee determined to support converting temporary judgeships to permanent judgeship positions and creating new permanent judgeships. In connection with this issue, Judge Waites advised that the bankruptcy case weights formula was changed for evaluating the need for new judgeships. To assist with current judgeship needs, the Bankruptcy Committee recommended that districts with open judgeship positions "lend" the judgeships to districts with a need for judgeships. The new judge would be appointed for a 14 year term but would spend approximately five years in the district with the need for a new judgeship. This recommendation was approved by the Judicial Conference. Currently, this impacts the District of South Dakota, the Middle District of Florida, the District of Iowa, and the Eastern District of Michigan.

Judge Waites noted several other issues under consideration by the Bankruptcy Committee, including its oversight of the Bankruptcy Administrator program. In addition, the Bankruptcy Committee is reviewing a pilot program run by the Third Circuit in which funds obtained through savings in chambers costs remain within the circuit.

Finally, Judge Waites stated that the Judicial Resources Committee raised several issues for consideration by the Bankruptcy Committee: the administration of smaller courts; the desirability of the continuation of the Bankruptcy Administrator program, and the operation of bankruptcy clerks' offices. The Bankruptcy Committee is reviewing these issues and will respond in due course.

(D) Spring 2014 meeting of the Advisory Committee on Civil Rules and hearing on rules published for comment.

Judge Arthur Harris reported that the proposed amended civil rules, including a package of proposed amendments focusing on changes to discovery rules, frequently referred to as the "Duke Rules Package," which was published in August 2014, and the new electronic discovery sanctions, were approved by the Standing Committee and the Judicial Conference.

(E) April 2014 meeting of the Advisory Committee on Appellate Rules.

Judge Adalberto Jordan reported that the Advisory Committee on Appellate Rules considered three main issues. First, the time at which a mailing is effective if filed from prison by an inmate. Second, the change from page count to word count for appellate briefs. Third, whether amicus briefs can be permitted at the rehearing stage. The Appellate Committee considered a few other items, but none of them impacts bankruptcy practice.

(F) Bankruptcy Next Generation of CM/ECF Working Group.

This report was provided as part of the Forms Modernization Project report.

At the conclusion of the reports from other committees, Judge Wedoff noted that the Committee will no longer maintain liaisons to the Appellate and Evidence Committees.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Judge Arthur Harris provided a brief overview of the issue, referring to the memo at Tab 4A. The Judicial Conference adopted a policy that a case does not need to be reopened to redact a previously filed document. CACM has suggested that Rule 5010 be amended to reflect this policy. The subcommittee preliminarily concluded that such an

amendment should be made to Rule 9037 instead, along with the inclusion of procedures for redacting previously filed documents. There was no recommendation for specific language from the Consumer Subcommittee, but it will present language at the spring 2015 meeting. Judge Harris explained that Bankruptcy Rule 9037 prohibits the inclusion of certain information on filed documents and there were several cases involving large creditors redacting large numbers of previously filed documents. The method of redaction varies among districts, including how notice is provided. The subcommittee will consider several issues related to redaction, including when and how notice of a request for redaction should be provided to affected persons.

(B) Report concerning Suggestion 12-BK-I by Judge John Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Bankruptcy Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris explained that this issue has been under consideration for several years and that a report on the topic was completed by the Federal Judicial Center (FJC). Professor Gibson's memo on the topic was included at Tab 4B, and Molly Johnson's memo and research were included at Tab 4B.1. As background, Judge Harris stated that a debtor may seek to pay filing fees in installments. Often debtors do not complete the installment payments if a case is dismissed prior to completion of payment. Some courts instituted required minimum payments with applications to pay in installments. The subcommittee determined that minimum payments are permissible under the current rules with the limitations that (1) Rule 1017 does not permit a case to be summarily dismissed for lack of payment of the minimum fee and (2) a clerk cannot refuse to accept a petition if the upfront installment payment is not provided. Judge Harris concluded that the subcommittee does not believe any change to the current rules is required to permit upfront installment payments, so long as petitions are not refused or summarily dismissed for failure to make upfront installment payments.

Judge Harris advised that the research regarding upfront minimum payments showed a very small percentage difference in the number of fee waiver requests for courts that require an upfront payment for applications to pay in installments. Molly Johnson provided further detail about her report, stating that there was a very low rate of fee waiver filings, making it difficult to draw any conclusions about the potential impact on the level of fee waiver filings in courts that require upfront installment payments.

Judge Wedoff summarized that the subcommittee determined that the underlying Bankruptcy Code and rule provisions permit the practice of requiring upfront minimum payments with applications to pay in installments and that making a rule governing judges' discretion would be inappropriate. Several members commented that the FJC research includes evidence that some courts are rejecting filings when debtors do not have the upfront payments. Judge Wedoff responded that the legal requirements will be

communicated to judges through the minutes of this Committee, the response to the Bankruptcy Judges Advisory Group, and the educational programs of the FJC. A separate but related question was raised regarding the proper procedure in a case in which a debtor has unpaid fees from a prior case and requests to pay the filing fee for a subsequent case in installment payments. Judge Wedoff referred this matter as well as the issue of dismissing or rejecting petitions for failure to pay upfront minimum installment payments to the Consumer Subcommittee. For this reason, any communication to the Bankruptcy Judges Advisory Group will be delayed until after the spring 2015 meeting.

(C) Report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim.

Judge Harris reported that the subcommittee suggested setting up a working group to consider whether an overall review of noticing in the Bankruptcy Code and Bankruptcy Rules is necessary, and if so, the process for doing so. He advised that there were several suggestions for revising noticing procedures, and that each of the suggestions could be reviewed by the working group. These suggestions are outlined in memos at Tabs 4C and 7C.

Judge Stuart Bernstein spoke about the second suggestion (Item 7C), which was considered by the Business Subcommittee and stated that subcommittee supports the suggestion to create a working group.

(D) Oral report concerning suggestion 11-BK-N by David Yen regarding fee waiver forms to implement 28 U.S.C. § 1930(f)(3).

Judge Harris explained that the suggestion had been under consideration for some time. Given that there is no current guidance from the Judicial Conference to assist with consideration of the issue, the subcommittee recommended that the suggestion no longer remain under consideration. If the Conference does issue guidance, the suggestion can be revisited. For this reason, the subcommittee recommended taking no action on this suggestion, and the Committee agreed.

(E) Oral report concerning suggestion 13-BK-G that Rule 1015(b) be changed to use the word “spouse.”

Judge Harris reminded the group that the suggestion was discussed at the spring 2014 meeting and the Committee recommended waiting for further legal developments before making any changes to the rule given that this issue will likely be before the Supreme Court in the future. He further explained in response to a question that even if a change is made to the rule, a change is also required to the Bankruptcy Code; therefore it

makes sense to wait for further guidance from the Supreme Court. Several members noted that this issue exists in many federal statutes and Supreme Court precedent may make the wording of a rule or statute irrelevant.

Judge Sutton noted that the Committee could, but did not have to, make a conditional recommendation to the Standing Committee, one that would be dependent on the Supreme Court's resolution of the constitutional status of same-sex marriages. Judge Wedoff reminded the group that if the Committee makes a recommendation at either the winter or summer meeting of the Standing Committee, the timing for publication would be the same.

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

(A) Issues Related to Home Equity Loans and Lines of Credit: (1) Suggestion 14-BK-A by Michael Bates, Senior Company Counsel, Wells Fargo, to amend Bankruptcy Rule 3002.1 to address notices related to home equity loans and lines of credit, and (2) additional proposed amendments to Bankruptcy Rule 3002.1: (i) suggestion to add procedures for objecting to notice of payment changes; (ii) suggestion for declaring mortgage current when no arrearage is provide for in the chapter 13 plan; (iii) suggestion to clarify whether court approved charges must be reported; and (iv) whether the claims docket should continue to be used for filing notices of fees and expenses.

The Reporter explained the history of the mortgage forms revisions and the differences between traditional mortgage loans and home equity loans and lines of credit (HELOCs). The differences between the types of loans were discussed at the mini-conference held in the fall of 2012 and it was agreed that HELOCs should be treated differently than other mortgage loans for the reporting of payment changes during the course of a chapter 13 plan. The suggestion from Mr. Bates would retain a notice requirement for HELOC payment changes but would reduce the burden on servicers by limiting who must receive notice in some situations and by making easier the means of providing notice. The notice procedure would vary depending on whether the debtor makes the HELOC payments directly (non-conduit) or the trustee makes them (conduit). If the debtor is making payments directly, the mortgage servicer would provide notice of the change to the debtor only through a regular monthly statement. If the trustee is making the payments, the servicer would provide an electronic file to the trustee with the old payment amount and the new payment amount. If the change in payment amount is less than $25, the servicer would provide also provide notice to the debtor in the same manner as it provides notice of payment changes outside of bankruptcy. For changes exceeding $25, the servicer would have to comply with the current notice requirements of Bankruptcy Rule 3002.1(b) in addition to providing the electronic file to the trustee. A memo on the topic was included in the materials at Tab 5A.

The subcommittees concluded that the suggestion was too complex, and they recommended a simpler solution of adding a sentence that the notice requirements for payment changes for HELOCs could be modified by court order. In addition, the subcommittee recommended a Committee Note explaining the reasoning behind the added language and suggesting that local rules could be adopted or that procedures could be adopted in each case. The subcommittees asked that the Committee approve the language but not send it to the Standing Committee pending other changes that are in progress. A motion was made to approve the language, and the motion was approved.

Professor Edward Morrison asked about current practice. Judge Harris stated that Bankruptcy Rule 9006 can be used to modify the time requirements of Bankruptcy Rule 3002.1 in cases involving HELOCs, and he has not seen opposition to these types of requests by creditors. Professor Coquillette noted his continued concern regarding straying from uniformity in national practice.

Michael Bates provided some background regarding changes in payment amounts for HELOCs, stating that most changes are the result of a variable interest rate or because of the number of days in a month and are generally *de minimis*. The monthly statements debtors receive comply with other legal requirements such as the Truth in Lending Act.

A motion was made to hold the recommendation rather than to send it to the Standing Committee and the motion was adopted.

The Reporter continued with a suggested change to Official Form 410S1's language to reflect the fact that HELOCs are based on an account rather than a note. The subcommittees recommended this change; however because the form is currently out for publication, this suggestion will be considered with other comments at the spring 2015 meeting. The Reporter suggested that a language change could be made at that time with a notation that it was a change made after publication.

The Reporter concluded her report by stating that the remaining outstanding issues regarding the mortgage rules and forms were considered by the subcommittees and they recommended that a working group review these issues and suggest any possible amendments to Bankruptcy Rule 3002.1. With regard to the suggestion to place mortgage actions on the main docket rather than on the claims docket, the subcommittees recommended no action. The Committee accepted the subcommittees' recommendation.

(B) Suggestion from the National Association of Chapter 13 Trustees (NACTT) Mortgage Liaison Committee for proposed forms to implement Rule 3002.1(f) and (g).

The Reporter discussed the suggestion for proposed forms to implement Bankruptcy Rule 3002.1(f) and (g) and referred to the memo at Tab 5B. The

subcommittees considered the suggestion regarding proposed forms and reviewed the draft forms submitted by the NACTT's Mortgage Liaison Committee. The subcommittees agreed that the forms were well-drafted and believed that they would be useful as Director's Forms after review by a broader group. The subcommittees suggested that a working group review the forms, and the Committee agreed with the recommendation.

Judge Wedoff referred the review of the proposed forms to a working group and explained the difference between Official Forms and Director's Forms. Official Forms are reviewed and approved by the Committee, published, approved by the Standing Committee, and approved by the Judicial Conference. Director's Forms are drafted by the Administrative Office and often reviewed by the Committee, but are not mandatory and do not require any official approval or recommendation.

(C) Suggestion 14-BK-C from Professor Timothy Tarvin to amend Director's Form 201A to provide pre-filing notice of the privilege against self-incrimination in consumer bankruptcy cases.

The Assistant Reporter discussed the suggestion to add a warning to Director's Form 201A about the privilege against self-incrimination. A memo was provided at Tab 5C of the agenda materials. The subcommittees discussed the issue and noted that while this type of warning is provided in some other legal materials and the privilege against self-incrimination exists in bankruptcy, there are a number of issues with including the warning on Director's Form 201A. First, there is case law suggesting that a case may be dismissed if it cannot be administered because a debtor invoked the privilege, and second, including the language would be complicated and potentially incomplete. Another factor considered by the subcommittees was that the cases cited in the suggestion to support the inclusion of the warning may not have been decided differently if the privilege was invoked. Based on these reasons, the subcommittees recommended that no further action be taken on the suggestion, and the Committee agreed with the recommendation.

6. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project (FMP) including: (1) clean up issues pertaining to the means test forms; (2) proposed technical changes to previously approved individual debtor forms; (3) renumbering modernized Official Forms 3A, 3B, 6I, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2; and (4) renumbering proposed Official Form 112 to Official Form 108.

Judge Perris started the discussion with an explanation of the basis of the FMP, explaining that at the time the project started the forms had not been reviewed in total for over 20 years. The Next Generation of CM/ECF (Next Gen) project started at

approximately the same time and it made sense to plan to utilize the newly modernized CM/ECF system in connection with the forms.

Prior to giving a more detailed report on the FMP, Judge Perris provided an update on the work on the Next Gen CM/ECF Working Group (Next Gen Working Group). She provided a brief overview of the work of the Next Gen Working Group, stating that the group was reduced to a smaller group to prioritize the tasks to be done for Next Gen. The modernized forms are not a priority for completion for the Next Gen Working Group. Representatives of the Administrative Office's (AO) technology group were involved with the FMP from its inception and represented that the forms would be data-enabled and expandable. In addition, the AO technology group indicated that the data could be used to create a number of reports, both existing and to be developed. At some point after the creation of the modernized forms, the AO technology group determined that the development of the data elements on the forms would be delayed beyond the first release of Next Gen and that a business objects program would be used with the data. Jim Waldron explained the business objects program and advised that the issue of providing data to outside users is on hold.

Several members noted experiences with court employees assisting with program development for the AO, and they suggested that this procedure may assist with the completion of the work required to make the modernized forms useful in Next Gen.

Judge Perris stated that the Committee needs to continue pressuring the AO to complete the work on the forms. David Lander made the point that the cost to the bar, trustees, and debtors should not be overlooked, and that the new forms will have a real impact on cost without the technology piece.

Judge Perris cited the form chart included at Tab 6 listing the status of each form, and advised that all the forms are drafted and almost all have been published or approved by the Standing Committee. The few remaining forms, which have been reviewed and drafted, include the small business forms. The FMP recommended that these forms be referred to the Business Subcommittee for review, along with Exhibit A to current Official Form 1 (to be renamed Official Form 201A, see below). Tom Mayer explained the issue with this form, mainly that many companies de-register their companies prior to filing for bankruptcy. The form could be revised to reflect this practice, as well as to expand the time period for required reporting. A motion was made to refer the small business forms and Exhibit A to Official Form 1 to the Business Subcommittee for review, and the motion was approved. Judge Perris stated that a final project to be completed is the modernization of the Director's Forms.

Next Judge Wedoff explained a small change required to Official Form 22B to reflect the fact that a non-filing spouse's income is not relevant in an individual debtor case if it is not used to support the debtor or debtor's dependents. The change - the

deletion of lines 12-14 - will be made when the re-numbered forms are made effective with the other modernized forms (discussed below). Judge Wedoff confirmed that this is not a change that would require publication. A memo explaining the change was included in the materials at Tab 6.

Scott Myers reported on the modernized forms that must be renumbered to match the remainder of the modernized forms. Mr. Myers advised that the forms were included within the agenda materials at Tab 6 and he provided background regarding the purpose of the renumbering of the forms. A suggestion was submitted to renumber Official Forms 22A-1 through 22C-2 to Official Form 122A-1 through 122C-2. As a result, Official Form 8 will be renumbered as Official Form 108 rather than Official Form 112. The form number changes do not need to be published and can go into effect with the remainder of the modernized forms. A motion was made to approve the revised and renumbered forms and the motion was approved.

Mr. Myers continued that Exhibit A to Official Form 1 should be renumbered as Official Form 201A until any revised version of the form becomes effective. A motion was made to revise the motion previously made to include the renumbering of Exhibit A, and the motion was approved. The revised motion to approve the revised and renumbered forms was approved.

7. Report by the Subcommittee on Business Issues.

(A) Recommendation concerning *Stern* amendments to Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 previously approved by the Judicial Conference, but withdrawn from presentation to the Supreme Court in light of the pending *Arkison* matter.

The Assistant Reporter explained the history of the *Stern*-related amendments, namely that *Executive Benefits Insurance Agency v. Arkison* was heard by the Supreme Court during the 2013 Term, causing the Standing Committee to withdraw from Supreme Court consideration its proposed rule amendments based on *Stern*. The Court has now granted certiorari in *Wellness Int'l Network v. Sharif*, and the issue of consent may be considered in that case. The amendments will be held pending a decision in *Wellness*.

(B) Recommendation concerning suggestion 12-BK-I by Judge Stuart Bernstein, that Official Forms 9F and 9F(Alt.) be amended to address complaints to deny discharge for a debt "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit."

Judge Bernstein explained that this was a suggestion he made prior to membership on the Committee. The issue raised concerns with the language used on Official Forms 9F and 9F(Alt.) regarding the commencement of a dischargeability action

and the deadline for filing such an action. The subcommittee's suggested change was to narrow the language in the forms by limiting the statutory reference to section 523(c) of the Bankruptcy Code to reflect a potential ambiguity in section 1141(d)(6)(A) of the Bankruptcy Code. A motion was made to accept the recommendation to change line 8 on Official Forms 9F and 9F(Alt.) (to be renumbered Form 309F), and the motion was approved. Judge Wedoff asked the group to consider whether this change requires republication, and the Reporter reminded the group that it is instructional language on the form. Judge Bernstein stated that parties rely on this language in litigation, so the conclusion was that the form should likely be republished. A decision about publication will be made at the spring 2015 meeting.

(C) Suggestion by David Lander for a rule change to address limiting notice in large cases for motions that do not impact all creditors.

This issue was discussed as part of Agenda Item 4C.

(D) Suggestion by Judge Harris to amend Bankruptcy Rule 1001 to track pending changes to Civil Rule 1.

The Reporter discussed the suggestion to amend Bankruptcy Rule 1001. An amendment to Civil Rule 1 to emphasize the need for cooperation among parties has been approved by the Judicial Conference, and Rule 1001 is largely based on Civil Rule 1 (with the exception of the term "administered"). The related amended civil discovery rules will be automatically incorporated in the Bankruptcy Rules, so it the subcommittee determined that it made sense to ensure that the language of Bankruptcy Rule 1001 parallels Civil Rule 1 with an explanation of the change in the Committee Note.

Professor Coquillette suggested that the reference to attorneys be removed from the Committee Note, given that the language was objected to as part of the revision of Civil Rule 1. Judge Harris suggested that the language be revised to incorporate the Civil Rule 1 amendments by reference. Further discussion was had regarding the reference to attorneys, and Professor Coquillette explained that the American Bar Association and other groups objected to the idea that all attorneys have the same types of practice and responsibilities with regard to Civil Rule 1. The Reporter explained that the reference to attorneys appears in the Committee Note accompanying an earlier amendment to Civil Rule 1 that is now being incorporated into Rule 1001. A motion was made to adopt the suggested changes to the rule and Committee Note and the motion was approved.

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

(A) Suggestion 12-BK-H by Alan Resnick to amend Rule 8013 to allow an appellate body to treat a bankruptcy court's judgment, order, or decree as proposed findings and conclusions if there is a constitutional issue in the bankruptcy court's ruling.

The Assistant Reporter provided the report, citing a memo included at Tab 8A of the agenda materials. The subcommittee discussed this suggestion and determined to wait for further developments in light on the uncertainty in this area. The Supreme Court will consider *Wellness Int'l Network v. Sharif* this Term, and following a decision in that case, the subcommittee will revisit the issue.

(B) Status report concerning issues pending in: (1) the bullpen - amendments previously approved for publication to Rules 8002, 8006, and to 8023; and (2) the dugout - consideration of Comments 12-BK - 005, 12-BK-015, 12-BK040 regarding designation of the record in bankruptcy appeals.

Judge Jordan provided the report on these issues, citing a memo included at Tab 8B. He advised that there are three matters currently in the bull pen that relate to appellate issues. The amended rules will be effective December 1, 2014, so these issues will remain in the bull pen until after the effective date of the rules. Judge Jordan explained the various items in the bull pen, and there was no objection from the Committee to retaining the issues in the bull pen. He noted that for the issue regarding the record on appeal, the subcommittee is waiting for action from several other Judicial Conference committees.

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

There was no report from this subcommittee.

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

(A) Status report concerning the subcommittee's consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's (ABI) Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

Judge Robert Jonker discussed the subcommittee's work on this issue. A memo was included in the materials at Tab 10. The suggestion is from the ABI to make changes to Bankruptcy Rule 2014 governing the retention of professionals. The broad language of the rule has led to some problems for attorneys in larger cases. The subcommittee felt that the suggestion was too elaborate but that some change should be made to the rule. The subcommittee noted that there was a suggestion similar to the ABI's suggestion put forward fifteen years ago and there was objection from the Judicial Conference.

The subcommittee's current working draft revises the "all connections" language by providing an exception for "cause shown" to limit the broad nature of the required

disclosures. Members of the subcommittee raised a concern that any discretion regarding disclosure should not be left to the attorney making the disclosure. Another concern was that the lack of disclosure of relevant connections rarely causes any problems. The subcommittee determined to seek the input of various experts in the field, including judges and attorneys, to evaluate the best way forward.

Several members asked about the supplemental filing suggestion and whether an attorney would be required to disclose supplemental information relevant to another member of his or her firm but not relevant to the attorney. It was suggested that the subcommittee consider this issue. A suggestion was made to provide a "safe harbor" for any inadvertent lack of disclosure through a narrative describing the nature of the attorney's employment.

Information Items

11. Recommended revisions to proposed chapter 13 plan form.

Judge Wedoff updated the group on the proposed revisions to the chapter 13 plan form. He reviewed the changes to the chapter 13 plan form that the Working Group proposed in response to suggestions and comments that were made since the spring 2014 Committee meeting. Judge Wedoff stated Judge Ikuta has asked him to remain involved with the Working Group after he leaves the Committee.

12. Oral update on opinions interpreting section 109(h) of the Bankruptcy Code.

Professor Gibson explained that the opinions involved a technical change regarding the timing of consumer debtor's completion of credit-counseling briefing. The issue is whether it is permissible for debtors to complete the credit-counseling briefing on the day of the filing of the petition but after the time of the filing of the petition. The majority of the cases have held that the briefing had to occur prior to the filing of the petition but one case held the opposite. This case was appealed directly to the Seventh Circuit. The case may be moot because the underlying chapter 13 case was dismissed for other reasons. The Reporter will continue to monitor case law interpreting section 109(h).

13. Oral report on the status of bankruptcy-related legislation.

Judge Wedoff stated that there is a pending piece of legislation called the Financial Institutions Bankruptcy Act which concerns Systematically Important Financial Institutions (or "too big to fail companies") that are currently covered by the Dodd Frank Act. Under the legislation, in certain circumstances the Federal Reserve would file a petition in support of the bankruptcy of the institution with a bankruptcy judge (one of 10 on a panel selected by the Chief Justice). If the petition is opposed, the bankruptcy judge

would have 18 hours to make a decision and any appeal would have to be filed in one hour. The court of appeals would be required to decide the appeal within 14 hours. The concept is that the decision would be made while the world markets are closed. Judge Wedoff advised there is little chance that this legislation will be passed in this session of Congress, but it is possible in the next session.

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

(A) Proposed revisions to Rule 8002(a)(5) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting, see Agenda Item 8(B);*

(B) Proposed revisions to Rule 8006(b) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting, see Agenda Item 8(B);*

(C) Proposed revisions to Rule 8023. *Approved at the spring 2014 Advisory Committee meeting, see Agenda Item 8(B);*and

(D) Suggestion 13-BK-G that Rule 1015(b) be changed to use the word "spouse." Approved at the spring 2014 meeting, s*ee Agenda Item 4(E).*

15. *Dugout.* Suggestions and issues deferred for future consideration.

(A) Recommendation concerning Suggestion 11-BK-N by David S. Yen for fee waiver forms addressing fees other than the chapter 7 filing fee. *See Agenda Item 4(D).*

(B) Suggestion 12-BK-M by Judge Scott Dales to amend Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed proof of claim. *Placed in dugout at fall 2013 meeting pending receipt of comments on the Chapter 13 Plan Form and related rules amendments, see Agenda Item 4(C).*

16. Future meetings: Spring 2015 meeting, April 21-22 in Pasadena, California.

Judge Ikuta welcomed everyone to Pasadena on April 21-22, 2015. The meeting will be held at the courthouse. As for the fall 2015 meeting, the Committee may meet in Washington D.C.

17. New business.

There was no new business.

18. Adjourn.

Judge Wedoff thanked everyone for attending and for the work of each member of the Committee.