ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 14, 2021
Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Circuit Judge Thomas L. Ambro
Bankruptcy Judge Rebecca Buehler Connelly
Circuit Judge Bernice Bouie Donald
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Marcia S. Krieger
Bankruptcy Judge Catherine Peek McEwen
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq.
Tara Twomey, Esq.
District Judge George H. Wu

The following persons also attended the meeting:

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
Professor Daniel R. Coquillette, consultant 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
Bankruptcy Judge Laurel L. Isicoff, Liaison to the Committee on the Administration of the Bankruptcy System
Brittany Bunting, Administrative Office
Bridget M. Healy, Esq., Administrative Office
S. Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Daniel J. Isaacs-Smith, Administrative Office
Susan Jenson, Administrative Office
Burton DeWitt, Rules Law Clerk

Molly T. Johnson, Federal Judicial Center
S. Kenneth Lee, Esq., Federal Judicial Center
Carly E. Griffin, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees
Jakub Madej, Research Assistant to Professor Robert Schiller, Yale University
John Hawkinson, freelance journalist

**Discussion Agenda**

1. **Greetings and Introductions**

Judge Dennis Dow, chair of the Advisory Committee, was unable to attend the meeting because of a family medical emergency, so Scott Myers welcomed the group and thanked them for joining this meeting. He asked everyone to keep microphones muted unless that person is talking. Motions will be passed if there are no objections. Otherwise, members will use the raise hand function for voting and discussions. He introduced new member Judge Benjamin Kahn.

2. **Approval of Minutes of Remote Meeting Held on April 8, 2021**

The minutes were approved by motion and vote after one correction to move David Hubbert's name to the list of committee members.

3. **Oral Reports on Meetings of Other Committees**

(A) ***June 22, 2021 Standing Committee Meeting***

Professor Bartell gave the report.

(1) **Joint Committee Business**

(a) ***Emergency Rules.*** Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") , Pub. L. 116-136, required that "the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.)." Each of the Advisory Committees for the Civil, Criminal, Appellate and Bankruptcy Rules presented to the Standing Committee its version of an emergency rule. Professor Dan Capra provided a side-by-side comparison of the rules and discussed the

outstanding differences between them. The Standing Committee approved the proposed rules for publication.

### (2) Bankruptcy Rules Committee Business

The Standing Committee recommended for final approval:

(1) restyled versions of the 1000 rules series (Part I-Commencing a Bankruptcy Case; The Petition and Order for Relief) and 2000 rules series (Part II-Officers and Administration; Notices; Meetings; Examinations; Elections and Appointments; Final Report; Compensation);

(2) rules to replace the interim rules issued to implement the Small Business Reorganization Act: Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 1020 (Chapter 11 Reorganization Case for Small Business Debtors), 2009 (Trustees for Estates When Joint Administration Ordered), 2012 (Substitution of Trustee or Successor Trustee; Accounting), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case), 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case), Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11), new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement), Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and

(3) amendments to Rule 3002(c)(6) (Filing Proof of Claim or Interest), Rule 5005 (Filing and Transmittal of Papers), Rule 7004 (Process; Service of Summons, Complaint), Rule 8023 (Voluntary Dismissal), and Official Form 122B (Chapter 11 Statement of Your Current Monthly Income).

The Standing Committee also recommended for publication:

(1) restyled versions of the 3000 rules series (Part III-Claims; Plans; Distribution to Creditors and Equity Security Holders); the 4000 rules series (Part IV-The Debtor's Duties and Benefits); the 5000 rules series (Part V-Courts and Clerks); and the 6000 rules series (Part VI-Collecting and Liquidating Property of the Estate);

(2) amendments to Rule 3002.1 (Chapter 13 Claim Secured by a Security Interest in the Debtor's Principal Residence); and

(3) amendments to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy), Official Form 309E1 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors)), and Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors under Subchapter V)), and Official Forms Related to Rule 3002.1 amendments: Form 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim); Form 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim); Form 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)); Form 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)); and Form 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim).

Judge Dow also provided the Standing Committee information on the status of:

(1) Interim Rule 4001(c) (Obtaining Credit) to be distributed to the courts if the Administrator of the Small Business Administration authorizes debtors in bankruptcy to obtain certain loans under the Small Business Act;

(2) Director's Form 4100S (Supplemental Proof of Claim for CARES Forbearance Claim);

(3) Consideration of *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) and Suggestions 21-BK-B and 21-BK-C for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding; and

(4) Consideration of Suggestion 20-BK-E from the Committee on Court Administration and Case Management for a rule amendment establishing minimum procedures for electronic signatures of debtors and others.

(B) ***April 7, 2021 Meeting of the Advisory Committee on Appellate Rules***

Because this Committee received a report on the April 7, 2021 meeting of the Appellate Committee at its last meeting, and the next meeting is on October 7, 2021, there was no report.

(C) ***April 23, 2021 Meeting of the Advisory Committee on Civil Rules***

Judge Catherine Peek McEwen provided a report on the April 23, 2021 meeting. The meeting was conducted virtually because of the COVID-19 health emergency.

1. **No Pending Amendments.** There are no amendments to the Civil Rules scheduled to become effective on December 1, 2021.

2. **Fed. R. Civ. P. 12(a)(4).** The Civil Advisory Committee gave final approval to an amendment to FRCP 12(a)(4) which expands the time from fourteen to sixty days to file a responsive pleading after the court has denied a Rule 12 motion or postponed its disposition until trial if the defendant is a United States officer or employee sued in an individual capacity for an official act or omission. Civil Rule 12(a) is not applicable in bankruptcy, but Fed. R. Bankr. P. 7012(a) specifies that a responsive pleading must be served within 14 days after the court has denied a motion or postpones its disposition until trial. There is currently no different time period for United States actors. The Bankruptcy Advisory Committee should consider taking like action if the Civil Advisory Committee's amendment is adopted.

3. **CARES Act – Rules Emergency.** The Civil Advisory Committee approved for publication Rule 87, the rules emergency proposal.

4. **Privilege Logs and Sealing Court Records – Rules 26(b)(5)(A) and 45(e)(2).** The Discovery Subcommittee is considering proposals to amend Rules 26(b)(5)(A) and 45(e)(2). These rules apply in bankruptcy cases, so we will continue to monitor the Subcommittee's efforts.

5. **Rule 9(b).** The Civil Advisory Committee considered as an information item a suggestion from Dean Spencer (William & Mary) to amend Rule 9(b). The amendment would change the sentence that allows state of mind to be pleaded "generally" by deleting that word and saying instead that state of mind may be pleaded "without setting forth the facts or circumstances from which the condition may be inferred." The goal is to undo the portion of the Supreme Court's *Iqbal* decision holding that although mental state need not be alleged "with particularity," the allegation must still satisfy Rule 8(a) – meaning some facts must be pleaded. Dean Spencer's view is set out at length in a *Cardozo Law Review* article.

This is a question of serious interest to the Bankruptcy Advisory Committee. Rule 9(b) comes up often in bankruptcy (adopted by reference in Fed. R. Bankr. P. 7009) because some of the section 523(a) exceptions to discharge and some of the objections to discharge under § 727 have state of mind elements. The Bankruptcy Advisory Committee will want to watch this proposed amendment closely and consider weighing in when the time comes.

6. **Joint Civil-Appellate Subcommittee on Final Judgment Rule.** The Joint Civil-Appellate Subcommittee (aka "*Hall v. Hall* Subcommittee") appointed to study the effects of the final judgment rule for consolidated actions announced in *Hall v. Hall*, 138 S. Ct. 1118 (2018), received an extensive Federal Judicial Center study of appeals in consolidated actions filed in 2015, 2016, and 2017. It subsequently began informal efforts to ask judges in the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about their experience with *Hall v. Hall*. Only the Second Circuit has dismissed appeals based on *Hall v. Hall*. The Subcommittee will meet again to consider further steps. The initial study was not useful. Consequently, the FJC's Emery Lee devised a different study methodology that he believed would yield better data. His initial findings were released recently. The Subcommittee has not met to discuss them.

7. **IFP Practices and Standards.** The Civil Committee has received various submissions over the past couple of years relating to the great variations in standards employed to qualify for *in forma pauperis* status as among different districts and as among judges in the same district. The Civil Advisory Committee discussed creating a joint subcommittee or other joint study of *in forma pauperis* standards, which could craft a civil rule or provide uniform and good practice guidance on IFP standards.

"Who is poor?" in the eyes of different courts could lead to some poor people having to pay a filing fee for some kinds of cases and some other poor people not having to pay. There are two criteria in 28 U.S.C. § 1930(f)(1) for the filing fees to commence a bankruptcy case, one a bright line (tied to the poverty line) and the other inexact—the debtor is "unable to pay . . . in installments." And there are other filing fees that are waivable by the district or bankruptcy court under § 1930 as well as under other authority, such as appellate fees.

Judge McEwen supports the idea of a joint subcommittee or study and thinks the Bankruptcy Advisory Committee should participate. Judge Bates suggested that the reporters for the various committees discuss whether there is interest in creating a joint subcommittee to consider IFP standards.

The next meeting of the Civil Advisory Committee will be a virtual meeting on October 5, 2021.

### (D) *June 22-23, 2021 Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")*

Judge Isicoff provided the report.

The Bankruptcy Committee met by videoconference on June 22-23, 2021. The next meeting is December 7-8, 2021.

The Bankruptcy Committee previously made a legislative proposal on responses to emergencies, which was withdrawn. They are now considering whether a new legislative proposal is appropriate.

The proposed amendments to Rule 3011 on unclaimed funds are currently published for comment, and the Bankruptcy Committee thanks the Advisory Committee for pursuing that proposal.

The *City of Chicago v. Fulton* proposal is also important to the Bankruptcy Committee, and the Bankruptcy Committee will be available to provide feedback on the proposal.

Judge Bates wants to make sure that there is coordination between any proposals by the Bankruptcy Committee and the Advisory Committee with respect to proposals to deal with emergency situations.

**Subcommittee Reports and Other Action Items**

4. **Report by the Consumer Subcommittee**

(A) ***Recommendation Concerning Suggestion 21-BK-G for Amendments to Rule 1007(b)(7)***

Professor Bartell provided the report.

Rule 1007(b)(7) requires that, "[u]nless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a statement that such a course has been completed (Form 423)."

Bankruptcy Judge Arthur I. Harris of the N.D. Ohio submitted Suggestion 21-BK-G, in which he proposed that use of Official Form 423 not be required. Instead, he suggests that the rule be amended to also allow submission to the court of the Certificate of Debtor Education that is provided to the debtor by the provider of that course.

The Subcommittee agreed with Judge Harris that the certificate of completion issued by the provider should be acceptable evidence of completion of the required course on personal financial management, but recommended that the amendment go further and make that certificate the *only* acceptable evidence. The Subcommittee sees no benefit in allowing debtors to complete an Official Form in lieu of submitting the actual certificate to evidence course completion.

Second, the Subcommittee recommended that a debtor who is not required to complete such a course be explicitly excluded from the requirements of the rule. If the debtor has been excused from completing the course by court order, the court order will provide adequate evidence of that fact and submission of an Official Form seems unnecessary.

Since the draft language of the proposed amendment was circulated, Professor Struve has pointed out that there are a number of other bankruptcy rules that refer to the "statement required by" Rule 1007(b)(7), all of which would have to be modified if the language of Rule 1007(b)(7) were changed to require a certificate rather than a statement. This could be avoided if the draft language replaced the words "certificate of course completion" with "statement of course completion" in both the text of the rule and the committee note.

There were four issues for the Advisory Committee to decide:

1. Should the certificate of compliance be permissible evidence of completion of the financial management course?

2. Should the certificate of compliance be the only permissible evidence of completion of the financial management course?

3. Should a debtor who is not required to complete a financial management course be required to file something?

4. If the Advisory Committee agrees with the Subcommittee recommendation, should the draft language replace the word "certificate" with "statement"?

On the first two issues, the Advisory Committee supported the approach adopted by the Subcommittee. Deb Miller stated that the certificate is the best evidence of completion of the financial management course and enables the trustee and court to ensure that there has not been a forgery. Judge Donald asked whether anything other than the official form is currently submitted, and whether there are people providing these courses for free. Deb Miller described the resources for low-income debtors to get the course for free. Professor Bartell noted that the rule currently requires submission of Official Form 423. Mr. Schaible asked whether every provider provides a certificate to the debtor, and whether it is in a standard form. Judge Rebecca Connelly replied that they do, and it is. Ramona Elliott said that the EOUST licenses the providers, and a certificate is always generated with a unique bar code. The certificate numbers can be linked to the bar codes to confirm authenticity.

As to the third issue, there was discussion about whether the form would still be needed for those who were excused from filing the report. Various parties pointed out that the court's order on the motion to excuse the debtor from completing the course would already be on the docket, so the form does not provide any additional information. The general consensus was that it was unlikely to be needed, but the matter will be referred to the Forms Subcommittee for consideration.

On the fourth issue, Deb Miller and Judge Kahn stated that they did not think changing the language from certificate to statement was appropriate because the document from the providers is clearly labeled a certificate. There was a suggestion that the language might be changed to "statement of completion of the course in the form of a certificate of completion," but the suggestion generated little enthusiasm. The general consensus was that the other rules referring to the statement required by Rule 1007(b)(7) should be amended to refer to a "certificate."

The Advisory Committee decided to refer this back to the Subcommittee to reconsider the language and propose it for publication at the same time as it proposes possible amendments to the other rules referring to Rule 1007(b)(7), and the Forms Subcommittee should consider the continued need for Official Form 423.

(B) ***Consideration of City of Chicago v. Fulton, 141 S. Ct. 585, and Suggestions 21-BK-B, 21-BK-C, and 21-BK-J for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceedings***

Professor Gibson provided the report. On January 14, 2021, the Supreme Court decided in *City of Chicago v. Fulton*, 141 S. Ct. 585, that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). The Court concluded that a contrary reading would render largely superfluous the provisions of § 542(a) providing for turnover of property of the estate. In a concurring opinion Justice Sotomayor noted that turnover proceedings "can be quite slow" because they must be pursued by adversary proceedings, *id*. at 594, and stated that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id*. at 595.

Since the decision in *Fulton*, the Advisory Committee received suggestion 21-BK-B from 45 law professors for rules amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding for all chapters and all types of property. Another suggestion, 21-BK-C, submitted by three of those law professors proposed amended language from that offered in the original suggestion. Since the Advisory Committee last met, the National Bankruptcy Conference submitted suggestion 21-BK-J in support of the law professors' suggestions, although the language in the Conference's letter was more narrowly focused on chapter 13 and § 542 motions.

The Advisory Committee discussed this topic at its last meeting and asked the Subcommittee to consider the feedback it received and come back with a proposal. The Advisory Committee tentatively expressed its view that a narrower approach than that proposed by the law professors would be preferable.

The Subcommittee gathered information from bankruptcy clerks and from chapter 13 trustees on their practices in dealing with turnover of estate property, both before and after *Fulton*. Professor Gibson described the results of that survey. After reviewing the results of this survey, the Subcommittee considered various limiting principles for a rule allowing more expeditious turnover proceedings, such as limiting it to chapter 13 or certain types of property or property necessary for an effective reorganization. The Subcommittee agreed that the amendment should extend to individual debtors, without regard to the chapter under which they file, and to tangible personal property when turnover is sought under § 542(a). That would still require adversary proceedings for other situations. The Subcommittee concluded that an amendment to Rule 7001(1) would accomplish this result without creating a new rule to create a national turnover procedure.

The Subcommittee recommended an amendment to Rule 7001(1) (which is Rule 7001(a) in the restyled version) to add language excluding from adversary proceedings "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."

Since the proposed amendment was circulated, Professor Struve asked whether the Advisory Committee should consider including proceedings under § 543 (turnover by custodians). Professor Gibson said this may include agents that take possession of property to enforce a lien. For example, a towing company taking possession of a debtor's automobile, or a sheriff executing on an automobile, might be deemed a custodian under § 543.

Judge Krieger asked whether the Subcommittee considered the due process implications of changing from an adversary proceeding to a motion practice. Professor Gibson said that she did not see a due process concern; the third party gets notice and an opportunity to respond under a motion practice. If the issues get more complicated, the court may incorporate other part VII rules under Rule 9014.

Judge Kahn said creditor rights in property are dealt with by motion all the time, such as cash collateral orders and adequate protection. Dealing with property in the jurisdiction of the bankruptcy court has not traditionally caused due process concerns, dating back to the summary/plenary distinction in jurisdiction under the Bankruptcy Act. He agrees with the recommendation of the Subcommittee. He has two questions: Why not limit to chapter 13? If a turnover order is like an injunction, is there a need to except § 542(a) from Rule 7001(7)?

Professor Gibson responded that a chapter 12 debtor or even a chapter 7 debtor may need to get the car back quickly. And as to the second question, if the turnover is excepted in Rule 7001(1), she did not think it was needed to be expressly excluded in Rule 7001(7) as an injunction.

Judge Connelly agreed that due process was not implicated by changing the turnover proceeding from adversary proceeding to motion. The issues that might arise are manageable in a motion mechanism. The service provisions applicable to adversary proceedings will apply, and the court can apply any other part VII rules. The court can also specify the time to respond. She saw no reason to distinguish between individuals in chapter 13 and those who file under other chapters.

Dave Hubbert supported limiting the proposal to tangible personal property.

As to § 543, Professor Gibson suggested that perhaps it has not been a problem, and it might be best to just publish our proposal and see if we get any comments on it. Judge Connelly noted that the Subcommittee did not consider § 543 and the Advisory Committee should either recommit the suggestion to the Subcommittee or publish it. Deb Miller does not want to expand the proposal any further than necessary. Professor Struve said that she thought the proposal was terrific and that it could be modified in the future if creditors shifted property into the hands of custodians. Judge McEwen said that in her district § 543 actions are already by motion.

The Advisory Committee approved the proposed amendments to Rule 7001(1), and committee note and directed that they be submitted to the Standing Committee for publication.

5. **Report by the Forms Subcommittee**

Professor Gibson provided the report.

The Advisory Committee received Suggestion 21-BK-K from Charles A. King, an attorney for the City of Chicago. Mr. King practices bankruptcy law in the Northern District of Illinois, a district that uses the national chapter 13 plan form—Official Form 113. Based on what he considers to be inappropriate treatment of the City's claims that were secured by statutory liens, Mr. King suggested that a portion of Part 3.1 of the form be revised. Specifically, he contends that the following plan statement regarding the effect of lifting the automatic stay is contrary to the Bankruptcy Code and produces consequences that were likely unintended by the Advisory Committee:

> If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan.

The Subcommittee reviewed the history of the lift-stay provision in Part 3.1 of Form 113, and concluded that the impact on creditors other than the creditor that sought relief from the stay was intended by the drafters and was not inconsistent with § 1325(a)(5)(B) of the Code. The purpose of the provision is to require secured creditors to look to the collateral (rather than the plan) for payment of their secured claims once the stay has been lifted with respect to that collateral. Mr. King simply disagrees with that decision.

The Subcommittee noted that only a few districts use Official Form 113 rather than their own local form, and the provision in question is not one that Rule 3015.1 requires local forms to include. Its impact is therefore limited. Because the provision is consistent with the Code and seems to be operating as intended, the Subcommittee recommended that the Advisory Committee take no further action on the suggestion. The Advisory Committee agreed to take no action on the suggestion.

## 6. Report by the Technology and Cross-Border Insolvency Subcommittee

Judge Oetken and Professor Gibson presented the report.

Rule 5005 requires electronic filings, but does not deal with what counts as a valid electronic signature for individuals who do not have a CM/ECF account. Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management (CACM), submitted a suggestion (20-BK-E) based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig noted that in 2013 CACM "requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules." That effort was eventually abandoned, however, largely because of opposition from the Department of Justice. Among the reasons for the DOJ's opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater

electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

Judge Fleissig's letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to the Advisory Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that the Advisory Committee take the lead in pursuing the issues. The matter was assigned to this Subcommittee. Subsequently two more suggestions filed by Sai, 21-BK-H and 21-BK-I, made related points.

The Subcommittee is still in the fact-finding stage of its deliberations. Dave Hubbert and Ramona Elliott are engaged in discussions within the Department of Justice about its views on the issues raised by the suggestions and whether those views have changed since 2014, when DOJ opposed a proposed amendment to Rule 5005(a) that would have allowed the use of debtors' scanned signatures without the retention of the documents bearing the original, "wet" signatures. While no official position has been arrived at, there is an acknowledgment that electronic signature technology has advanced considerably since 2014. Because the Department's position will likely be closely tied to the types of electronic signature products allowed and the security features required, the Subcommittee's exploration and understanding of the technological aspects of electronic signatures will be important.

Ken Lee of the Federal Judicial Center gathered information on the practices of bankruptcy and district courts with respect to requirements for the use and retention of wet signatures of debtors and other non-attorney participants in bankruptcy, civil, and criminal cases, showing the alterations in court practices in response to the COVID-19 pandemic.

The rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently sufficient for evidentiary purposes. The issue the Subcommittee has been considering, therefore, is how best to require an evidentially sufficient form of a debtor's signature that appears on an electronically filed document.

Currently, this goal is generally achieved by the requirement in local rules that the attorney retain the original document with the wet signature for a period of years. This method works, although it has the drawback of making the attorney the custodian of potential evidence against his client—a situation that in the past has caused concerns for both prosecutors and debtors' attorneys.

A solution that provides for an acceptable electronic signature on the document that is filed—rather than a retention requirement—is what CACM seems to have in mind. Its suggestion refers to "the ability of those without CM/ECF filing privileges in bankruptcy cases to electronically sign documents that are submitted to the court." A drawback of this approach, however, is that it would require adequate e-signature technology in the software that many

bankruptcy lawyers use for the creation and filing of forms that debtors must sign, such as the petition and schedules. Such software may not currently exist, and a rule that requires the development and purchase of new software is not desirable.

Although the Subcommittee was not prepared to make a formal recommendation to the Advisory Committee, it presented possible amendments to Rule 5005(a) that would create a national retention requirement of either wet signatures or electronic signatures in an evidentially acceptable form. Subdivision (a)(2)(C), governing signatures, could be amended to provide for persons who are not CM/ECF account holders. Such amendments could impose a national retention period, but it also allows the retention of electronic signatures. It could further declare that, if the requirements are met, the electronic signature that is filed constitutes the debtor's signature. That statement allows electronically filed documents signed by represented debtors to comply with rules and statutes that require the debtor to sign.

As to unrepresented debtors, the Subcommittee recommended no action in response to Sai's suggestion to revisit the electronic filing rights of pro se debtors. But because courts are authorized to allow pro se debtors to file electronically, an all-encompassing amendment about electronic signatures needs to include such filers.

If a court allows pro se debtors to file electronically through CM/ECF, they are covered by Rule 5005(a)(2)(C), and their electronic signature would be treated the same as an attorney with a CM/ECF account.

If a court allows pro se debtors to file by other means—such as by email or through an eSR program—then there needs to be a method of authenticating the electronic signature. A retention requirement is likely ineffectual in this situation. Prosecutors are unlikely to favor a requirement that the pro se debtor retain the document with the wet signature, so unless courts are willing to retain such documents, there would need to be a rule requiring the electronic signature itself to be evidentially sufficient. A rule could require such a debtor to use "a signature affixed through a commercially available electronic signing technology that maintains an audit trail and other security features to ascertain the authentic identity of the signer." However, based on information that Molly Johnson provided the Subcommittee about the need for a DocuSign license, such a requirement is probably feasible only if courts can include such technology in their software for pro se filers because the filers will not have their own license.

Sai has suggested that pro se litigants should not have more onerous signature requirements than CM/ECF requirements. Sai also suggests that electronic filings should be required for all litigants whether or not represented, subject to limited exceptions. The Subcommittee suggests that the filing requirements for pro se litigants should not be pursued now. But the Subcommittee asked the Advisory Committee for feedback on whether the approach with respect to represented litigants was appropriate.

Once the Subcommittee has a concrete proposal that is consistent with the Advisory Committee's views, it would like to seek input from outside groups. These groups would include, among others, other rules advisory committees or their reporters; court officials; the Department of Justice and law enforcement officials; debtors' attorneys; IT experts; and

bankruptcy software vendors. Ken Lee from the FJC has agreed to survey some outside groups, and the Subcommittee has discussed the possibility of seeking permission to convene a miniconference on a proposed amendment.

Dave Hubbert reiterated that the Department of Justice does not currently have a firm position on electronic signatures. They need to detect fraud and prove the elements in an appropriate case. With respect to the technology, it ranges from authenticating a signature without verifying the identity of the signer, to something like TSA pre-check where there is in-person verification at some point.

Professor Gibson pointed out the § 341 meeting is unique to bankruptcy where there is a way of verifying the debtor's signature that does not exist in other judicial proceedings.

Deb Miller asked whether this proposed rule modification affects the filing by someone with an account where there are subaccounts, like the trustee's office and large firms. Judge Connelly asked whether there is any need to specify a retention period given the requirements imposed on lawyers under state law. Tara Twomey asked how this applies to proofs of claim, which are often filed by pro se litigants. She also asked how it applies to a document with signatures of multiple persons that is electronically filed by one of them. Professor Gibson said that the Subcommittee had focused mostly on debtor signatures.

Judge McEwen asked how DocuSign works. Ken Gardner explained how it works, but noted that someone has to have a DocuSign account, like the lawyer. Professor Coquillette said this is a complicated area and we have to avoid inconsistent regulation with state rule systems.

Judge Isicoff stated that her district requires email confirmation of signature and a mailed-in wet signature retained by the court. Their new rule will require that the wet signature must be retained by the lawyer or by the court (for pro se filers).

Judge Connelly said Rule 5005 already allows local courts to allow pro se litigants to file electronically. What is the purpose in changing the rule? Is there a problem here? Professor Gibson says that all electronically filed documents already have electronic signatures. The rule is addressing what requirements are needed to provide evidentially valid electronic signatures. Currently local rules are handling this issue. She suggested that perhaps a federal rule is needed to provide uniformity.

Scott Myers pointed out that pro se filers who do not use CM/ECF accounts for filing are not covered by the existing rule.

Judge McEwen said that her district has a local rule dealing with multiple signatures. That same rule has a retention requirement for certain types of papers.

Ken Gardner thinks we need to make this simple. He asked why we cannot offer limited filing access to CM/ECF for pro se filers. He suggested that we could require that everyone have a login that constitutes a signature. Professor Gibson asked about the represented debtor. Ken Gardner thinks the § 341 meeting confirms the signature and that should be satisfactory

evidence. Judge McEwen said this does not work for remote § 341 meetings conducted by telephone. Scott Myers said that a limited filing account could really help pro se debtors. Judge Kahn likes the idea of limited filing accounts for pro se debtors. With respect to represented debtors, he does not think the § 341 meeting solves everything because many documents are signed after the § 341 meeting. Deb Miller said that her district requires retention of wet signatures on everything.

The Subcommittee will consider all the input from the Advisory Committee.

7. **Information Items**

(A) ***Restyling Subcommittee***

Judge Krieger and Professor Bartell provided the report. The 7000 series of restyled rules is almost finalized for publication. The style consultants have prepared initial drafts of the 8000 and 9000 series, which will be considered by the Subcommittee at its next meetings. All three series will be ready for approval for publication at the next Advisory Committee meeting.

Rules in the 1000-5000 series that have been amended since the restyling project began have also been restyled by the style consultants and reviewed by the Subcommittee and are almost finalized. The Subcommittee expects to make a recommendation to the Advisory Committee about publication of those rules at its next meeting.

8. **Future meetings**

The spring 2022 meeting has been scheduled for March 31-April 1, 2022.

9. **New Business**

There was no new business.

10. **Adjournment**

The meeting was adjourned at 12:45 p.m.

## Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Advisory Committee.

A. Recommendation of amendment to Rule 9006(a)(6) to add "Juneteenth Independence Day" to list of Federal holidays (Professor Bartell).

2. Business Subcommittee.

A. Recommendation of no action regarding Suggestion 21-BK-F from Judge Catherine Peek McEwen to shorten the deadline to file schedules in Chapter 11, Subchapter V (Professor Bartell).