ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26 - 27, 2011
Chicago, Illinois

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge Robert James Jonker
District Judge Adalberto Jordan
District Judge William H. Pauley III
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire

The following persons also attended the meeting:

District Judge Jean Hamilton (new member – term beginning 10/01/11)
Richardo I. Kilpatrick, Esquire (new member – term beginning 10/01/11)
Professor S. Elizabeth Gibson, reporter
Professor Troy McKenzie, assistant reporter
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Nan Eitel, Associate General Counsel – Chapter 11, EOUST
Professor Douglas Baird (attended second day only)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Jonathan Rose, Rules Committee Support Officer, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Administrative Office
Jeffery Barr, Administrative Office
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Molly Johnson, Federal Judicial Center (FJC)

Beth Wiggins, FJC
Christopher Blickley, law clerk for the Hon. Eugene R. Wedoff
Kathy Byrne, Cooney & Conway
Joseph D. Frank, Frank/Gecker LLP

The following member was unable to attend the meeting:

John Rao, Esquire

Introductory Items

1. Greetings; Introduction of new committee members and Administrative Office staff, and acknowledgment of the service of outgoing committee members.

The Chair welcomed new members Judge Jean Hamilton (E.D. MO), and Richardo I. Kilpatrick, Esquire. He also introduced the Administrative Office's new Rules Committee Officer, Jonathon Rose, and its Deputy Rules Committee Officer, Benjamin Robinson.

The Chair thanked outgoing members Judge William Pauley and Michael Lamberth for their hard work and their many contributions to the Committee over the past six years.

2. Approval of minutes of San Francisco meeting of April 7 - 8, 2011.

The San Francisco minutes were approved with minor changes noted by Mr. Kohn.

3. Oral reports on meetings of other committees:

(A) June 2011 meeting of the Committee on Rules of Practice and Procedure.

The Chair said the Standing Committee approved all the Committee's action items.

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

Judge Lefkow reported that in light of current budget concerns, Congress is unlikely to approve the Judicial Conference's most recent request for over 50 additional bankruptcy judges. Consequently, the Bankruptcy Committee was focused on the need for extending the 28 temporary bankruptcy judgeship positions that were added in 2005 and are now set to expire. She explained that the expiration of a temporary bankruptcy judgeship position in a district means that the next retiring judge in that district cannot be replaced – unless the temporary position is extended. Because roughly two thirds of bankruptcy judges will be eligible for retirement in the next 10 years, a contraction of the total number of bankruptcy judges is likely if the temporary positions are not extended or made permanent.

Judge Lefkow said that the Bankruptcy Committee has approved a policy for courtroom sharing in new construction. She said the new policy would be triggered most often in larger courts, but would probably have no immediate effect because new construction is unlikely in the current budget environment.

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

Judge Harris said that Civil Rules Committee will not meet until November, but that its Subcommittee on Discovery held a mini-conference on discovery preservation and sanctions issues in Dallas on September 9. He said no decisions were made at the mini-conference, but that much of the material discussed has been posted on the U.S. Courts' public website at: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

(D) Meeting of the Advisory Committee on Evidence.

Judge Wizmur said the Evidence Committee will next meet in October and that there is nothing new to report since its last meeting. She said the restyled evidence rules have been approved and are in effect. She also noted that a proposed amendment to Evidence Rule 803(10) was out for publication. The amendment—to the hearsay exception for absence of public record or entry—is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009).

(E) Meeting of the Advisory Committee on Appellate Rules.

The Reporter said the Appellate Rules Committee will next meet in October. She noted that the Committee met jointly with the Appellate Rules Committee at its last meeting to discuss proposed changes to the bankruptcy appellate rules (the Part VIII Rules). She said that the Appellate Rules Committee was also proposing amendments to Appellate Rule 6 concerning bankruptcy appeals, including a new subdivision governing appeals taken directly to a court of appeals from a bankruptcy court. The proposed amendments are designed to coordinate with proposed changes to the Part VIII Rules.

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

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the Forms Modernization Project at Agenda Item 7.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion (11-BK-B) by Judge A. Benjamin Goldgar (Bankr. N.D. Ill.) to amend Rule 3002(a) to require secured creditors to file proofs of claim.

The Assistant Reporter said that Judge Goldgar suggests amending the Bankruptcy Rules to require secured creditors to file proofs of claim. According to Judge Goldgar, Rule 3002(a), which currently provides that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . . ," has led to confusion with respect to the need for secured creditors to file claims. Courts disagree on two related questions: (1) whether a secured creditor must file a proof of claim to participate in a chapter 13 plan, and (2) whether a nongovernmental secured creditor must file a proof of claim within 90 days of the meeting of creditors, as required by Rule 3002(c).

The Subcommittee discussed Judge Goldgar's suggestion and concluded that the issue deserves further study. Because the omission of secured creditors from Rule 3002(a) has the greatest impact in chapter 13 cases, the Subcommittee recommended that the Advisory Committee fold the suggestion into the ongoing project to draft a model chapter 13 plan and related amendments to the Bankruptcy Rules.

Although several members agreed that the failure of a secured creditor to file a proof of claims was most problematic in chapter 13, where the secured creditor may be barred from collecting anything during the course of the debtor's chapter 13 plan, others noted that there are issues in chapter 7 as well. And some members suggested a possible need for different approaches in chapters 7 and 13. **After additional discussion, the Chair asked the Subcommittee to consider a rule change that would apply to all chapters, allowing for the possibility that a model plan provision might be the best approach in chapter 13**

(B) Recommendation concerning Suggestion (10-BK-K) by Judge Paul Mannes to amend Rule 4004(c)(1)(J) to delay the entry of a discharge if a scheduled hearing on a reaffirmation agreement has not concluded.

Judge Harris said the Subcommittee concluded that the basis for the suggested amendment was the requirement that a hearing to disapprove a reaffirmation agreement based on undue hardship be concluded before the entry of the discharge. Judge Mannes would add explicit language to Rule 4004(c)(1) to permit the entry of the discharge to be delayed until after the conclusion of such a hearing.

The Subcommittee, however, did not see a need for the amendment. Rule 4004(c)(1)(K) already provides for a delay in the entry of a discharge if "a presumption has arisen under § 524(m) that a reaffirmation agreement is an undue hardship." The exception is broader than the one proposed by Judge Mannes, and it encompasses the situation he apparently had in mind. If the court has scheduled a reaffirmation hearing that has to be concluded before the discharge is

entered, it would be a situation in which a presumption of undue hardship has arisen. Thus under Rule 4004(c)(1)(K), the court could delay the entry of the discharge until after the conclusion of the hearing.

Although the Subcommittee did not recommend any changes to Rule 4004(c)(1) to address the issue raised by Judge Mannes, as described in the agenda materials, it did identify some wording problems that could be considered by the Advisory Committee at an appropriate time. It also identified a more immediate issue in Rule 4004(c)(1) concerning pending changes Rule 1007(b)(7).

The Committee has proposed an amendment to Rule 1007(b)(7) that would relieve the debtor of the obligation to file Official Form 23 if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) of Rule 4004(c)(1), however, provides for delay in the entry of the discharge if "the debtor has not filed with the court a statement of completion of a course concerning personal financial management [Official Form 23] as required by Rule 1007(b)(7)." If the amendment to Rule 1007(b)(7) is adopted, Rule 4004(c)(1)(H) will need to be reworded so that it will not unnecessarily delay the discharge if the debtor's "failure" to file Official Form 23 is because the course provider has already notified the court that the debtor completed the required personal financial management course.

The Committee agreed that no amendment to Rule 4004(c) is needed to address Judge Mannes' suggestion, and asked the Subcommittee to report at the spring meeting on any needed changes to Subparagraph (c)(1)(H) to conform to the pending Rule 1007(b)(7) changes.

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

> Recommendation concerning the opinion issued by the Ninth Circuit BAP in *Charlie Y., Inc. v. Carey* concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings.

Judge Harris explained that in March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion—*Charlie Y., Inc. v. Carey (In re Carey)*, 446 B.R. 384, 389 n.3 (2011)—in which it suggested that the Advisory Committee might want to address the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it does not have a provision that parallels Civil Rule 54(d)(2), which governs the recovery of attorney's fees. Instead Rule 7008(b) provides that attorney fees must be pled as a claim in the complaint.

The Subcommittee recommended that Rule 7054 be amended to include much of the substance of Civil Rule 54(d)(2) and that the provision on attorney's fees in Rule 7008 be deleted. The amendments would clarify the procedure for seeking an award of attorney's fees and provide a nationally uniform procedure for doing so. They also would bring the bankruptcy rules into closer

alignment with the civil rules and eliminate a trap for the unwary. Proposed language amending Rules 7054 and 7008 was included in the agenda materials.

A motion to recommend publication of amendments to Rules 7008 and 7054 as set forth in the agenda book, subject to review by the Style Subcommittee, was approved without objection.

6. Joint Reports by the Subcommittees on Consumer Issues and Forms.

(A) Recommendation on how and when to gather input on the new mortgage forms and the desirability of including a complete loan history on Form 10-A

Judge Harris gave the report. He said that in light of comments and testimony about the need for a full loan history as an attachment to the proof of claim, the Subcommittees considered how best to get feedback on the loan summary contained the newly approved attachment to the proof of claim form, B10 (Attachment A), as well as the two new proof of claim supplement forms, B10 (Supplement 1) and B10 (Supplement 2), that will be used in chapter 13 cases.

Because B10 (Attachment A), B10 (Supplement 1) and B10 (Supplement 2) will not be used until December 1, 2011, the Subcommittees suggested waiting to solicit feedback until parties have developed some experience with the new forms. They recommended, therefore, holding a mini-conference next fall, possibly in conjunction with the fall 2012 Committee meeting. The Subcommittees favored a mini-conference as the best option for promoting a back-and-forth exchange of ideas and concerns about the new forms from interested parties, but recognized that in the current budget environment cost may be a factor.

The Committee agreed that a mini-conference would provide the most effective feedback on the new proof of claim attachment and supplements and recommended such a conference in the fall, with targeted conference calls as a fallback position if funding is not available for the mini-conference. As a cost-saving measure, members agreed that the proposed mini-conference should overlap if possible with the fall Committee meeting.

(B) Oral report on consideration of a form or model chapter 13 plan.

Judge Perris reported that the working group has reviewed many of the model plans in existence, and it has requested information from judges around the country about the idea of a national model plan. The Assistant Reporter said there have been 40-50 responses – mostly in support of the project (though many supporters anticipate negative responses once a detailed plan is produced for comment). Some responses objected to the idea of a national plan, arguing that it is more important that chapter 13 plans be flexible and allow for local practice, but that was a minority position.

Judge Perris said that the working group has gone through common plan provisions and

has preliminary ideas on what should be in the plan. Many choices remain, however, such as whether claims dealt with in the plan must also be addressed through the claims allowance process, whether payments can or should be made outside the plan, and whether payments are made from a pot, or by percentage. The working group will also consider whether changes in the rules are needed to make a national chapter 13 plan easier to implement. For example, a change to Rule 3001 that requires secured creditors to file a proof of claim could also explain when and how to resolve differences (if any) in the amount listed on the proof of claim and the amount listed in the debtor's plan.

Judge Perris said that now that the working group has considered what should be in a plan, the next step will be to draft a model plan and consider possible rule changes. She said that in the spring the group may recommend rule changes and talk about seeking pre-publication comment from interested groups.

(C) Recommendation concerning the amendment of section 109(h)(1) of the Bankruptcy Code by the Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, regarding the timing of credit counseling for individual debtors.

The Assistant Reporter said the Subcommittees discussed a technical change to 11 U.S.C. § 109(h)(1) that, read literally, could allow an individual debtor to complete the "pre-petition" credit counseling briefing after the petition is filed, so long as it is completed on the same day the petition is filed. The Subcommittees considered whether the rules and forms should be revised to account for this possibility.

The Assistant Reporter said that prior to this technical change, many courts concluded that statutory requirement to complete credit counseling briefing during the 180-day period "preceding the date of filing" meant that the requirement could not be satisfied on the same calendar day the petition is filed. Other courts concluded that same-day completion satisfied the statutory language so long as the course is completed before the petition is filed. The Assistant Reporter said that the purpose of the technical change was presumably to address the statutory ambiguity that led to the split in the case law, but that the "fix" seems to have introduced a new ambiguity. Because there is no case law on the new language, the Subcommittees recommended waiting before revising the rules or forms.

Committee members agreed that, because the forms and rules anticipate that the credit counseling course will be taken before the petition is filed, no change is needed unless case law develops that allows debtors to take the course post-petition but on the day of filing. **Members agreed to await further developments in the case law.**

(D) Oral report on revising Official Form 22A and advising the courts to rescind Interim Rule 1007-I if the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is no longer available after December 18, 2011.

The Chair explained that the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is scheduled to expire on December 18, 2011. Mr. Wannamaker reported, however, that a four-year extension of the exclusion has just been voted out of the House of Representative's Judiciary Committee, and that an extension seems uncontroversial. The Chair added that no action was necessary at this time, but if the proposed extension fails to pass before December 18, the Committee will have to consider whether to revise Official Form 22A to remove the exclusion as an option. If Congress seems likely to extend the exclusion but has not done so by December 18, one possible option will be to leave the form unchanged, but notify courts, the public, and the EOUST that the option may be temporarily unavailable.

7. Report of the Subcommittee on Forms.

> Review of the draft individual forms developed by the Bankruptcy Forms Modernization Project and the question whether the rules should be amended to establish standards regarding signatures by parties in the electronic context in which the courts currently operate.

Judge Perris reported on the most recent updates to CM/ECF, including program changes needed to implement the new amendment and supplements to the proof of claim (B10-A, B10-S1, and B10-S2) that are scheduled to go into effect December 1, 2011.

She said that functional requirements phase of CM/ECF NextGen should be complete by February 12, 2012. The next step (Phase 2) will be to take all of the requirements, code them and put them into effect. Rollout will probably be in iterations and modules, with the first module coming out as early as the end of 2013. She said the plan was to use as much code as possible from existing CM/ECF and not lose any existing functionality. It will probably take four to six years to fully implement.

Mr. Waldron spoke briefly on the pro se pathfinder project. He said the pro se pathfinder was an electronic filing module for unrepresented debtors being developed by NextGen and tested in current CM/ECF pilot courts. Mr. Waldron and Judge Perris noted that one obstacle being examined in the pro se pathfinder that has also come up in the Forms Modernization Project was whether electronic signatures are enforceable under the bankruptcy code and existing rules. Mr. Waldron said for the initial testing phases, the pro se pathfinder will require users to submit a hard copy signature page that incorporates by reference the debtor's signature from the various official forms. He believes, however, that standards establishing the acceptability of electronic signatures in some form would greatly facilitate electronic filings. **The Chair referred the electronic signature issue to the Technology and Cross Boarder Subcommittee for consideration of any needed rule changes.**

For the benefit of new members, Judge Perris gave an overview of the Forms

Modernization Project (FMP). She explained that the FMP was an undertaking by the Forms Subcommittee to systematically revise all official bankruptcy forms to make them more understandable and thereby improve the accuracy of the data collected and to improve the interface between the forms and technology. She said the FMP surveyed judges, clerks, case trustees, United States trustees, law professors and members of the bankruptcy bar for comments on what does and does not work in the current forms. Armed with that information and drafting help from a contractor with experience in revising tax forms, census forms and other government and corporate forms, the FMP began the drafting process.

The guiding principles behind redrafting the forms were to help debtors understand the bankruptcy process and what they are being asked by using conversational language, instructions, and context to explain the process and show the timing of the case. In general, the idea was to improve the accuracy of the information provided by the debtors, and help them better understand what they are attesting to under penalty of perjury. Judge Perris said that the FMP has solicited and is reviewing pre-publication comments from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys and a group of attorneys from the Executive Office for United States trustees.

Judge Perris said that the conversational language and length of the forms has led to negative feedback from some reviewers. Some criticized the FMP forms as making bankruptcy look too easy, and thereby encouraging pro se filings. Others thought the length of the forms would make them harder for regular users to sort through and would increase attorney costs because it would take longer for counsel to review the forms. Conversely, some thought the project was a laudable achievement and while the conversational tone might seem more inviting, it was also more understandable. Moreover, the many warnings and amount of detail requested would make the need for counsel plainer, which would tend to lower the likelihood of pro se filings.

One important concept that emerged throughout the drafting process and through comments received on early drafts of the FMP forms is that input (what debtors see and sign) and output (what judges, clerks, trustees, creditors, and others need to review) are different things. Judge Perris said that because the FMP forms were designed to maximize the accuracy of input, they were not necessarily great for output and the comments reflected that fact. She said the issue was particularly complicated because different users are interested in different output. Judges, for example, often want to compare income and expense information on the schedules and means test forms in the context of requests for fee waivers. Case trustees, on the other hand, might be most interested in comparing exemptions and any security interests as they pertain to particular properties.

Judge Perris said the need for customized output is where NextGen and the FMP intersect. Reviewers were generally excited about the prospect that NextGen would collect the data contained in the forms and that user-created reports could be generated from the form data. If the Judicial Conference allowed non-judiciary users, such as case trustees and other parties in the case,

to generate reports, the length of the new forms would much less of an issue to those users.

Judge Perris asked the Advisory Committee for guidance on a number of issues going forward. She asked whether members agreed that the conversational language would lead to more pro se filings, and, if so, whether more formal language should be reintroduced. No member favored reintroducing more formal language, and several members questioned the assumption that conversational language would lead to more pro se filings. With respect to increased costs, one member thought that if the length of the forms required more attorney time to review debtor responses, it was probably time well spent and could eliminate problems that would otherwise come up later in the case.

Next, Judge Perris asked for comments on the increased length of the FMP forms, which she said is generally attributable to the increased use of close-ended questions and integrated instructions. She said that the current forms, which consist of mostly open-ended questions and separate instructions, provide a model for shortening, but that comments solicited at the beginning of the Forms Modernization Project were that debtors don't seem to read separate instructions and often don't answer open-ended questions. Several members voiced support of the increased use of integrated instructions and close-ended questions, and they suggested that the issue of length would recede after the forms are used for a while.

Judge Perris suggested three approaches to publication of the new forms: (1) publish the whole individual filing package at once; (2) publish a subset of the individual package – the fee waiver and installment payment forms, and the income, expense and means test forms; or (3) radically change the current direction.

She said the FMP leadership favored publishing only the subset in 2012 for at least two reasons. First, under the normal publication process, any forms published in 2012 will be ready to go into effect on December 1, 2013. Although parts of CM/ECF NextGen may be operational by December 2013, no computer code has been written yet, and different constituents will have their own ideas of what should be implemented first. Second, given that the appellate rules package is also on track to be published in 2012, publishing just a subset of the forms would be less of a shock to the bankruptcy community and may allow for more constructive feedback.

The Chair supported an incremental approach, and said he thought the Committee already began that approach when it published the mortgage-related attachment and supplements to the proof of claim form last year, as all three of the new forms followed the formatting and some of the plain language style of FMP forms. Several other members agreed with the Chair, and **the Committee voted in favor of an incremental approach and recommended working with NextGen to get it implemented as soon as possible.**

8. Report of the Subcommittee on Business Issues.

(A) Consideration of Suggestion 10-BK-H by the Institute for Legal Reform for a rule

and form to promote greater transparency in the operation of trusts established under section 524(g) of the Bankruptcy Code.

The Assistant Reporter explained that the Institute for Legal Reform ("ILR") proposed an amendment to the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." Under the ILR proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment by asbestos claimants if that information is relevant to litigation in any state or federal court.

Committee members recognized that the ILR suggestion addressed an important matter deserving careful attention, but members also expressed concern that the proposal presented difficult jurisdictional questions and would not serve a sufficiently bankruptcy-specific purpose. Because it would apply to trust operations after confirmation of a plan, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although possibly beneficial to parties in nonbankruptcy tort litigation, was of limited use in administering bankruptcy cases and therefore might be beyond the proper reach of the Bankruptcy Rules.

Members discussed comments received from interested individuals and groups (practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and the ILR) who responded to a request from the Chair for input on the ILR suggestion. As detailed in the agenda materials, some responses supported the proposal, but most urged the Committee not to adopt it, and many questioned whether the bankruptcy rules are the appropriate mechanism to address the concerns raised by the ILR.

After discussing the ILR suggestion and considering all the responses, the Committee adopted the recommendation of the Business Subcommittee that further action not be taken on ILR's suggestion.

(B) Recommendation concerning Suggestion (10-BK-J) by Judge Linda Riegle to amend Rule 1014(b).

The Reporter described Judge Reigle's suggestion. Bankruptcy Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

Judge Riegle expressed concern that there is no mechanism for alerting the first court that a

subsequent case has been filed. She also said that the rule seems to prevent the second court from transferring venue on its own motion, and she offered suggested amendments that would address the problems.

For reasons detailed in the agenda materials, the Subcommittee concluded that the amendments suggested by Judge Riegle are unnecessary. As currently drafted, the rule provides a solution for a problem the venue statute leaves open: which of the judges of the different districts has authority to transfer venue. The rule avoids possible conflicting rulings by giving the authority to decide venue to the judge in the first filed case. The Subcommittee was not concerned that the judge in the first case would not become aware of the second case because generally some party in the second case will have an interest in bringing that case to the attention of the judge in the first case.

The Subcommittee did conclude, however, that Rule 1014(b) should be amended to state clearly when the stay of any subsequently filed case goes into effect. Rather than selecting either the filing of a subsequent petition or the filing of a motion under the rule as the event that commences the stay, the Subcommittee recommended that an order by the first court be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination – not just a party's assertion – that the rule applied and that a stay of other proceedings was needed. The Subcommittee also recommended a number of stylistic changes that could be made to the rule if the Committee decided to recommend a change clarifying when the stay in the second case goes into effect. **After a short discussion, the Committee agreed with the Subcommittee, and recommended publishing for comment the proposed changes, as set forth in the agenda materials, in the summer of 2012.**

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

Judge Wizmur gave the report. She said that Judge Stone's suggestion was referred to the Subcommittee at the spring 2010 Committee meeting. The Subcommittee recommended at the fall 2010 meeting that additional information be gathered to determine whether there is a need for a national rule or official form for the allowance of administrative expenses. Accepting that recommendation, the Committee asked Molly Johnson and Beth Wiggins of the Federal Judicial Center ("FJC") to survey bankruptcy clerks and business bankruptcy attorneys regarding local rules and practices currently governing applications for administrative expenses, whether there have been problems with existing practices, and whether a national rule and form is needed.

Ms. Johnson reported on the survey results at the spring 2011 Advisory Committee meeting. After disucssing the results, the Committee asked the Subcommittee to consider the range of possible responses to Judge Stone's suggestion and to recommend whether one or more national rules and/or forms for the allowance of administrative expenses should be developed.

During a conference call on June 15, the Subcommittee reviewed the survey results and noted that there did not seem to be a major outcry for a rule or national form. Clerks saw virtually no problem at all, and, of over 2000 ABA business bankruptcy committee attorneys surveyed, only about five percent responded. Although approximately two-thirds of the 94 business attorney respondents thought a national rule could be helpful, few thought there was a problem with the local procedures that have developed over the past thirty years. Because the lack of a national rule for paying administrative expenses did not seem to be a problem, the Subcommittee recommended that Judge Stone's suggestion not be pursued further.

After a short discussion, the Committee accepted the Subcommittee's recommendation that there is no need for a national rule or form governing the payment of administrative expenses.

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

Oral report on the revision of the Part VIII rules.

For the benefit of the new members, Judge Pauley and the Reporter recapped the progress of the of the Subcommittee's efforts over the past several years to review Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts to district courts and bankruptcy appellate panels. They explained that an early goal of the revision project was to bring the bankruptcy appellate rules more in line the Federal Rules of Appellate Procedure (FRAP) and that comment on early drafts emphasized the need to incorporate into the rules greater use of the electronic transmission, filing, and storage of electronic documents.

Over the summer, a working group composed of several members of the Advisory Committee, its reporters, a member of the Appellate Rules Advisory Committee, and that committee's reporter met to thoroughly review and edit the Part VIII draft and accompanying committee notes. The Reporter explained that the working group recommended a number of changes and that during this meeting she would go through approximately one half of the package, explain drafting choices, and ask for comments. She said the Subcommittee would present the second half of the draft at the spring 2012 meeting, with a recommendation that the entire package be published for public comment in August 2012.

The Reporter said that a number of general drafting decisions reflected reoccurring issues throughout the Part VIII draft. For example, the working group concluded that references to appellate "court" are more common than appellate "judge" and therefor adopted an "appellate court" convention. And, although the bankruptcy rules historically favor "shall" over "must," the working group concluded that using "must" would make the Part VIII rules more consistent with FRAP. The working group also decided that internal references to "this rule" should be avoided if possible, and instead chose to restate the entire rule or refer to the rule subsection. **The Committee supported the working group's drafting conventions.**

The Committee reviewed Rules 8001 – 8012, and recommended publishing them for public comment in August 2012, with changes described below and subject to the additional revision of a few rules and review by the style consultant.

Rule 8001: Subsection (b) deleted; new (b) "Definitions" added with BAP and Appellate Court as (b)(1) and (b)(2) respectively; "Transmit" changed from subsection (e) to (b)(3) and the Subcommittee was asked to add language clarifying that the court must allow reasonable exceptions to the preference for electronic filing.

Rule 8002: no amendments suggested.

Rule 8003: changed "district court or a BAP" references to "appellate court;" at line 34, added "*sending it* to the pro se party's last known address;" made several other stylistic changes.

Rule 8004: changed "district court or a BAP" references to "appellate court" and the Reporter said she would search the draft and replace similar instances; Judge Pauley suggested changes to the committee note describing subsection (d) to be added after the meeting.

Rule 8005: one member suggested changing "the BAP clerk" at line 16 to "a BAP clerk."

Rule 8006: several changes to the committee note to explain the effective date of the certification and to deal with interlocutory judgments (interlocutory judgment language to come from strike-out material at lines 13-20 of Rule 8004).

Rule 8007: revisions to paragraph one of the committee note.

Rule 8008: no changes.

Rule 8009: bullet points added to 8009(a)(1); line 103, change "judge" to "court"; line 106, change "truthful" to "accurate."

Rule 8010: one member noted that requiring the court reporter to file a transcript in the BAP or district court would be problematic in practice because bankruptcy court reporters typically do not have authority to file electronically in those courts. District courts and BAPs generally can, however, view the lower court's docket, so it probably makes more sense to allow all filings to occur on the bankruptcy court's docket. **A motion to allow all filings by the reporter on the bankruptcy court docket passed and the Subcommittee agreed to revise Rule 8010 accordingly for consideration in the spring. Other stylistic changes also approved.**

Rule 8011: Subsection (2)(D) deleted, other stylistic changes made and **a motion to strike the reference to Rule 9037 and consider at the next meeting which 9000 rules apply carried without objection**.

Rule 8012: stylistic changes.

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

(A) Recommendation on Suggestion 10-BK-M by the States' Association of Bankruptcy Attorneys for a uniform rule for national admissions and local counsel requirements for governmental entities.

The Reporter said that the States' Association of Bankruptcy Attorneys ("SABA") has proposed a rule that would allow attorneys admitted to practice in any U.S. bankruptcy court, and in good standing in all jurisdictions in which they are a members of the bar, to practice in one or more cases in any other bankruptcy court, subject to certain conditions. Under the proposal, eligible attorneys would not be required to associate with local counsel for these representations.

Although the suggestion proposed a national admission rule applicable to all attorneys, the Subcommittee focused primarily on an alternative proposal limited to government attorneys. The Reporter said that subcommittee members recognized the difficulties that strict admission and local counsel requirements pose for state and local government attorneys who are required to participate in an out-of-state bankruptcy cases, but they questioned whether the matters raised by SABA are ones appropriately addressed by the Advisory Committee. Many bankruptcy court admission rules are governed by the district court, and the idea of a national federal bar or national admission standards to federal courts has been advocated for many years without success because both the Advisory Committee and the Standing Committee have been reluctant to override local admission requirements.

After discussing the suggestion, the Committee accepted the recommendation by the Subcommittee to take no further action.

(B) Recommendation on Suggestion 10-BK-N by Judge Thomas Waldrep concerning a new rule to provide greater transparency in the process for retaining counsel to creditors' committees.

The Assistant Reporter said that the issue arose in the context of *In re United Building Products*, 2010 WL 4642046 (Bankr. D. Del. Nov. 4, 2010). In that case the court denied the application to retain a law firm as committee counsel because it had engaged in solicitation for that position through the use of a surrogate to obtain the proxies of creditors. He said the Subcommittee was aware of EOUST interest in *United Building Products*, and suggested awaiting responsive action from the EOUST.

Mr. Redmiles said that the formation of committees was under review by the EOUST well before the *United Building Products* came out, and Ms. Eitel said that the EOUST has developed new internal guidance and template forms for U.S. trustees that explain how to form committees. She said the biggest problem with respect to committee formation was getting creditors to serve at

all, and the new guidelines address that, but they will also reveal proxy votes and should address the concerns raised in *United Building Products.*

In response to a question from the Chair, Ms. Eitel said the EOUST does not think any amendments to the Bankruptcy Rules are needed to address the *United Building Products* situation, and that Bankruptcy Rule 2014 is sufficiently broad to do its job. **After further discussion, the Committee decided to take no action on Judge Waldrep's suggestion at this time.**

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

No report.

Discussion Items

12. Oral report on the impact of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter gave a brief overview of *Stern* and then explained that there appear to be two immediate practical considerations. He said that in light of some of the language in *Stern* there was concern about whether parties can consent to entry of a final judgment by a bankruptcy judge in matters that are not "constitutionally" core matters. In his opinion, consent is still valid in part because the court made a point of demonstrating that there was no consent with respect to the issue before it, the counterclaim. On the other hand, the court found that consent to final judgment on the proof of claim itself was explicit, and it had no concerns with bankruptcy judge entering a final judgment on that matter. In addition, the Court made clear that its ruling was a narrow one. The Assistant Reporter said the consent issue is a concern to many commentors, however, and a panel of the Fifth Circuit is already seeking briefing on whether *Stern* upsets long-standing case law that consent to a final judgment by a magistrate judge is valid.

A second issue raised by *Stern* is how best to deal with the apparent statutory gap that now exists in 28 U.S.C. § 157. Although *Stern*-like counterclaims were found to be "core" in sense of the statute, the Court made clear that the bankruptcy court could not enter a final judgment on that matter constitutionally, at least not without the consent of the parties. Section 157 has no guidance, however, on a bankruptcy court's power to decide a matter that is core under the statute, but is not core under the Constitution. The Assistant Reporter said it makes sense to treat the *Stern*-like matters as if they are non-core but otherwise related to the bankruptcy case under Section 157(c), such that the bankruptcy judge can enter a final judgment if consent is given by both parties; otherwise, the court can enter a report and recommendation.

The Assistant Reporter said he did not think there was anything the Committee could do at this point but see how courts interpret the opinion. **A motion to take no action at this time, and to monitor case law, passed without opposition.**

13. Oral report on the change in how the IRS allocates internet services in its "National Standards and Local Standards," which are used by debtors to complete Official Forms 22A and 22C.

The Chair said that effective October 3, 2011, the IRS will remove internet service expenses from its "Other Necessary Expense" category, and incorporate that expense into its Local Standards for Housing and Utilities. He said the change will affect Official Forms 22A and 22C. Both forms currently direct the debtor to deduct as an expense the actual amount paid for telecommunication services, including "internet service." OF 22A, Line 32; OF 22C, Line 37. Because of the IRS change, the forms will double count internet expenses if any are reported on telecommunication lines of the forms.

Mr. Redmiles gave members some background information about how the IRS change came about and why the notice to the EOUST and the Committee was too short to revise the forms this year. Members agreed that any needed revisions to the forms would be technical and would not require publication, so that once revised they could go into effect in December 2012. **The Chair asked the Consumer Subcommittee to suggest changes for December 1, 2012 that the Committee could consider at its spring meeting.**

14. Suggestion 11-BK-C by Wendell J. Sherk to amend Official Forms 22A and 22C to allow debtors with a below-median income to file shortened versions of the forms.

The Chair said that the FMP had incorporated the suggestion into its proposed drafts of 22A and 22C, which the Committee will consider at its spring meeting.

15. Suggestion 11-BK-D by Sabrina L. McKinney to amend Official Form B10 to provide a space for designating the amount of a general unsecured claim.

After the meeting the suggestion was referred to the Consumer and Forms Subcommittees, along with a suggestion by Mr. Kilpatrick that B10 also address leases and executory contracts.

16. Suggestion 11-BK-E by Judge A. Thomas Small to amend Rules 7016 and 8001 to permit parties to agree that their appellate options will be limited to no more than one appeal or to no appeal at all.

Some members expressed concerns about how knowledge of the waiver might affect the bankruptcy judge's consideration. **Referred to the Appellate Rules Subcommittee.**

17. Suggestion 11-BK-F by Chief Judge Peter W. Bowie to amend Rules 7012, 7004(e), and 9006(f) to provide that the deadline for responding runs from the date of service of a

summons, rather than the date of issuance.

Referred to the Business and Consumer Subcommittees.

Information Items

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

Mr. Wannamaker reported on pending bankruptcy legislation. He said HR 2192, introduced on 6-15-11 by Representative Steve Cohen, was of particular interest because it would extend the temporary exclusion from the means-test in Public Law No. 110-438 for certain Reservists and National Guard members for an additional four years. Mr. Wannamaker said the bill was referred to the Judiciary Committee on June 15, 2011, and was voted out of committee last week. [See also, Agenda Item 6-D].

19. Oral update on opinions interpreting section 521(i) of the Bankruptcy Code.

The Reporter said that courts continue to say that despite the automatic dismissal language in 11 U.S.C. § 521(i), a bankruptcy court retains discretion not to dismiss, at least if it appears that the debtor is trying to use the provision to avoid court scrutiny.

20. *Bull Pen*:

A. Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting.

B. Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7), which would authorize providers of postpetition personal financial courses to notify the court directly of a debtor's completion of the course, approved at September 2010 meeting.

C. Amendment to Box 7 on Official Form 10 to add a reminder to attach the new mortgage attachment form under proposed Rule 3001(c), (Official Form 10 (Attachment A)), and the statement concerning open-end or revolving consumer credit agreements under proposed Rule 3001(c)(3)(A), approved at April 2011 meeting.

No comments were made on matters in the bull pen.

21. Rules Docket.

Mr. Wannamaker said the rules docket was meant to help the Advisory Committee keep track of its work, and that he would appreciate any comments.

22. Future meetings:

Spring 2012 meeting, March 29 - 30, 2012, at the Arizona Biltmore http://www.arizonabiltmore.com in Phoenix, Arizona. Possible locations for the fall 2012 meeting.

The Chair said he was considering Portland, Oregon for the fall, 2012 meeting, but that he was open to suggestions.

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers