ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 2 - 3, 2008
Denver, Colorado

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge David H. Coar
District Judge Irene M. Keeley
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, outgoing reporter
Professor S. Elizabeth Gibson, incumbent reporter
Bankruptcy Judge Christopher M. Klein, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Professor Daniel R. Coquillette, reporter for the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen “Scott” Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following member was unable to attend:

Dean Lawrence Ponoroff

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 and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, *other than materials distributed at the meeting after the agenda was published*, is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings; Appreciation of departing Reporter and Members.

The Chair welcomed the members and guests to the meeting. She noted that Judge Rosenthal and Professor Daniel Coquillette, the chair and reporter of the Standing Committee, were in attendance, and thanked them for coming. The Chair also praised the outgoing reporter, Professor Jeffrey Morris, for ten years of outstanding service to the Committee, and she welcomed the incumbent reporter, Professor Elizabeth Gibson, to her new position. The Chair said Judge Kenneth Meyers had resigned from the Committee for personal reasons and he would not attend this meeting, and she said that this would be the last meeting for Judge Keeley and Mr. Brunstad. She commended the departing members' dedicated and effective Committee service. Finally, the Chair expressed the regrets of Dean Lawrence Ponoroff, who was unable to attend the meeting because Hurricane Gustav necessitated class rescheduling at Tulane Law School.

2. Approval of minutes of St. Michaels meeting of March 27-28, 2008.

The minutes were approved without objection.

3. Oral reports on meetings of other Committees.

(A) June 2008 meeting of the Committee on Rules of Practice and Procedure, including final Time Computation changes.

The Chair gave the report. She said with respect to the proposed time computation amendments, this Committee argued for a change in the templates so that state holidays would not be taken into account in backward-looking deadlines. She reported that the Standing Committee approved the change, not only with respect to the bankruptcy template, but with respect to all of time computation templates. She said that the Standing Committee also approved the rest of this Committee's proposals.

(B) April 2008 meeting of the Advisory Committee on Appellate Rules.

The Chair said that the Appellate Rules Committee approved a procedure for indicative rulings, to coordinate with the procedure established by the Civil Rules Committee. She said that this Committee would also address the issue of indicative rulings during the course of the meeting.

(C) June 2008 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Hopkins reported on the work of the Bankruptcy Committee. He said that it would be undertaking a time measurement study for judges, and that it discussed and supported legislation that would extend the FEGLI fix (a change relating to charges for life insurance premiums for older judges) to bankruptcy judges.

He reported that the Bankruptcy Committee also considered two requests from the Executive Office for United States Trustees. First, it had an extensive review and discussion of the EOUST's request for data-enabled forms. Although it did not recommend adopting such forms, it recommended providing most of the information requested by the EOUST through modifications to CM/ECF. Second, the Bankruptcy Committee approved a recommended change to CM/ECF that would provide for a virtual entry on the docket for chapter 7 trustee closing reports.

Judge Hopkins said that the Bankruptcy Committee did not recommend filling any bankruptcy judge vacancies at this time, and that it would assess vacancies going forward under the new case weighting standards. He said that, in light of the election cycle, judicial salary restoration was unlikely at this time.

Judge Conti added that the Bankruptcy Committee recently developed a long-range planning group, and that she anticipated that it would become a major impetus of the Bankruptcy Committee's work over the next several years.

(D) April 2008 meeting of Advisory Committee on Civil Rules.

Judge Wedoff gave the report. He observed that the default timeline in the proposed changes to Rule 56 might require changes for the bankruptcy context. The Civil Rules Committee also discussed publishing alternate proposals for whether the court "must" or "should" grant a well-founded motion for summary judgment.

He said there were continued discussions with respect to the committee's proposal for revision of the expert witness disclosure provisions of Rule 26, including a new procedure for disclosure of the substance of anticipated testimony of an expert witness who is not required to prepare a formal report. The proposed changes to Rules 26 and 56 were published for comment in August 2008.

Judge Wedoff said that another issue concerned a proposal to eliminate bankruptcy discharge as an affirmative defense in Civil Rule 8(c) on the ground that 11 U.S.C. § 524 was

self-executing and a rule could not cause a debtor to waive a right that was granted by statute. He said that the Department of Justice had opposed removing discharges from the list on the ground that some debts, such as student loan and some tax debts, are not automatically included in the debtor's discharge.

Judge Wedoff said that the Civil Rules Committee ultimately decided to table the Rule 8(c) issue until they could have further discussions with representatives of DOJ to address their concerns. Judge Rosenthal and Mr. Rabiej added that, if this Committee felt strongly about removing discharges from Rule 8(c), it should formally support removal.

Several members were in favor of sending a letter to the Civil Rules Committee recommending removal of discharges from the list of affirmative defenses in Rule 8(c), but Professor Morris said that the Committee should probably more fully discuss the matter as a formal agenda item. **After additional discussion, the Chair asked Judge Wedoff and Mr. Kohn to prepare memoranda for consideration by the Committee at its March 2009 meeting.**

(E) May 2008 meeting of Advisory Committee on Evidence.

Mr. McCabe gave the report. He said the Evidence Committee considered two major issues: (1) restyling the rules of evidence, which it recommended publishing for comment next August, and (2) an amendment to Rule 804(b)(3) extending the corroborating circumstances requirement to all declarations against penal interest made in a criminal case.

(F) Bankruptcy CM/ECF Working Group.

[See Agenda Item 10].

(G) Progress report from the Sealing Committee.

Professor Gibson reported that the Sealing Committee was looking at all cases with sealed documents in 2006. She noted that there were no cases in bankruptcy courts where the entire case was sealed.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning the 9th Circuit Bankruptcy Appellate Panel's decision in *Drummond v. Wiegand*, 386 B.R. 238 (9th Cir. BAP Apr. 3, 2008), that chapter 13 business debtors may not subtract business expenses from gross receipts in determining current monthly income on Official Form 22C.

Judge Wedoff described the issue raised by the *Wiegand* decision. In that case, the court held that a chapter 13 debtor engaged in business may not subtract business expenses from gross

receipts in determining his current monthly income (CMI). That conclusion led the court to declare that Form 22C, by instructing the debtor to make such a deduction, is inconsistent with §1325(b)(2). Judge Wedoff said the Consumer Subcommittee had considered the arguments presented in *Weigand*, and that it recommended no change to Form 22C.

Judge Wedoff said that the issue of business expenses was thoroughly discussed in the course of drafting Form 22C, and that several reasons supported the Committee's decision to deduct such expenses in the calculation of CMI. One reason is that the Census Bureau uses net rather than gross income in computing median family incomes. Since those are the figures that the debtor's annualized CMI must be compared with under § 1325(b), it makes sense to calculate current monthly income in the same manner.

Another reason is that the use of gross receipts for self-employed debtors would lead to distinctions in the calculation of CMI based merely on the business form under which the debtor has chosen to operate. Under the *Wiegand* approach, for example, a self-employed debtor with gross business receipts of $250,000 would be above the applicable median family income of any state, even if his net income was only $40,000. If the same debtor organized as an LLC, however, and took a salary of $40,000, income would likely be below the applicable median family income. It seems unlikely that any such distinction was intentional, so the Committee, in approving Form 22C, chose to interpret "income" as used in § 101(10A)'s definition of "current monthly income" as net, rather than gross, business income.

Judge Wedoff said that a strict construction interpretation of § 1325(b)(3) and § 707(b)(2)(A) and (B) would also result in a self-employed debtor with an above-median family income never being able to deduct most business expenses. Section 1325(b)(3) requires an above-median-family-income debtor to determine "amounts reasonably necessary to be expended" according to "subparagraphs (A) and (B) of section 707(b)(2)." Those paragraphs of the means test require application of "the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service . . . ." All of those IRS standards and categories relate to personal and household, not general business, expenses. Permissible business expenses are included in another section of the IRS Financial Analysis Handbook. Likewise, all of the other expenses expressly allowed to be deducted under § 707(b)(2)(A) and (B) are personal and household, not business, expenditures. Thus, as the Advisory Committee previously concluded in approving Form 22C, the Subcommittee concluded that the most sensible interpretation of income for a self-employed debtor is net, not gross, income.

Several committee members said that they supported the Subcommittee's recommendation, **and, after a motion was made and seconded, the Committee voted to make no change to Form 22C with respect to this issue.**

(B) Recommendation concerning use of the terms "household" and "family" on Official Forms 22A and 22C.

Judge Wedoff said that, once again, the Consumer Subcommittee had been called on to

consider use of the term "household size" on Forms 22A and 22C. He said that on several lines of Forms 22A and 22C, the reference to "household size" was clearly appropriate and dictated by the statute. Section 707(b)(7) provides the safe harbor from the means-test presumption based on "household" size, and § 1325(b)(3) and (4) contain provisions that require comparing the debtor's current monthly income with the appropriate "median family income of the applicable State" based on the debtor's "household" size. The debtor's "household" size is therefore the relevant consideration by the terms of the Code itself.

In the case of means-test deductions, however, Judge Wedoff said the Subcommittee concluded that use of the term "household" size was not dictated by the Code and could result in both under and over inclusion in calculating deductions, because it was not "dependent" orientated. For example, if a debtor has dependents who are not members of the debtor's household, an instruction to take into account only household members results in a smaller deduction than the IRS standards allow. On the other hand, if a debtor lives in a household with persons the debtor does not support, allowing deductions to be based on household size results in a greater deduction than the IRS standards permit. In this context, Judge Wedoff said that the statue was not dispositive. Rather, § 707(b)(2)(A)(ii)(I) simply provides that "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards . . . for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case if the spouse is not otherwise a dependent."

Judge Wedoff noted that the "National and Local Standards" are set out in the Internal Revenue Manual, and that, in the absence of a statutory provision to the contrary, the Committee has tried to apply the standards the same way they are applied in the Manual itself. He said that a review of the Manual indicates that the concept of "dependency" was relevant in applying deductions, and he cited several examples in excerpts at page 93 of the agenda materials.

Judge Wedoff said that the Subcommittee reviewed Forms 22A and 22C and concluded that the only way to ensure the that those forms track the Manual's calculations would be to change the instructions in Lines 19A, 19B, 20A, and 20B of Form 22A and Lines 24A, 24B, 25A, and 25B of Form 22C as set forth on pages 94-96 of the agenda materials.

Some members expressed concern that the change would add confusion to the existing forms but agreed that it should be published. Others agreed that the proposal should be published, but suggested that the second paragraph in the committee note, which described why the changes were being made, should be deleted and moved to the report and recommendation for publishing the change. After additional discussion, **the Committee approved a motion to publish in August 2009 the proposed changes to Forms 22A and 22C set forth on pages 94 – 96 of the agenda materials (with the exclusion of the second paragraph of the note).**

(C) Recommendation concerning a possible national rule on post-petition mortgage fees in chapter 13 cases.

Judge Wedoff said that the Consumer Subcommittee recommended an amendment to Rule 3001(c) and a new Rule 3002.1 to address the failure of many secured lenders to disclose

post-confirmation charges and fees while the case was pending. He said the problem was that the subsequent assertion of those fees and charges immediately after the debtor emerges from bankruptcy undermined the debtor's fresh start.

Judge Wedoff said that, although several courts have already addressed the issue locally, to date, no uniform solution has emerged. He said that Congress has also held hearings, but that so far no legislation had been enacted.

He said that the purpose of the proposed rule changes was to ensure that any fee or payment changes are disclosed in a timely manner, during the case, so that they can be dealt with under the plan or by court order or some other mechanism. He said that the proposed changes were set out in detail the August 27 memo distributed at the meeting (a revised version of the memo in the agenda materials).

Several members supported publishing the rule changes, but had concerns about particular provisions. Some wondered whether there was a basis for imposing the sanctions included in the proposals. Mr. Rao responded that the Subcommittee discussed the sanctions issue extensively. He said that, ultimately, subcommittee members concluded that discovery-type sanctions, such as these, do not address the substantive rights of the parties. Rather, they merely establish a consequence for failing to follow the procedural rules governing the presentation of evidence of substantive rights. Two members said that they were still in favor of removing the sanctions.

Another member suggested that requiring notice of a new fee or expense within 30 days of the fee or expense being incurred might be onerous in situations of small recurring changes. Judge Wedoff said the Subcommittee considered that possibility but decided in favor of 30 days to encourage early resolution of disputes.

One member recommended changing "security interest" to "claim" new Rule 3002.1, and another member proposed adding language that the notices required under the new rule were not entitled to prima facie validity under Rule 3001(f). After additional discussion, **the Committee voted, with one dissent, in favor of publishing the proposed amendment to Rule 3001 and new Rule 3002.1 as set forth in the handout with the following changes to Rule 3002.1:**

> Strikeout "and" on line 13, and add "and (3) shall not be subject to Rule 3001(f)" at the end of line 14; substitute "claim" for security interest at line 21; change "of" to "after" on line 25; add "The notice shall not be subject to Rule 3001(f)" after "incurred" on line 26; change "payments" to "amounts" on line 54; and add "and shall not be subject to Rule 3001(f)" at the end of line 57.

(D) Status of consideration of possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code.

Professor Morris reminded the Committee that § 521(i)(1) of the Code provides that if an individual debtor in a voluntary case fails to file all of the required information within 45 days of

the date of the filing of the petition, that "the case shall be automatically dismissed effective on the 46th day after the filing of the petition." He reported that the courts still have not reached any consensus on the meaning and operation of § 521(i) when the debtor has not provided all the required information. Some courts have concluded that the provision requires a dismissal order effective on the 46th day after the filing of the case, while other courts have found the provision ambiguous and concluded that the dismissal is either not automatic, or that the order of dismissal need not be made effective on the 46th day after the filing of the petition. He recommended that the Committee continue to monitor the issue, and take no other action until after consensus develops. Professor Gibson agreed to continue monitoring case developments and to provide status reports at future meetings.

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

> Recommendation in response to suggestion by Judge Laurel Isicoff to create a new official form to be used as a petition in chapter 15 cases.

Judge Coar said that Judge Isicoff's suggestion arose in the context of a consumer case involving a foreign national who had moved to the United States after an insolvency proceeding in the United Kingdom. In an attempt to attach the debtor's assets in the U.S., the U.K. foreign representative initiated a chapter 15 case in the debtor's name in the U.S. Judge Isicoff said this resulted in the credit rating agencies picking up the chapter 15 case as a new bankruptcy filing, when, in fact, it was not really a new case. She suggested that the problem could be resolved by creating a new form to be used specifically for chapter 15.

Judge Coar said the Subcommittee recognized the potential problem identified by Judge Isicoff, but concluded that the creating a separate form to commence a chapter 15 case was not warranted. He said that, as an initial matter, chapter 15 cases are rare (in 2007, just 42 were filed), and the vast majority involve corporations. Thus, the Subcommittee concluded few individual debtors would face the problem identified by Judge Isicoff.

Judge Coar said that Subcommittee also concluded that a new form would not prevent credit reporting agencies from posting a bankruptcy filing on the debtor's credit report. He noted that filing a chapter 15 petition for recognition commences a "case" under § 1504. Consequently, whether the filing is accomplished through Official Form 1, or some other form, the credit reporting agencies will simply report that a bankruptcy petition has been filed by or against the debtor. Creating a chapter 15-specific form will not change the fact that a bankruptcy case was filed. Moreover, since Form 1 already contains a checkbox that identifies the *type* of case (Chapter 7, 11, 12, 13 or 15), a form specifically for chapter 15 would not provide any new information. The Subcommittee therefore did not recommend creating a new form.

The Committee discussed the Subcommittee's recommendation, and decided not to recommend a new or separate form for initiating a chapter 15 case.

6. Report of Subcommittee on Attorney Conduct and Health Care.

Recommendation on requests by the Bankruptcy Judges' Advisory Group and Judge Robert Kressel for further consideration of the December 1, 2007, amendment to Rule 6003.

Judge Schell described the issue. Rule 6003 became effective on December 1, 2007, as part of a package of amendments offered to address problems that had arisen primarily in large chapter 11 cases. Subdivision (a) of the rule provides that the court, absent immediate and irreparable harm, cannot grant an application for the employment of a professional within 20 days after the commencement of the case. He said that the intent of the rule was to provide a short breathing spell for the courts and parties in interest who often face a large volume of documents being filed on the first day of a case. Other subdivisions of the rule restrict the entry of orders granting relief under Rule 4001 and for some matters under § 365.

Shortly after Rule 6003 became effective, some members of the bankruptcy community expressed concern that the rule could prevent corporate debtors from being represented during the first 20 days, because it seemed to prohibit authorization of representation by counsel during that time period. Judge Schell said that some members of the Bankruptcy Judges Advisory Group (BJAG) shared the concerns raised by the bankruptcy community, and suggested that the rule be amended to make clear that it did not prohibit counsel from representing debtors during the first 20 days of the case, subject to subsequent approval.

Judge Schell said that BJAG members also pointed out that Rule 6003 might be read more broadly than probably intended because it prohibits entry of any order during the first 20 days of the case "regarding" the enumerated categories. So, for example, since the sale of estate property is prohibited under the rule for the first 20 days, an order approving bidding procedures "regarding" a sale might also be prohibited during the first 20 days, even if the sale itself was scheduled to occur after 20 days.

Judge Schell said the Subcommittee on Attorney Conduct and Health Care had met by teleconference and discussed the matter. He said that subcommittee members agreed that the intent of the Committee in recommending Rule 6003 was merely to give the court and interested parties time to review applications for professional employment during the early part of a large case. Although no subcommittee member thought that rule prevented entry of an approval order on day 21 that was *effective* on an earlier date (such as when the case was opened, or when the application for employment was filed), subcommittee members did agree that it could be clearer. The Subcommittee therefore recommended publishing the rule with the clarifying amendments set out in the agenda materials.

Judge Schell said that the Subcommittee also considered a suggestion by Judge Robert Kressel (Bankr. D. Minn.), that the 20 day "cooling off" period in Rule 6003 be tied to the order for relief, rather than the filing of the petition, so it would operate similarly in voluntary and involuntary cases. Judge Schell said that the Subcommittee did not think the same issues were present in an involuntary case. Because creditors initiate an involuntary petition, they would likely be familiar with the issues involved long before the order for relief was entered, and would also be dealing with debtor's counsel before the order for relief was entered. The Subcommittee

therefore recommended no change with respect to Judge Kressel's suggestion.

After discussing the matter, **the Committee recommended publishing the Subcommittee's suggested changes to Rule 6003 as set out at pages 131 – 133 of the agenda materials.**

7. Report of Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation on a possible new rule or rules to authorize indicative rulings.

Judge Pauley said that, at the last Committee meeting, the Subcommittee on Privacy, Public Access, and Appeals had been asked to consider whether the Committee should recommend rule changes that would formalize a process practiced in many federal courts of providing an "indicative ruling" when the bankruptcy court lacks jurisdiction to grant a party's motion due to the pendency of an appeal. He said the Subcommittee had been asked to consider this issue in light of similar rules proposed by the Advisory Committees on Civil Rules and Appellate Rules: Civil Rule 62.1 and Appellate Rule 12.1.

Judge Pauley said the Subcommittee agreed that modifying the rules to formalize indicative rulings by the bankruptcy court was warranted, and, to accomplish this, it recommended publishing a new Rule 8007.1, and an amendment to Rule 9024, as set forth at pages 152 – 155 of the agenda materials. He said that, initially, the Subcommittee also recommended an amendment to Rule 9023 (included in the materials), but that it now believes no change to that rule is necessary.

The Committee discussed the matter, and voted to recommend publishing new Rule 8007.1 as set out at pages 152-154; and the amendment to Rule 9024 as set out on pages 154-155 with the following substitutes for the new (underlined) material on page 155: "If the court lacks authority to grant a timely motion under this rule because an appeal has been docketed and is pending, the court may take any of the actions specified in Rule 8007.1(a)." **Because of ongoing consideration of a complete revision to the appellate rules, the Committee decided to wait until at least the March 2009 meeting to decide whether to recommend that the proposed changes be published at the next opportunity (in August 2009), or if they should be held and published along with any global recommended revision of the Part VIII Rules.**

(B) Recommendation on suggestion by Mr. Brunstad that Part VIII of the Bankruptcy Rules be rewritten to follow more closely the Federal Rules of Appellate Procedure.

Judge Pauley said that at the last meeting, Mr. Brunstad proposed a complete rewrite of Part VIII of the Bankruptcy Rules (the bankruptcy appellate rules), so that they more closely track the style and changes that have been made to the Federal Rules of Appellate Procedure (FRAP) over the years. He said that Mr. Brunstad agreed to attempt a first draft of proposed revisions, and he then asked Mr. Brunstad to report on that process so that the Committee could

consider how best to review and revise the proposal before deciding whether to recommend publishing proposed changes.

Mr. Brunstad distributed copies of his draft of the proposed revisions to the bankruptcy appellate rules and explained why he thought the revisions were needed. He said that unlike the current FRAP, the Part VIII Rules have not changed much over the years, and that he thought it made sense to try to go through the rules and harmonize the procedures with FRAP as much as possible.

Mr. Brunstad discussed the revision process by walking the Committee through proposed Rule 8001 in the handout. He noted that the language was modeled on the style used in the FRAP, as distinguished from the existing bankruptcy rule styling. He said that he recognized that the change would mean the Part VIII Rules would be styled differently than the rest the bankruptcy rules, but he said he thought it was worthwhile to conform the bankruptcy appellate styling to the other appellate rules to the extent possible. Moreover, because the bankruptcy rules would likely be restyled in the future, the proposed revisions to the Part VIII Rules could be a first step in that process.

Judge Pauley said that the question for the Committee is "where do we go from here?" He said that initially the Subcommittee was in favor of simply assigning to each Committee member, or maybe a small team of Committee members, a couple of rules with the task of reviewing Mr. Brunstad's draft, and suggesting changes at the next meeting. He said that he now thought a better approach would be to convene a focus group of some type to take a look at the suggested proposal.

Mr. McCabe suggested the following procedure: convene a "mini-conference" to discuss the proposal (maybe by extending the spring meeting by a day) and inviting BAP judges, appellate judges, lawyers and other appeals experts to review, discuss and possibly refine the proposal. **The members discussed Mr. McCabe's idea and unanimously agreed that it was a good approach and asked the Chair and AO staff to take steps to set up a mini-conference for the spring and possibly the fall meetings.** The Chair and membership also formally expressed their deep gratitude to Mr. Brunstad for the great start he has given the Committee in this endeavor.

8. Report of Subcommittee on Business Issues.

The Chair introduced Judge Hopkins as the new subcommittee chair, and she also explained that, since there was no activity by the Subcommittee over the past term, no report was needed.

9. Report of Subcommittee on Forms.

> Oral report on proposed amendment to Form 201 to advise debtors that notices to joint debtors at the same address will be mailed in a single envelope addressed to both of the debtors.

Mr. Myers explained that the Bankruptcy Court Administration Division was considering a cost saving proposal under the new Bankruptcy Noticing Center contract to provide a single notice in joint cases if the husband and wife debtors live at the same address. He said that if the proposal went forward, the AO intended to amend Director's Form B201, generally given to consumer debtors at the beginning of the case, to inform joint debtors that they should expect only a single notice of events unless they tell the court that they want to receive notices at different addresses. No member objected to the proposed changes to B201.

Discussion Items

10. Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris updated the Committee on the CM/ECF working group, the Future of CM/ECF project, and the Forms Modernization Project. She explained that the CM/ECF working group has existed for some time and that it deals with ongoing CM/ECF issues and modification requests. She said that, as this Committee's liaison to that group, her role is to communicate upcoming changes to the rules and forms that might affect ongoing CM/ECF updates. By way of example, she said she anticipated speaking with the CM/ECF working group about whether any of the proposals under consideration by the Committee for post-petition claim adjustments for mortgages in chapter 13 (see Agenda Item 6C), would require changes to CM/ECF.

Judge Perris said that, in contrast to the CM/ECF working group, which focuses on current CM/ECF issues, the CM/ECF futures project is tasked with identifying and implementing the replacement/update of CM/ECF. She said nothing is really off the table with that project, and that the steering committee would have its initial kickoff meeting next week. She said that at the kickoff meeting, participants would discuss 10 "functionalities" that the AO has identified for the new system based on comments from the field, and would also discuss additional areas that might be considered. She said that the projected time line for implementation was 2013, and that the current thinking for the next step was to write requirements for the 10 function areas that have been identified so far.

Judge Perris next reported on the progress of Forms Modernization Project. She said that project members had their second in-person meeting at the AO this summer. She said that project members were looking at all the official bankruptcy forms with an eye toward increased ease of use both for those who fill out that forms and those who pull information from the forms. She then updated the Committee on the progress of the initial two subgroups that evolved out of the first meeting.

Judge Perris said that analytical subgroup continued to evaluate the forms. Judge Klein, chair of the analytical subgroup, added that the deeper into each form the group got, the more complex and interrelated the forms seemed to become, and the harder it became to determine whether seemingly redundant information was really dealing with subtly different issues.

Judge Perris said that the second subgroup continued to look at technology solutions, and that an ad hoc group of members had attended several AO and FJC functions, gave presentations about the project, and solicited feedback from bankruptcy judges and clerks. Judge Perris said that one suggestion that came from court personnel was that project members should solicit input from professionals who specialize in creating polls and questionnaires. She said that in response to this suggestion the ad hoc "user information" group met with representatives of the Census Bureau and the Bureau of Labor and Statistics to talk about how those groups updated their forms, how they developed questions for the public, and what outside resources they used.

Judge Hopkins reported that he participated in the discussions with the Census Bureau and Bureau of Labor and Statistics, and he met some of the people who had participated in revising forms for those agencies. He said that one suggestion to improve clarity was to try to avoid making forms that are all things to all debtors. So, for example, the ultimate recommendation might be to separate form packages by chapter (7, 11, 12, or 13) or by type (consumer or business) so that information that was irrelevant to the particular user could be eliminated. He said other suggestions included prioritizing changes by identifying the most common errors in the forms, and reducing errors by telling the debtor the types of documents that might be needed before filling out the forms.

11. Oral report on planning for the future of the CM/ECF system.

[See Agenda Item 10].

12. Suggestion by Chief Judge Vincent Zurzolo that Rule 9014(b) be amended to permit service on non-debtor attorneys of a motion initiating a contested matter through CM/ECF in the manner provided in Civil Rule 5(b) rather than requiring service in the manner provided in Rule 7004 for service of a summons and complaint.

Professor Gibson noted that a supplemental memo, dated September 12, had also been distributed on this issue. She said that Judge Zurzolo's reading of Rule 9014(b) and Rule 7004 was that the rules require paper service on creditors' attorneys of a motion initiating a contested matter, but allow electronic service on the debtor's attorney in the same situation. He suggested that Rule 9014 be amended to allow electronic service of the first motion in a contested matter on either attorney (debtor's or creditor's) so long as the attorney for the defending party has entered an appearance in the case.

Some members disagreed with what seemed to be an assumption in Judge Zurzolo's analysis, that an attorney who entered an appearance in a bankruptcy case on behalf of a party for one matter – to file a claim for example – was the party's attorney for all matters. Other members pointed out that paper service of the first motion in the contested matter would still need to be made on the party, so requiring paper service on the party's attorney (assuming the attorney was known) was not a significant additional burden. Of course, if the attorney had already entered an appearance in the case, the attorney would receive electronic notice of the filing as well. **After additional discussion, the Committee decided no change should be**

made.

13. Request by the Committee on Codes of Conduct for further study of policy issues concerning conflict screening.

The matter was moved to the next meeting, in anticipation of further clarification of the request by the Committee on Codes of Conduct.

14. Suggestion by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association to repeal Rule 2019.

The matter was referred to the Business Subcommittee in anticipation of further submissions from the National Bankruptcy Conference as well as other organizations.

15. Discussion of issues presented by Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008): (1) whether Rules should permit application for denial or revocation of a discharge based on the debtor's fraud discovered by a party during a gap period after the deadline for objecting to discharge and before the granting of the discharge; and (2) Chief Judge Frank Easterbrook's concurrence concerning the impact of the designation of objections to discharge as adversary proceedings on appellate jurisdiction.

Professor Gibson said that the first issue was whether the rules, as currently in effect, permit a party to challenge the debtor's right to a discharge if the party discovers the basis for the challenge in a "gap period" after expiration of the discharge objection period, but before a discharge is entered. She said the court in *Zedan* concluded that the discharge cannot be revoked if the fraud is discovered during this gap period because 11 U.S.C. § 727(d)(1) requires a person seeking revocation of the discharge on the ground of fraud "not know of such fraud until *after* the granting of such discharge." The *Zedan* court acknowledged that if courts entered the discharge "forthwith" after the objection period closed, as required by Rule 4004, gap issue cases would be rare. It concluded, however, that in rare gap issue situation, no remedy was available, and suggested that an amendment to the rules be made to eliminate the gap period.

Professor Gibson said that some courts have worked around this problem by "deeming" the discharge to have been granted immediately after the objection deadline passed, even if no formal discharge order was entered. The *Zedan* court rejected this approach, however, as inconsistent with a literal reading of the rules and the statute.

Professor Gibson said that, if the Committee was inclined to make a change as suggested by the Seventh Circuit, a possible fix was incorporated in Rule 4004 at pages 211 and 212 of the agenda materials.

Some members suggested possible changes to the proposed language and, **after additional discussion, the Chair referred the matter to the Consumer Subcommittee for further review and recommendation.**

Professor Gibson said that the second issue in *Zedan* was raised in Judge Easterbrook's concurring opinion, which suggested that discharge objections should be classified as contested matters, rather than adversary proceedings.

After much discussion, the Committee decided to maintain the current procedure. It concluded that treating discharge objections as adversary proceedings is not inconsistent with their statutory classification as "core proceedings" and, because of the importance of the discharge to a debtor, the committee members favored adherence to the long-established position that the greater procedural protections available in an adversary proceeding are appropriate for the resolution of most objections to or attempts to revoke a discharge. In the relatively rare situation in which several different grounds for denying or revoking a discharge are raised by different parties, the Committee concluded, existing procedural mechanisms (such as consolidation and stay orders) can be employed to prevent premature or piecemeal appeals.

16. Discussion of Judge Paul Mannes' suggestions that Rule 3003 be amended to require chapter 11 debtors to give notice to creditors if a claim is scheduled as disputed, contingent, or unliquidated; and that Rule 2016 be amended to require the attorney for the debtor to file the § 329 statement (the statement of compensation paid or to be paid in connection with the case) with the petition, rather than being allowed to wait for 15 days.

The Committee carefully considered each of Judge Mannes' suggestions and, after extensive discussion decided that no action was needed.

17. Discussion of suggestions by Judge Eugene Wedoff and attorney Philip Martino for promulgation of a rule regarding applications for payment of administrative expenses.

Professor Gibson said that Mr. Martino had suggested an amendment to Rule 1017 that would allow a chapter 7 trustee to assert an administrative claim in a case converted to chapter 13 by filing a special administrative proof of claim form modeled on the current proof of claim form.

Judge Wedoff said such a procedure might also be warranted for certain administrative claims in chapter 11, such as when a supplier of goods in the ordinary course to a chapter 11 debtor seeks payment for those goods after the case converts to chapter 7. He said another example would be a supplier of goods who seeks payment for goods received by the debtor during the first 20 days before commencement of the case under § 503. **After additional discussion, the Chair referred the matter to the Business Subcommittee for further consideration.**

18. Discussion of suggestions by Judges Paul Mannes, Randall Newsome, and Robert Kressel for revision of Director's Form 240, Reaffirmation Agreement.

The matter was referred to the Forms Subcommittee.

19. Discussion of Judge Colleen Brown's suggested revision of Official Form 3B,

Application for Waiver of Chapter 7 Filing Fee.

Professor Gibson said that Judge Brown raised the issue of whether Official Form 3B should require more detailed financial information to aid the court in its determination of whether a fee waiver should be granted. Several members did not think a change was warranted, and that the issue was best managed at the local court level. **After additional discussion and careful consideration, the Committee decided not to change Official Form 3B.**

20. Discussion of suggestions by the courts in the Southern District of New York and the Eastern District of Pennsylvania that a space be added to Official Form 10 for the portion of a claim which is a general unsecured claim.

The matter was referred to the Consumer Subcommittee.

21. Discussion of suggestion by the Executive Office for United States Trustees for amendments to Rules 1017(e) and 4004(c).

Professor Gibson said that the EOUST had submitted two suggestions. She said the first suggestion was to amend Rule 1017(e) to define the term "date of the first meeting of creditors." She said that the concept of the "first meeting of creditors," which marks when the UST's declination statement is due under § 704(b)(1)(A), is ambiguous – it could be the date on the § 341 notice (whether the meeting is actually held or not), the date that the meeting is actually commenced, or the date that the meeting, if held open, concludes.

On behalf of the EOUST, Mr. Redmiles said he believed that the term could be defined by rule and he thought that the suggested edits to Rule 1007(e) would accomplish that. However, he said that he would prefer that the issue be referred to the Consumer Subcommittee for consideration. He added that the EOUST's primary aim was uniformity among the courts concerning when the declination statement was due.

Judge Wedoff supported referring the matter. He said that he didn't think the issue is one of ambiguity, but rather a simple gap in the statute, which can be filled by rule. Judge Klein added that, if the matter was referred, the subcommittee should note that the term "first date set for the meeting of creditors" is used in Rules 4004 and 4007. **After further discussion, the Committee referred the Rule 1007(e) issue to the Consumer Subcommittee.**

The second EOUST suggestion concerned the timing of the court's entry of the discharge. As a general matter, Rule 4004 requires the court to grant the discharge "forthwith" upon the expiration of the time stated by the rule for filing a complaint objecting to discharge. Subdivision (c), however, specifies twelve exceptions to that requirement. Among those exceptions are cases in which a motion is pending to dismiss the case, to extend the time for objecting to discharge, or to delay or postpone discharge. Mr. Redmiles suggests that those provisions, Rule 4004(c)(1)(D), (E), (F), (I), and (K), be amended by adding the language "or until appellate review is no longer available." Mr. Redmiles said that the suggested change would clarify that "pending" includes the time until all appeals are exhausted, so that a discharge

was not entered immediately upon, for example, denial of a motion to dismiss.

Some members said that they understood the problem, but thought that the proposed solution would cause further problems, such as, for example, extending the "gap period" identified by the Seventh Circuit's *Zedan* decision (discussed at Agenda Item 15). Professor Gibson added that she had been unable to identify any cases in which an appellate court reversed the denial of a motion to dismiss and yet considered itself bound to uphold the discharge, so she was not sure whether a change was needed. **After additional discussion, the Committee decided to table the matter until the March meeting, to allow time for a supplemental submission from Mr. Redmiles identifying the extent of the problem.**

22. Discussion of the Executive Committee's request that Conference Committees review the draft Best Practices Guide to Using Subcommittees of Judicial Conference Committees and report on the status of subcommittees.

Judge Rosenthal addressed the issue. She said that each of the rules advisory committees needed to report on how subcommittees are used to conduct business, and also to clearly address why subcommittee use is so prevalent in the work of the rules advisory committees. She asked this Committee to coordinate its response with the other advisory committees. She said that, once the draft responses were received, she would circulate those responses to the other advisory committees.

Judge Rosenthal also encouraged the Committee to review and consider recommending clarification of the conference policy regarding appointment of non-committee members to subcommittee. She said that such appointments were sometimes needed to allow the advisory committees to more closely work with subject matter experts on various topics. She said that she believed that the current language allows the Director of the AO (as the designee of the Chief Justice) to approve non-committee members to subcommittees, but she acknowledged that the language could be interpreted (and has been in the past) as requiring the Chief Justice to personally act on each such appointment. Judge Rosenthal said that she thought revision the language to make clear that the Director has authority to make such appointments would streamline the process when it is needed, and would increase the efficiency of the committees.

The Chair thanked Judge Rosenthal and said that she and Professor Gibson would draft a response for the Committee and circulate it to the membership for comments and response in the coming weeks.

Information Items

23. Rules Docket.

Mr. Wannamaker told the Committee that an updated version of the Rules Docket was in the agenda materials and asked members to report any inaccuracies.

24. Posting a list of suggested rules amendments on the Internet.

Mr. Ishida updated the Committee on three projects undertaken by the Rules Support Office. First, he said, in response to the Chair's request, the Rules Support office was now not only tracking rules suggestions, but that, like comments, it was posting suggestions on the public website as well.

He said the second project concerned gathering older committee reports and minutes. He said the AO was in the process of digitizing the older records and posting them on the internet. He said that there were fairly large gaps of records in bankruptcy, but that he hoped to obtain many historical records from the Committee's former reporter, Alan Resnick.

Finally, Mr. Ishida noted that the FJC and the AO were working on a project to post an official copy of the bankruptcy rules in WIKI format that would have links to committee notes, all amendments, comments, and other background material.

25. Preparation of letters reporting the Committee's resolution of suggestions.

Mr. Ishida and Mr. Wannamaker reported on the process for preparing letters in response to the Committee's resolution of suggestions. In general, Mr. Wannamaker anticipated at least two letters: a general acknowledgment that the suggestion was received, followed by a letter that reports that the suggestion was referred to a subcommittee or that the Committee considered the suggestion at a particular meeting.

26. Status of legislation exempting certain members of the National Guard and Reservists from the means test.

Judge Wedoff described an amendment to § 707(b) of the Code that had just passed Congress (but had not yet been signed by the President) that would give a temporary exclusion from the means test to National Guard members and Reservists who are called up for active duty. He said that the exclusion period would be in effect if a qualifying debtor is called up for active duty military service or a homeland defense activity for more than 90 days, and would last until 540 days after the military service or homeland defense activity ends.

Judge Wedoff said that because the proposed amendment provided only for a *temporary* exclusion (rather than a permanent exemption like the disabled veteran exemption), implementing it through Form 22A (the chapter 7 means test form) was difficult. He envisioned that some qualifying debtors would file near the end of their exclusion period, such that it was almost certain that the exclusion would expire while the case was still pending, and while it was still possible to bring a § 707(b) motion asserting a presumption of abuse. He said it might make sense for such debtors to complete the whole form when filing, since they could probably be compelled to complete the form once the exclusion expired anyway. Other debtors, however, would file while on active duty, or early in the 540 day period, such that it was almost certain that their case could be completed long before the exclusion expired. He said that for such debtors it was unlikely that a presumption of abuse would arise during the case, and making them complete the entire means test form seemed to defeat the purpose of the legislation.

Judge Wedoff said that the challenge was deciding at what time during the exclusion period the Committee should recommend that a qualifying debtor be required to complete the entire Form 22A. He suggested two alternative approaches: (1) allow the debtor to check a box asserting that the exclusion applies, but still require completion of the form (even if the presumption of abuse will not apply to some); or (2) allow a temporary exclusion box, but only require completing the full form if the exclusion will expire shortly after filing (within 100 days, for example).

In discussing the matter, members advocated for each of the suggestions put forth by Judge Wedoff, and additional suggestions emerged. Some members rejected the position that all qualifying debtors should be required to complete the entire form, but could not agree on appropriate cutoff date. Professor Gibson suggested limiting the category of qualifying debtors who don't have to complete the entire form to active duty debtors, while Judge Perris suggested that a qualifying debtor be allowed to check a temporary exclusion box, along with a date of separation from active service, but only be required to complete the entire form if an interested party files a motion. Ultimately, five proposals emerged for a vote:

1. all qualifying debtors complete the entire form;
2. no qualifying debtor completes the entire form unless a motion is filed;
3. qualifying debtors must complete the entire form only if filing within 100 days of the expiration of the temporary exclusion;
4. qualifying debtors must complete the entire form unless they are on active duty or performing a homeland defense activity at the time of filing; or
5. qualifying debtors must complete the entire form only if the exemption expires during the case at the time a § 707(b) presumption of abuse motion could be filed (generally 60 days after the § 341 meeting, unless extended by the court).

A vote was taken in rounds, with option 5 (only complete entire form if a § 707(b) motion could be raised) carrying by two votes over option 2 (only complete entire form if a motion is filed). Because the legislation had an effective date of 60 days after enactment, and it was anticipated that the President would sign the legislation such that the effective date would occur in December, the Chair asked Judge Wedoff and Professor Gibson to revise Form 22A to incorporate option 5, and to draft a proposed interim rule for the Committee to consider via email for a final vote as soon as possible.

After the meeting, a version of Form 22A, containing a new temporary exclusion checkbox, and a new line 1C implementing option 5 above, was circulated to the Committee and approved without objection. The Committee also considered and recommended distributing proposed Interim Rule 1007-I to the courts with a recommendation that it be adopted as a local rule to implement the change to Form 22A. Both recommendations were approved on an expedited basis by the Standing Committee and the Executive Committee of the Judicial Conference.

27. Notice to local courts concerning the need to repeal or amend local rules adopting the

Interim Rules.

The Chair said that the AO recently notified the courts that, with one exception, they will need to sunset the general orders or local rules used to adopt the Interim Rules in 2005, because they would be replaced by the final BAPCPA-related amendments on December 1, 2008. She said the exception was Interim Rule 5012, which addressed Communication and Cooperation with Foreign Courts and Foreign Representatives. She said a permanent version of Rule 5012 was currently out for comment, and was on schedule to go into effect December 1, 2010.

28. Notice to local courts concerning the need to review local rules in light of the upcoming time computation amendments.

The Chair said she anticipated that the AO would soon notify the courts to revise their local rules in contemplation of the adoption of the time-amendment rules due to take effect in December, 2009. Mr. Rabiej added that the issue was pertinent to all the federal rules, and he anticipated that there would several transmittals to the courts, as well as an article in the Third Branch.

29. *Bull Pen*: All of the proposed rules amendments currently in the *Bull Pen* are addressed above.

30. Oral report on appointment of new chairs of the Business and Forms Subcommittees and composition of subcommittees.

The Chair asked the members to review their subcommittee assignments and let her know if there any changes were needed.

31. Future meetings:

The Chair reminded the Committee that the next meeting will be on March 26-27, 2009, at Estancia La Jolla Hotel & Spa in San Diego. Possible locations for the fall 2009 meeting were discussed.

32. New business: No new business.

33. Adjourn

Respectfully submitted,

Stephen “Scott” Myers