ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 24 - 25, 2013
At the University of St. Thomas, School of Law
Minneapolis, Minnesota

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 James Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire (by telephone)
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Roy T. Englert, Jr., Esq., liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on Bankruptcy Administration
Jonathan Rose, Secretary, Standing Committee, and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Peter G. McCabe, Assistant Director, Office of Judges Programs, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees (by telephone)
Andrea L. Kuperman, Chief Counsel to the Rules Committees (by telephone)
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Bridget Healy, Administrative Office
Molly Johnson, Federal Judicial Center
District Judge Patrick J. Schiltz, District of Minnesota

Associate Dean Joel Nichols, St. Thomas School of Law
Professor Nancy B. Rappaport, William S. Boyd School of Law, UNLV
Michael T. Bates, Senior Company Counsel, Wells Fargo
Margaret Burks, President, National Association of Chapter 13 Trustees
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees
Debra L. Miller, Chapter 13 Trustee, Northern District of Indiana

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials. An electronic copy of the agenda materials is available at http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-bankruptcy-procedure.aspx. Votes and other action taken by the Advisory Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and welcome to new member Judge Amul R. Thapar.

The Chair welcomed the Advisory Committee's newest member, Judge Thapar, and thanked Judge Schiltz and Associate Dean Joel Nichols for hosting the Advisory Committee's meeting at the Saint Thomas School of Law. The participants introduced themselves and the Chair recognized Mr. McCabe for his service to all the rules committees and Mr. Wannamaker for his many years of service as primary staff support for the Advisory Committee. The Chair noted that both men would be retiring in the next few months and the Advisory Committee would deeply miss their institutional knowledge and camaraderie.

2. Approval of minutes of New York meeting of April 2 - 3, 2013.

The draft minutes were approved.

3. Oral reports on meetings of other committees:

(A) June 2013 meeting of the Committee on Rules of Practice and Procedure, including the request for comments on the alternatives included in the proposed amendment of Rule 5005(a)

The Reporter, Chair, and Judge Wizmur gave the report. All of the Advisory Committee's recommendations were approved. The form of the proposed amendment to Rule 5005(a) was modified to provide alternative proposals with respect to electronic signatures of individuals who are not registered users of the judiciary's case management and electronic case filing system (CM/ECF).

Judge Wizmur explained that the Advisory Committee on Evidence did not think there was a need to change the evidence rules in order for electronic signatures to be admissible as evidence. There was, however, concern about how scanned signatures would be validated.

The Reporter and the Chair explained that a cross-committee "CM/ECF Subcommittee" has been created to consider the impact of electronic filing on the existing federal rules. As part of that subcommittee's initial recommendations, alternative versions of the proposed amendments to Rule 5005(a) have been published for public comment. With respect to individuals who are not registered users of CM/ECF, one proposed version of the rule would deem the registered user's electronic submission of the signature to validate it. In bankruptcy cases that would mean the debtor's attorney would validate the debtor's signature by submitting it as part of a CM/ECF filing. The alternative proposal would require that a notary public validate the signature of the non-registered user.

(B) Cross-committee CM/ECF Subcommittee

The Reporter explained that in addition to weighing in on the proposed amendments to Rule 5005, the CM/ECF Subcommittee has also proposed eliminating the 3-day extension in Rule 9006(f) and Civil Rule 6(d) in cases of electronic service. She said that the proposal would be taken to the Standing Committee in January. Several members supported the idea, and one member suggested that the 3-day extension should be removed for all modes of service. But other members noted occasional problems with electronic service including spam filters, security settings, and the failure of electronic mail servers. The Chair said that he would relate concerns about ineffective electronic service to the Standing Committee.

(C) June 2013 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Smith said that the term of the Bankruptcy Administration Committee's Chair, Judge Joy Conti, ends this month, and that the new chair, Judge Danny Reeves, begins his term on October 1, 2013.

Judge Smith said that the General Accounting Office has issued its report "Efforts to Consolidate and Share Services between District and Bankruptcy Clerks' Offices" and that it did not find any evidence that consolidation would save money. She said that the AO has gathered data on shared services and it hopes to have a report at the Committee's December meeting. She said there appear to be savings in shared services, but that the savings are difficult to quantify.

Judge Smith said that the Committee approved funding for recalled bankruptcy judges and temporary law clerks. The Committee has endorsed the use of video conferencing to save costs where possible, and has again been asked to look at eliminating the Bankruptcy Appellate Panels (BAPs) as a cost savings measure. As it has in the past, the Committee determined eliminating the BAPs would be cost-shifting rather than cost-saving.

With respect to judgeship requests, Judge Smith explained that the Committee has been asked to prioritize judgeship needs. Judge Smith also sent members a copy of the revised *In Forma Pauperis* guidelines that were recently approved by the Judicial Conference.

(D) April 2013 meeting of the Advisory Committee on Civil Rules.

Judge Harris said that the amendments on civil discovery that emerged out of the Duke conference have been approved for publication. Most proposed amendments, if adopted, will automatically apply in bankruptcy proceedings because most of the bankruptcy discovery rules incorporate civil discovery rules. The "Scope and Purpose" rule for bankruptcy (Rule 1001) does not, however, incorporate the civil rule version (Rule 1). Accordingly, if the Advisory Committee decides to track the proposed amendment to Rule 1, a conforming change to Rule 1001 will have to be recommended and approved. In this respect, the Chair approved Judge Harris' request to put in the dugout consideration of an amendment to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1.

(E) May 2013 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that in addition to the electronic signature issue with respect to Rule 5005, the Evidence Rules Advisory Committee will hold a mini-conference in Portland, Maine next month (October 2013) to discuss the impact of technology on the rules of evidence.

(F) April 2013 meeting of the Advisory Committee on Appellate Rules.

Judge Jordan said that the Appellate Rules Committee has approved published revisions to Appellate Rule 6 that would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. §158(d)(2), and (4) take account of the range of methods available now or in the future for dealing with the record on appeal.

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

Judge Perris and Mr. Waldron said that the development of CM/ECF NextGen continues and that test courts should begin seeing the first release early next year and that full implementation by all bankruptcy courts is targeted for early 2015. Mr. Myers added that the Administrative Office has had a number of conference calls with private forms vendors in connection with the development of NextGen. Some vendors have expressed concern that not all of their competitors will invest the resources to comply with the new requirements and may thereby obtain a competitive pricing advantage for their software. Mr. Myers said the vendors have been told, however, that courts will likely issue deficiency notices to bankruptcy attorneys who submit forms without all the data required by NextGen and that as a result attorneys will seek out vendors that do comply with the new requirements.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion 12-BK-B by Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Rule 2002(f)(7) currently requires notice to creditors of the entry of confirmation orders in cases under chapters 9, 11, and 12—but not chapter 13. The Assistant Reporter said that the Administrative Office's Bankruptcy Noticing Working Group has suggested that the rule be expanded to require notice when a chapter 13 confirmation order is entered. The Working Group explained that although courts can order notice of entry of a chapter 13 confirmation order under Rule 9022, adding the notice requirement to Rule 2007(f)(7) would provide clarity about who should receive the notice.

The Assistant Reporter said that the Subcommittee carefully considered the suggestion but concluded that a rule amendment was unnecessary. The Subcommittee first concluded that notice of the chapter 13 plan confirmation hearing, already required by the bankruptcy rules, was sufficient notice of the pending entry of a confirmation order, and that creditors represented by counsel who have entered an appearance in the case will receive electronic notice when the chapter 13 confirmation order is entered on the docket.

The Subcommittee also conducted an informal survey of 77 court clerks and found that approximately 80% reported that the judges in their courts already routinely require some type of notice under Rule 9022. Given that current noticing practices appear to be sufficient, and that the Subcommittee is already considering a separate suggestion to limit certain notice requirements in chapter 13 cases that may be costly and provide little benefit, the Subcommittee recommends that no further action be taken on the suggestion. **The Advisory Committee agreed with the Subcommittee and no further action will be taken on the suggestion.**

Professor Morrison said that, like chapter 13 cases, there seemed to be little benefit to providing notice of entry of the confirmation order in small business chapter 11 cases. At Professor Morrison's request, **the Chair asked the Business Subcommittee to consider removing small business chapter 11 cases from the list in Rule 2002(f)(7).**

(B) Recommendation concerning Comment 11-BK-12 by Judge Eric L. Frank regarding the negative notice procedure for objections to claims in the proposed amendment to Rule 3007 that was published in 2011.

Judge Harris and the Reporter reminded members that the Advisory Committee previously proposed an amendment to Rule 3007(a) in response to two suggestions submitted on behalf of the Bankruptcy Judges Advisory Group ("BJAG"). The first suggestion (09-BK-H), from Judge Margaret D. McGarity, proposed an amendment to permit the use of a negative

notice procedure for objections to claims. The second suggestion (09-BK-N), from Judge Michael E. Romero, sought clarification of the proper method of serving objections to claims. Judge Romero noted that some courts require service under Rule 7004 because an objection to a claim creates a contested matter and Rule 9014(b) provides that the "motion [initiating a contested matter] shall be served in the manner provided for service of a summons and complaint by Rule 7004." Other courts have concluded that Rule 3007(a) governs claims objections by specifying the notice recipient of a claims objection.

2011 Proposed Amendments to Rule 3007(a)

The Reporter said that Advisory Committee addressed the suggestions through proposed amendments to Rule 3007(a) published for comment in 2011-12. The amendments adopted an objection procedure to make clear that Rule 7004 applies to claims objections only if the recipient is the United States, an officer or agency of the United States, or an insured depository institution. Otherwise, the claimant must be served by first class mail at the address and name set out on the proof of claim. The proposed amendments also permitted a negative noticing procedure.

The Reporter said that there were two comments in response to the published amendments. Judge Eric Frank questioned whether a negative notice procedure is generally appropriate for an objection to a claim since, under Rule 3001(f), a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. The other comment was submitted by Mr. Raymond P. Bell, Jr. (11-BK-015), who agreed with Judge Frank.

In his comment, Judge Frank contended that the problem with the proposed amendment arose more from the Committee Note than from the text of the rule itself. While the rule's reference to "any deadline to request a hearing" might suggest that a claim can be disallowed just because of the failure to make such a request, it did not expressly say so. The Committee Note, however, stated that the amendment authorized local rules to *require* a claimant to request a hearing or file a response. He therefore suggested that, "at a minimum," the Committee Note be revised to "state unequivocally that although local rules may impose the obligation on a claimant to respond to a proof of claim, there may [be] matters in which a proof of claim is valid and allowable notwithstanding the failure to file a response to claims objection or request a hearing …." In his view, the Committee Note should indicate that, with regard to those matters, the court has a duty to determine whether Rule 3001(f) requires allowance of the claim, even if the claimant does not respond or request a hearing.

At the spring 2012 meeting, the Subcommittee recommended that the proposed amendments to Rule 3007(a) be withdrawn so that they could be considered along with the package of rule amendments accompanying the development of a national chapter 13 plan form. The proposed plan form would allow certain claims to be determined through the plan and the Subcommittee concluded that the method of service on the claimant should be the same

regardless of whether the claim amount was determined through the plan or through a claims objection.

The Proposed 2013 Amendments to Rules 3007 and 3012

In connection with the chapter 13 plan form published for comment in August 2013, the Standing Committee published amendments to Rules 3007 and 3012 that would require enhanced Rule 7004 service for requests to determine the amount of secured and priority claims in chapter 12 and 13 cases. The proposed amendments to Rule 3012 make clear that secured claims can be modified through the plan as well as by claim objection or motion, and that priority claim amounts can be challenged though a claim objection or motion. Regardless of the form of objection, however, the proposed amendment to Rule 3012 appears to require service under Rule 7004. Outside the chapter 12 and chapter 13 context, however, the proposed 2013 amendment to Rule 3007 leaves the current method of objecting to claims unchanged – arguably requiring only that the objection and hearing be mailed or otherwise delivered to the claimant.

The Reporter said that the Subcommittee was asked to try to create a unified approach to the service of claim objections as well as claim modifications accomplished through plans. She said that the Advisory Committee's 2011 proposed amendment to Rule 3007(a) was based on the belief that claim objections should generally be served on the person that the claimant designated on the proof of claim for receipt of notices, rather than according to Rule 7004. She said that the Subcommittee continues to recommend this method of service for claim objections, and that it therefore recommends final approval of Rule 3007(a) as published in 2011 and as shown in the agenda materials beginning at page 98. She added that the Subcommittee also acknowledged Judge Frank's concerns and that it therefore recommends adding language to the Committee Note (as shown at page 99 of the agenda materials) to make clear that an objection to a claim does not automatically overcome the prima facie validity of a proof of claim that is afforded by Rule 3001(f).

The Reporter said that the Subcommittee also continued to recommend the portion of the proposed 2013 amendment to Rule 3012 that would allow a secured claim to be modified through a chapter 12 or 13 plan, along with the more formal Rule 7004 service in that context to increase the likelihood that affected claimants are made aware that the plan proposes to modify their claim. The Reporter said that the Subcommittee now recommends revising published Rule 3012 to clarify that all claims objections, including objections to secured and priority claims, be served on the person designated on the proof of claim in accordance with proposed Rule 3007(a); that secured claims being modified through a plan be governed by the service provision in Rule 3012; and that motions to modify a claim be governed as they currently are, by Rule 9014.

A motion to approve the Subcommittee's recommendations, subject to further amendments after considering comments on the published versions of Rule 3007 and 3012, passed without objection.

(C) Recommendation concerning conforming amendments of Rule 1007(a)(1) and (a)(2) to reflect the changed designations of the schedules proposed by the Forms Modernization Project.

Judge Harris explained that because schedules E and F are being combined for the Forms Modernization Project, the Subcommittee recommended a technical conforming amendments to Rule 1007(a)(1) and (a)(2) replacing references to schedules E and F with E/F. **A motion to conform the rule to the new form designations, effective when the new forms go into effect, passed without opposition.** The Chair explained that because the proposed amendment was conforming, publication would not be necessary.

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

Judge Harris said that the Subcommittee was aware that some courts already require an initial payment with a fee installment application, and that it has asked the FJC to research the prevalence of the practice and the amount of required initial installments. On behalf of the FJC, Ms. Johnson said that she hopes to have research done in time for a Subcommittee call before the spring meeting.

(E) Oral 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 in a chapter 13 case.

Judge Harris reviewed the suggestion. Bankruptcy Rule 2002(a) requires that certain notices go to all creditors. After the claims bar date in a chapter 7 case, however, Rule 2002(h) allows the court to enter an order limiting future notices to creditors who have either filed a claim or who have been given an extension to file a claim at a later date. Judge Dales suggests that Rule 2002(h) be revised and made applicable to chapter 13, or even to all chapters.

Judge Harris said that the Subcommittee recommends putting Judge Dale's suggestion in the dugout until after the published chapter 13 amendments have been considered. There were no objections to the Subcommittee's recommendation, and the suggestion was placed in the dugout.

5. Report by the Chapter 13 Plan Form Working Group.

Oral report concerning (1) responses to the publication of the chapter 13 plan form and the implementing rules amendments and (2) outreach to the chapter 13 community concerning the plan form and rules.

The Chair recognized the various people attending the meeting who commented on and/or attended meetings regarding the plan form. The Assistant Reporter discussed the plan

form process, and Mr. Kilpatrick explained the developments of an adequate protection order. Mr. Kilpatrick also noted that most of the comments received so far have been positive and many have included constructive suggestions for improvements. The Chair added that he anticipates many comments which should generate a full discussion of the plan form and the chapter 13 process at the spring 2014 meeting.

6. Report by the Mortgage Claim Form Working Group.

Oral report concerning amending Official Form 10A (Mortgage Proof of Claim Attachment) to require inclusion of a loan history.

Ms. Michaux explained that the working group was formed at the spring 2013 meeting. It has already had several conference calls, and the members hope to have a proposal for a detailed loan history to replace Official Form 10A ready to be considered at the spring 2014 meeting. The purpose of a detailed loan history, in contrast to the summary that is now Official Form 10A, Ms. Michaux said, is to provide as a default a clear accounting of how payments have been applied to the loan so that debtors can object to the claim calculation when appropriate.

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

(A) Recommendations concerning (1) Suggestion 13-BK-E by Judge Carol Doyle to amend Rule 3002.1 to clarify that the rule applies to all claims secured by a chapter 13 debtor's principal residence when the plan proposes to maintain mortgage payments postpetition and (2) providing guidance on whether the creditor's obligations under Rule 3002.1 cease to apply if the automatic stay is lifted with respect to the residence.

The Reporter explained that Judge Doyle's suggestion highlights a case law split on whether Rule 3002.1(a) applies only in chapter 13 cases in which an arrearage is being cured under 11 U.S.C. § 1322(b)(5). Among other things, the rule requires a mortgagee to provide certain notices pertaining to payment changes, fees, expenses, and charges, but some courts have ruled that these reporting requirements arise only if the chapter 13 plan is curing an arrearage. Others, including Judge Doyle, have concluded that the reporting requirements apply so long as the plan provides for maintaining current payments on the debtor's mortgage.

The Subcommittees agreed with Judge Doyle that Rule 3002.1(a) should be amended to clarify that it requires compliance with the rule whenever a plan provides for the maintenance of postpetition mortgage payments. If a debtor is trying to remain current on a home mortgage, he or she needs to know if the amount required to be paid has changed, whether or not an arrearage is being cured. The Subcommittees also recommended amending the rule to clarify that it applies regardless of whether the debtor or the trustee is making plan payments. **The Advisory Committee agreed with both recommendations.**

The Subcommittees further agreed that the rule should be amended to clarify that the creditor's reporting requirements cease at some point after a motion to lift the automatic stay is granted with respect to the debtor's principal residence. There was no agreement, however, as to when that point arrives. The views coalesced around two positions: (1) effective date of the order terminating the stay and (2) transfer of title from the debtor.

The Advisory Committee discussed the two alternatives proposed by the Subcommittees. Some members favored termination of the reporting requirements when the stay is lifted because the date is easy to determine and would be uniform throughout national bankruptcy practice. A title transfer date, in contrast, would vary depending on state foreclosure law. Members supporting the title transfer date pointed out, however, that the debtor and creditor often continue to negotiate after the stay is lifted, with the mortgage eventually being reinstated. The Chair said that either proposal would merely be a default provision and that a court could order that reporting requirements continue if that made sense is a particular situation. **After further discussion, and over three dissents, the Committee recommended publishing the "stay termination" alternative as the default date for ending a creditor's Rule 3002.1(a) reporting requirements.** One member also suggested adding language to the Committee Note to encourage courts to consider requests for continued reporting in appropriate circumstances, but no particular language was recommended.

(B) Oral report concerning Suggestion 11-BK-N by David S. Yen for a rule and form for applications to waive fees other than filing fees under 28 U.S.C. § 1930(f)(2) and (f)(3).

Judge Harris said that the Subcommittee tabled the suggestion until the Judicial Conference approved guidelines for fee waivers under 28 U.S.C. § 1930(b). As reported by Judge Smith at Item 3C above, fee waiver guidelines have now been approved. Judge Harris said that the Subcommittee will review the new guidelines, consider the suggestion, and report back at the spring meeting.

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

(A) Report on the status of the Forms Modernization Project and preliminary review of filing forms for non-individual debtors, including a chapter 15 petition.

Judge Perris provided an overview of the Forms Modernization Project and the Next Generation of CM/ECF. She said that the code for CM/ECF NextGen is being written now and that testing should begin in four test courts in January 2014. The test courts are scheduled to go live next summer, and the rest of the courts will follow later. She said that it would probably not be until early- to mid-2015 that all courts will be live on the first release of NextGen. The projected rollout is compatible with the release of the modernized bankruptcy forms, she said, because the bulk of the forms will not be ready to go into effect until December 1, 2015, shortly after most courts are expected to be using the first release of NextGen.

Judge Perris said that the individual debtor forms are currently out for public comment and that the Forms Subcommittee and Forms Modernization Project (FMP) will make recommendations for any needed changes and for final approval at the spring meeting. The recommended effective date for the individual debtor forms will be no earlier than December 1, 2015, however, because the new form numbering scheme developed for bankruptcy forms makes it necessary to put the bulk of the new forms into effect at the same time, and the non-individual debtor version of case opening forms will not be published for comment until next year. Mr. Myers briefly described the form numbering scheme and reported that an updated chart showing current and projected form numbers was included in the agenda materials beginning at page 281.

For this meeting, Judge Perris said that the FMP was seeking preliminary feedback on the non-individual debtor instruction booklet, case opening forms for non-individual debtors, B201, B202, B204, B205, B206Sum, B206A/B, B206D, B206E/F, B206G, B206H, B207, an Official Form for opening a chapter 15 case, B401, and the proof of claim form, B410. She said that the forms and their Committee Notes started at page 147 of the agenda materials. Members suggested a number of changes, and Judge Perris explained that the suggestions and any others she received would be evaluated by FMP working groups over the winter in the next round of form revisions.

(B) Recommendation concerning Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend the Voluntary Petition to include checkboxes for the documents small business debtors are required to file under § 1116(1) of the Bankruptcy Code.

The Reporter said that the Subcommittee considered the suggestion and agreed that the following language should be added to both versions of the voluntary petition: "If you indicate that the debtor is a small business as defined in 11 U.S.C. § 101(51D), you must append the attachments required under 11 U.S.C. § 1116(a)(1)." **The Advisory Committee agreed with the recommendation.**

(C) Oral report on the revision of the bankruptcy subpoena forms as a consequence of the amendment of Civil Rule 45 effective December 1, 2013.

Judge Harris explained that pending changes to Civil Rule 45 require revisions to the bankruptcy subpoena forms, which incorporate language directly from the rule. Although Director's Procedural Forms are not required to be used, Subcommittee members and AO staff revised the bankruptcy subpoena forms to more closely follow the presentation and organization of the civil rule subpoena forms. Form 255 is to be used to compel testimony at a hearing or trial, Form 256 for a deposition, and Form 257 for production or inspection. As is the case currently, Form 254 is to be used as a subpoena for Rule 2004 examinations. Judge Harris said that because the subpoena forms are Director's Procedural Forms, formal approval by the Advisory Committee is not necessary. He added that the forms are scheduled to go into effect on December 1, 2013, when revised Rule 45 becomes effective.

9. Report by the Subcommittee on Business Issues

(A) Oral report on the status of the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 scheduled to take effect on December 1, 2013, and other amendments proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter said that the *Stern* rules (proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033) have been approved by the Judicial Conference and are on track to become effective December 1, 2014, if approved by the Supreme Court and if Congress does not act to the contrary. He said that the timing was somewhat complicated, however, because after the Advisory Committee and the Standing Committee recommended the proposed amendments for final approval, the Supreme Court granted review of *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200. One question presented in *Arkison* is whether bankruptcy judges are constitutionally authorized, based on the express or implied consent of the parties, to resolve a proceeding otherwise entitled to an Article III forum.

The Chair explained that the proposed *Stern* amendments are premised on the idea that parties can expressly consent to final adjudication by a bankruptcy judge. Because both *Arkison* and the proposed *Stern* amendments raise the issue of consent, he said, the Supreme Court may decide to hold any decision on the *Stern* rules until after *Arkison* is decided. If the Court holds consideration of the *Stern* rules past May 1, 2014, he said, the rules would not go into effect until December 1, 2015, at the earliest.

NOTE: After the meeting, the Advisory Committee and the Standing Committee reconsidered the decision to recommend submitting the *Stern* amendments to the Supreme Court. The rules package was submitted to the Court earlier than usual this year to give the Court the option of handling its Rules Enabling Act work at the beginning of its term. Including the *Stern* amendments in the rules package undermines the goal of presenting a clean package that the Court could consider and potentially resolve early in the term. In addition, concerns were raised that the proposed *Stern* amendments could be perceived as favoring one side of the *Arkison* debate, and that amendments to the rules might be required after the case was decided. Based on the new recommendations of the Advisory Committee and the Standing Committee, the Executive Committee of the Judicial Conference withdrew the proposed *Stern* amendments from the rules package submitted to the Supreme Court.

(B) Recommendation concerning Suggestion 13-BK-D by David Tilem to add a checkbox for other voting parties to Official Form 14, the ballot for confirmation of a Chapter 11 plan.

The Assistant Reporter said that Mr. Tilem suggested the need for an "other" checkbox on Official Form 14, Ballot for Accepting or Rejecting Plan, to accommodate claims such as lease rejections. The Subcommittee considered the suggestion and concluded that no change was necessary. Official Form 14 is a generic ballot that is designed to incorporate the classes of

claims and interests described in the plan of reorganization. The plan proponent modifies the ballot form as needed so that each class identified in the plan has a ballot. If the plan proposes to separately classify lease rejection damages, for example, the proponent would incorporate that class name into the version of Official Form 14 given to members of the class.

After a short discussion, no member opposed the Subcommittee's recommendation that no further action be taken on the suggestion.

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

(A) Recommendation concerning Suggestion 13-BK-A by David W. Ostrander to include the debtor's age on the Statement of Financial Affairs or the Schedules of Assets and Liabilities.

The Assistant Reporter said that the Advisory Committee has historically required debtors to disclose information on publicly available bankruptcy forms only if that information is deemed necessary to the bankruptcy process. For example, the means-test forms require information about whether the debtor is over or under age 65 because that information is necessary in order to apply the IRS national standards for health care costs. The Subcommittee was unable, however, to determine a more general bankruptcy administration need for public disclosure of the debtor's specific age on bankruptcy forms, and therefore recommended that no further action be taken on the suggestion. **No member opposed the recommendation.**

(B) Recommendations concerning amendments to the bankruptcy appellate rules.

Judge Jordan said that the Subcommittee reviewed a number of previously tabled comments with respect to the restyled Part VIII bankruptcy appellate rules that are on track to become effective December 1, 2014. The Subcommittee concluded that some of the comments should be rejected at this time, and that others should be put in the bullpen or dugout until after the revised Part VIII rules take effect and there has been sufficient experience with them to determine whether any additional amendments will be needed.

The Reporter presented the suggestions and noted the Subcommittee's recommendation as to whether: (1) no change should be made, (2) a proposed amendment should be put in the bullpen for recommended implementation at a later date, or (3) a proposed amendment should be held in the dugout to be considered at a later date.

Rule 8002 (Time for Filing Notices of Appeal)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8002 should include a provision like FRAP 4(a)(6), which permits the district court to reopen the time to file an appeal for someone who did not receive notice of entry of the judgment within 21 days after its entry.*

The Reporter said that FRAP 4(a)(6) is not incorporated into the existing appellate rules, and that, in light of the need for finality of a bankruptcy court order or judgment, the Subcommittee recommended against incorporating it into the restyled appellate rules. No committee member opposed the recommendation.

Comment 12-BK-033—Judge Christopher M. Klein : *It would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). The provision helps clarify timing issues presented by the separate-document requirement.*

The Subcommittee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). A proposed new Rule 8002(a)(5) was set out in the agenda materials beginning at page 324. **The Advisory Committee agreed to recommend the proposed change and placed it in the bullpen.**

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal)

Comment 12-BK-036—Mary P. Sharon, Clerk (1st Cir. BAP): *There is an inconsistency between Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant.*

The Subcommittee recommends that no change be made to the service provisions of revised Rules 8003 and 8004. The rules are consistent with the parallel FRAP provisions. Because an appellant seeking leave to appeal under Rule 8004 will have to serve its motion on other parties, the Subcommittee concluded that it makes sense to require service of the notice of appeal along with the motion. No member opposed the Subcommittee's recommendation.

Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal): In response to a comment suggesting that an appellate court be allowed to treat a motion for leave to appeal as a notice of appeal if a notice of appeal is not filed, the Subcommittee raised the following issue for further consideration: Should the requirement that a notice of appeal be filed, in addition to a motion for leave to appeal, be eliminated from revised Rule 8004?

Subcommittee members observed that the requirement that a notice of appeal be filed along with a motion for leave to appeal has been as been a longstanding part of the rule on leave to appeal. No one outside the Subcommittee has questioned the need for a notice in this circumstance, and after careful consideration, the Subcommittee recommended that no change be made to the rule. No Advisory Committee member opposed the recommendation.

Rule 8005 (Election to Have an Appeal Heard by the District Court Instead of the BAP)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8005 does not retain the provision of current Rule 8001(e)(2), which provides for the withdrawal of an election with the district court's acquiescence.*

For reasons described in the agenda materials, Subcommittee members recommended no change to revised Rule 8005. No Advisory Committee member opposed the recommendation.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

12-BK-033—Judge Christopher M. Klein: *Rule 8006(c) should provide an opportunity for the bankruptcy court to comment on the proceeding's suitability for direct appeal when a certification is jointly made by all appellants and appellees.*

Subcommittee members agreed that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Subcommittee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The Subcommittee's recommended amendment to Rule 8006(b) was set forth at page 330 of the agenda materials. **The Advisory Committee approved the proposed revisions to Rule 8006(b) for the bullpen. In addition, the Subcommittee was asked to consider whether a deadline for certifying a direct appeal should be added to the rule.**

Rule 8009 (Record on Appeal; Sealed Documents)

12-BK-005—Judge Robert J. Kressel; 12-BK-015—Judge Barry S. Schermer 12-BK-040—Bankruptcy Clerks Advisory Group: *Designation of the record should not be required.*

Because the recently appointed CM/ECF Subcommittee of the Standing Committee will likely consider this issue, the Subcommittee recommended deferring consideration of the suggestion until after the CM/ECF Subcommittee submits its report. **The Advisory Committee agreed and the suggestion was put in the dugout.**

Rule 8010 (Completing and Transmitting the Record)

12-BK-008—National Conference of Bankruptcy Judges; 12-BK-034—Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee; 12-BK-040—Bankruptcy Clerks Advisory Group: *Rule 8010(b)(1) should be revised to fix an outside deadline for the clerk's transmission of the record, even if parties are slow to designate the record.*

The suggestion would be moot if the suggestion to revise Rule 8009 to eliminate designation of the record is approved. The Subcommittee therefore recommended that consideration of this suggestion be deferred until after the CM/ECF Subcommittee submits its

report and the Subcommittee takes up the proposed amendment to Rule 8009. **The Advisory Committee agreed, and the suggestion was put in the dugout.**

12-BK-014—Judge Dennis Montali: *In some cases when the appellate court orders paper copies of the record to be delivered, it may be appropriate for the appellee to provide them. Add to the end of the first sentence of Rule 8010(b)(4), "or the appellee where appropriate."*

The Subcommittee recommended no change because the issue of furnishing paper copies will likely diminish as courts continue to adapt to the use of electronic storage and transmittal of documents. No member of the Advisory Committee objected to the Subcommittee's recommendation.

Rule 8011 (Filing and Service; Signature)

12-BK-005—Judge Robert J. Kressel; 12-BK-026—Judge S. Martin Teel, Jr.: *Rule 8011(a)(2) should not follow the ill-advised rule of FRAP 25(a)(2)(B) of having different filing rules for briefs and appendices. The filing rules should be the same for those documents as for all others—requiring receipt by the clerk by the deadline.*

The Subcommittee recommended no change. Currently, briefs are timely if mailed on or before the last day for filing. This practice is longstanding and is consistent with FRAP, which is one of the goals of amending the Part VIII rules. Moreover, as electronic filing of briefs becomes more prevalent, the mailing rules become less significant. No Advisory Committee member objected to the recommendation.

Other Issues

The Reporter said that the Subcommittee has retained three other comments on the revised Part VIII rules for further consideration. They concern whether a provision should be added to the rules providing for the issuance of a mandate by the district court and BAP upon the disposition of a bankruptcy appeal, and whether revised Rule 8023 should be amended to clarify the procedure for voluntary dismissal of appeals when (1) the appeal concerns an objection to discharge or (2) the trustee is a party to the appeal. It has been suggested that the requirements of Rules 7041 and 9019 for bankruptcy court review in those situations should also apply to appeals. The Subcommittee will make recommendations to the Advisory Committee regarding those comments at a later meeting.

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

Oral report concerning Suggestion 13-BK-F by Judge Barry Schermer to amend portions of the Bankruptcy Rules that apply to chapter 15 proceedings.

Mr. Baxter said that the Subcommittee concluded that the rules are inconsistent about the requirement of a summons when a chapter 15 petition is filed. In practice, he said, most courts do not issue a summons regardless of whether the case seeks recognition of a foreign main or a foreign non-main proceeding. He said that the Subcommittee is considering several alternatives and will bring a recommendation to the Advisory Committee at the spring meeting.

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

> Oral report concerning Suggestion 13-BK-C by the American Bankruptcy Institute's 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.

The Chair acknowledged Professor Rappaport, who authored the suggestion and was at the meeting, and thanked her for her efforts on the suggestion.

Judge Jonker said that ABI's Ethics Task Force suggestion asserts that the Rule 2014 requirement to disclose all of a professional's "connections" to the debtor and other bankruptcy case parties in an employment application is overbroad and leads to voluminous "telephone-book" disclosures of every conceivable connection, thereby making it hard for courts and interested parties to find and evaluate those connections that are actually relevant. The suggestion would require disclosure only of "relevant connections," and it offered a definition of the term "relevant."

Judge Jonker reminded the Advisory Committee that a very similar suggestion was considered approximately ten years ago, but it was eventually withdrawn. He said that the current suggestion seems to make sense, but that the Subcommittee needs more information prior to making a decision. The Assistant Reporter is researching the issue, and there will be an update at the spring 2014 meeting**.**

Discussion Items

13. Oral report concerning Suggestion 13-BK-G by Gary Streeting to amend Rule 1015(b).

Referred to the Consumer Subcommittee.

14. Oral report concerning Suggestion 13-BK-H by Dan Dooley to amend Rule 2016 to require attorneys and other professionals employed by the estate to submit weekly reports and fee applications.

Referred to the Business Subcommittee.

15. Oral report concerning Suggestion 13-BK-I by Judge Stuart Bernstein to amend Official Forms 9F and 9F(Alt.).

Referred to the Business Subcommittee.

Information Items

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

Mr. Wannamaker reviewed bankruptcy-related legislation that has been introduced in Congress. None of the bills, he said, seemed likely to move forward anytime soon.

17. Bullpen.

Mr. Wannamaker explained that the "bullpen" is a designation for items that have been approved by the Advisory Committee but are held for a time pending submission to the Standing Committee. He said that the bullpen was empty before this meeting, but as a result of Advisory Committee's actions over the past two days, the following items had been approved to be held in the bullpen for submission to the Standing Committee in the future: (a) proposed revisions to Rule 8002(a)(5) (see Item 10B); and (b) proposed revisions to Rule 8006(b) (see Item 10B).

18. Dugout.

Mr. Wannamaker said that the "dugout" is a newly created designation for suggestions or issues that require further study before the Advisory Committee is asked to make a recommendation. A list of dugout items was included in the agenda materials.

The following items were added to the dugout during the meeting: (a) Recommendation for conforming change to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1; (b) Suggestion 12-BK-M (see Item 4E); and (c) Comments 12-BK-005, 12-BK-15, and 12-BK-040 regarding designation of the record in bankruptcy appeals (see Item 10B, Rule 8009).

19. Rules Docket.

Mr. Wannamaker asked members to review the Rules Docket and email any proposed changes to him.

20. Future meetings.

The spring 2014 meeting will be held April 22 – 23, in Austin, Texas. The fall 2014 meeting will be held September 29 – 30 in Charleston, South Carolina.

21. New business.

No new business.

22. Adjourn.

Respectfully submitted,

Scott Myers