ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 30, 2023
West Palm Beach, FL and on Microsoft Teams

The following members attended the meeting in person:

Circuit Judge Daniel A. Bress
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
District Judge Jeffery P. Hopkins
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Marcia Krieger
Bankruptcy Judge Catherine Peek McEwen
Debra L. Miller, Esq.
Professor Scott F. Norberg
Damian S. Schaible, Esq.
District Judge George H. Wu

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
Senior District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Bankruptcy Judge Laurel M. Isicoff, Liaison to the Committee on the Administration of the Bankruptcy System
H. Thomas Byron III, Administrative Office
S. Scott Myers, Esq., Administrative Office
Christopher Pryby, Rules Law Clerk
Andrew Ballentine, Shumaker
Kyle Cutts, Baker Hostelter
Gilbert Keteltas, Baker Hostelter
Gary Rudolph, Sullivan Hill
Nancy Whaley, National Association of Chapter 13 Trustees

The following persons attended the meeting remotely:

Professor Catherine T. Struve, reporter to the Standing Committee
Professor Daniel R. Coquillette, consultant to the Standing Committee
Circuit Judge William J. Kayatta, liaison from the Standing Committee
Circuit Judge Bernice Donald, former Committee member
Tara Twomey, former Committee member

Carly E. Giffin, Federal Judicial Center
Tim Reagan, Federal Judicial Center
Shelly Cox, Administrative Office
Bridget M. Healy, Esq., Administrative Office
Dana Yankowitz Elliott, Administrative Office

The following persons requested permission to observe the meeting remotely, but their attendance was not confirmed:

Shari Barak, LOGS Legal Group
Pam Bassel, Chapter 13 trustee
Michael Bates, USAA Counsel
Edward Boll, Dismore & Shohl
Hilary Bonial, Bonial & Associates, P.C.
Margaret Burks, Chapter 13 trustee, Cincinnati
Katherine Cacho, Valon
Andrea Celli, no affiliation
Andrea L. Cobery, U.S. Bank
Jeffrey Collier, Attorney for Locke D. Barkley, Trustee
Jeffrey Cozad, USBC, California
Ana DeVilliers, Office of Laurie K. Weatherford, Chapter 13 Trustee
Abbey Dreher, BDF Law Group
Marcy Ford, Trott Law
Mark Francisco, USBC, California
John Hawkinson, Journalist
James Nani, Bloomberg
Brian Nicolas, KMP Law Group
Nicole Noel, Kass Shuler Law Firm
Lauren O'Neil Funseth, Wells Fargo
Lance E. Olsen, McCarthy Holthus, LLP
Pam Quincy, Black Knight
Henry Sally, Texas Tech Law School
Andrew Spivack, Brock & Scott PLLC
Linda St. Pierre, McCalla Raymer Leibert Pierce, LLC
Joy Vanish, Black Knight
Benjamin Varela, USBC, California
Vicki Vidal, Black Knight
Mary Viegelahn, Chapter 13 Trustee
Mary Vitartas, Padgett Law Group
Alice Whitten, Wells Fargo Legal
Kristin Zilberstein, Padgett Law Group

Discussion Agenda

1. Greetings and Introductions

Judge Rebecca Connelly, chair of the Advisory Committee, first introduced Xavier Jorge of the Judicial Security Division, who provided a brief security announcement. Judge Connelly then welcomed the group and thanked everyone for joining this meeting, including those attending virtually. She thanked the members of the public attending in person or remotely for their interest. Two members of the Committee have transitioned off the Committee, and Judge Connelly thanked Circuit Judge Bernice Donald and Tara Twomey for their participation on the Committee. Joining the Committee are Circuit Judge Daniel A. Bress, District Judge Jeffery Hopkins, attorney Jenny Doling, Bankruptcy Judge Michelle Harner, and Professor Scott F. Norberg, and she welcomed them. She also acknowledged the presence of observers both in person and remotely.

Judge Connelly then reviewed the anticipated timing of the meeting and stated that there would be a mid-morning break and another break for lunch. In-person participants were asked to turn on their microphones when they spoke and state their name before speaking for the benefit of those not present. Remote participants were asked to keep their cameras on and mute themselves and use the raise-hand function or physically raise their hands if they wished to speak. She noted that the meeting would be recorded.

2. Approval of Minutes of Meeting Held on September 15, 2022

The minutes were approved.

3. Oral Reports on Meetings of Other Committees

(A) *January 4, 2023, Standing Committee Meeting*

Judge Connelly gave the report.

(1) Joint Committee Business

(a) *Pro Se Electronic-Filing Project*

Professor Catherine Struve provided the Standing Committee a status report on discussions at the fall Advisory Committee meetings on the suggestions related to electronic filing by self-represented litigants.

(b) *Presumptive Deadline for Electronic Filing*

Professor Catherine Struve provided the Standing Committee a status report on consideration of a suggestion to change the filing deadline from midnight local time to an earlier time. The Federal Judicial Center conducted a survey of electronic-filing deadlines in state courts

to identify courts that require filings at a time other than midnight, and the survey was shared with the Standing Committee.

(2) **Bankruptcy Rules Committee Business**

The Standing Committee approved one amended Official Form for publication for public comment.

Publication for Public Comment
Official Form 410

The Standing Committee approved for publication for public comment amendments to the proof-of-claim form to eliminate the language that restricts use of a uniform claim identifier ("UCI") to electronic payments in chapter 13. It would allow the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments, whether or not electronic.

Information Items

Judge Connelly, Professor Gibson, and Professor Bartell also reported on three information items.

(a) Report concerning proposed amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals), and work with Appellate Rules Committee concerning possible amendment to Appellate Rule 6.

(b) Update concerning work on proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and related forms.

(c) Update on bankruptcy consideration of suggestions regarding electronic filing by unrepresented individuals.

(B) ***Oct. 13, 2022, and Mar. 29, 2023, Meetings of the Advisory Committee on Appellate Rules***

Judge Bress provided the report.

(1) **Direct Appeals**

At the October 13, 2022, meeting, the reporter to the committee introduced a possible amendment to Fed. R. App. P. ("FRAP") 6 in conjunction with the Bankruptcy Committee's proposed amendment to Bankruptcy Rule 8006(g) in direct appeals. Judge Bybee appointed California Supreme Court Justice Kruger and Danielle Spinelli as a subcommittee to consider the draft amendment. At the March 29, 2023, meeting, amendments to FRAP 6 were approved for

publication. The FRAP amendment and the Bankruptcy Rule amendment will both be presented to the Standing Committee for approval of publication at its next meeting.

(2) Timing for Appeals from Bankruptcy Matters Decided in District Court

The Appellate Committee also approved for publication an amendment to FRAP 6(a) dealing with the time to appeal in a bankruptcy case. The problem is raised by the different time to appeal in an ordinary civil case—28 days after the judgment—and in a bankruptcy case—14 days after judgment. The issue is which period is applicable when a bankruptcy matter is decided not by a bankruptcy court but by a district court. At the meeting of the Bankruptcy Rules Committee in March 2022, the Committee recommended that the Appellate Committee amend FRAP 6(a) to deal with the issue, suggesting proposed language. The Appellate Committee is still working on appropriate language.

(3) Pro Se Electronic Filing

The Appellate Committee also continues to discuss the joint project on pro se electronic filing.

(4) Costs on Appeal

The Appellate Committee approved for publication an amendment to FRAP 39 in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), which held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule and which invited clarification of the procedure for bringing arguments to the court of appeals. The amendment clarifies (1) that the court of appeals decides which parties must bear the costs and, if appropriate, in what percentages, and (2) that the actual calculation and taxation of costs (based on the allocation decided by the court of appeals) may be done by the court of appeals, the district court, or the clerk of either. Additional amendments specify how the court of appeals should decide a motion to allocate costs after the mandate issues. Because the provisions of FRAP 39 that are proposed for amendment are mirrored in Bankruptcy Rule 8021, our Appellate Subcommittee should consider conforming changes.

(5) Amicus Briefs

The Appellate Committee continues to discuss whether FRAP 29 should be amended to require additional disclosure by amici curiae. No proposed amendment has yet been proposed, but the working group is considering amendments that would allow filing of amicus briefs without the consent of the parties or leave of court if they "bring to the court's attention relevant matter not already brought to its attention by the parties." There was also discussion about what disclosures the amici should be required to make about their identities and relationships to parties in the case. Bankruptcy Rule 8017 contains similar provisions dealing with briefs of amicus curiae in bankruptcy cases, so we are following this discussion.

(6) Social Security Numbers in Court Filings

The suggestion of Sen. Ron Wyden of Oregon that was also filed as Suggestion 22-BK-I to remove redacted social security numbers from all filed documents was considered by the Appellate Committee. The Appellate Committee views this as primarily an issue for the Bankruptcy Committee and will be following our discussions on the matter.

The next meeting of the Appellate Rules Advisory Committee will be on Oct. 19, 2023, in Washington, D.C.

(C) *Oct. 12, 2022, and Mar. 28, 2023, Meetings of the Advisory Committee on Civil Rules*

Judge McEwen provided the report.

(1) Personnel Update; Bob's Rules for Rules

The Civil Rules Committee has a new chair, Southern District of Florida District Judge Robin Rosenberg. She takes over for outgoing chair District Judge Bob Dow of the Northern District of Illinois. Judge Dow left to become Counselor to the Chief Justice, replacing long-time counselor Jeff Minear. A mantra invoking Judge Dow's name at the Civil Rules meeting was his three-point analysis for whether rulemaking is desired: First, is there a problem? Second, can rulemaking solve the problem—is there a rules-based solution? Third, does the rulemaking create harm or unintended consequences?

(2) December 1, 2023, Rules Effective-Date Cycle

Becoming effective on December 1, 2023, are new Civil Rule 87 and amendments of Civil Rules 6 and 15. Added to Rule 6 is Juneteenth as a federal holiday, and we have a companion Bankruptcy Rule amendment of Rule 9006. A fix to Rule 15 eliminates an unintended gap in the time permitted for filing an amended pleading without leave of court. Bankruptcy Rule 7015 makes Rule 15 applicable to adversary proceedings. Rule 87 is the CARES Act emergency rule, and we have a companion in new Bankruptcy Rule 38.

(3) Civil Rule 12

The Civil Rules Committee recommended final approval by the Standing Committee of an amendment to Civil Rule 12 that restructures part (a) of the rule. The restructuring is to clarify that the time specified for serving a responsive pleading under any subsection of Rule 12(a)—not just under (a)(1)—does not override a different deadline set by statute. In other words, the proposed amendment will apply to all of (a); its placement falls after (a) and before (a)(1)–(3). Subsections (a)(2) and (3) deal with suits against the United States or its officers or employees. If approved, the amendment would become effective December 1, 2024.

Bankruptcy Rule 7012 makes some of Rule 12 [(b)-(i)] applicable to adversary proceedings, but not subsection (a). We should look at Rule 7012(a) to determine if a parallel amendment is warranted. If so, Rule 7012(a) might be amended accordingly:

> (a) *When Presented*. If a complaint is duly served, the defendant must serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court or another time is specified under a federal statute.

According to the Committee's report (in Dec. 2021) to the Standing Committee proposing publication, "statutes setting shorter times than the 60 days provided by paragraph (2) exist. It is not clear whether any statute inconsistent with paragraph (3) [also providing 60 days] exists now."

(4) **Privilege Logs; Rules 16(b)(3)(B)(iv) and 26(f)(3)(D)**

The Civil Rules Committee recommended publication by the Standing Committee of proposed amendments to these two rules regarding the parties' intended "timing and method for complying with Rule 26(b)(5)(A)," the "privilege log" provision added in 1993. The Rule 26 amendment requires the parties to discuss and report the timing and method for compliance with the privilege log provision, and the Rule 16 amendment suggests that the court include the timing and method in its scheduling order. The amendment also adds "Management" to the subtitle of Rule 16(b) so that it would read "Scheduling and Management." Bankruptcy Rules 7016 and 7026 make Rules 16 and 26 applicable to adversary proceedings, so we will continue to monitor the amendments. Bankruptcy Rule 9014 makes Rule 26(b)(5)'s privilege log provision applicable to contested matters, but not Rule 16 or Rule 26(f), so if the amendments are ultimately passed, the timing and method discussion would not be required in a contested matter.

(5) **Civil Rule 41**

The Civil Rules Committee's Rule 41 Subcommittee has been studying Civil Rule 41 and the extent of dismissals under the rule, e.g., part of an action. The subcommittee sought feedback from practitioners to get a better sense of their experiences with the rule. Various proposed amendments have been discussed, and the subcommittee will consider the views expressed and return with a proposal. Bankruptcy Rule 7041 makes Civil Rule 41 applicable in adversary proceedings, so we will monitor the developments.

(6) **Civil Rule 45**

Reporter Rick Marcus reported that the Civil Rules Committee's Discovery Subcommittee still has before it the meaning of "delivery" of a subpoena but that the Committee will probably end up doing "nothing." The subcommittee may survey state rules for service of subpoenas and be informed thereby. Bankruptcy Rule 9016 makes Civil Rule 45 applicable in bankruptcy cases, so we will monitor the developments. The Bankruptcy Committee can take up

the issue on its own, particularly given that original process in an adversary proceeding may be served by mail.

(7) Filings under Seal

The Discovery Subcommittee has also been considering whether the Subcommittee should attempt to devise a set of procedural features applicable to motions to seal. Whatever is proposed would be applicable in bankruptcy, so we will continue to monitor this issue.

(8) Civil Rule 7.1

The Civil Rules Committee continues to consider whether any changes to the corporate parent disclosure rule are required to deal with ownership by a parent company of a parent company—the "grandparent problem." Another issue has to do with a suggestion requiring parties to certify that they have checked the assigned judge or judges' publicly available financial disclosures through the newly created database on judges' stock holdings. The Committee will continue to explore how better to require disclosures of parties' affiliates, particularly grandparent relationships. Bankruptcy Rule 7007.1 presents the same issues.

(9) Pro Se Filing and E-filing

Reporters for all the committees are deliberating on giving pro se filers authority to file electronically; Professor Struve provided an interim update on the working group's progress, and she is on the agenda to update us.

(10) IFP Practices and Standards

The Civil Rules Committee has received various submissions over the past couple of years relating to the great variations in standards employed to qualify for in forma pauperis status among different districts and among judges in the same district. The Committee discussed creating a joint subcommittee or other joint study of in forma pauperis standards, which could craft a civil rule or provide uniform and good practice guidance on IFP standards. The AO has a Working Group on this issue. There is no proposal for present action, and the sentiment is that a nationwide fix is not likely given differences in cost of living.

(11) Civil Rule 55

Rule 55 says that court clerks "must," in prescribed circumstances, enter defaults and then default judgments. But practice in many districts does not adhere to this directive. FJC's Emery Lee is studying why many districts require that all default judgments be entered by a judge and why a few seem to require that the initial default also be entered by a judge. Bankruptcy Rule 7055 makes Civil Rule 55 applicable in adversary proceedings.

(12) **End-of-the-Day Time for E-Filing**

The Civil Rules Committee agreed to drop any proposal to change the time for e-filing from midnight to an earlier time.

(13) **Shall, Must, Should, May**

The Civil Rules Committee had an interesting discussion on the differences between these directives in rules. For instance, "should" indicates that the thing likely ought to be done or is an "information forcing" mechanism.

The next meeting of the Civil Advisory Committee will be on October 17, 2023, in Washington, D.C.

(D) ***Dec. 8–9, 2022, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

The Bankruptcy Committee met in December in Washington, DC, and will next meet on June 8–9 in Boston. They are always happy to have Judge Connelly attend their meetings as liaison from our committee.

(1) **Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees**

The Bankruptcy Committee recently considered certain structural concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys. Current law prohibits post-petition collection of unpaid attorney fees for representing a chapter 7 debtor. Chapter 7 debtors' attorneys have developed several methods to ensure that they are paid for their work, including bifurcation of their fees and services under separate prepetition and post-petition agreements. Bankruptcy courts, in turn, have spent considerable time in otherwise straightforward chapter 7 cases wrestling with the legality of, and appropriate parameters for, these payment structures.

At its June 2022 meeting, the Bankruptcy Committee recommended that the Judicial Conference seek legislation to amend the Bankruptcy Code to (1) make chapter 7 debtors' attorney's fees due under a fee agreement nondischargeable; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees. The Conference adopted this recommendation at its September 2022 session, and the AO transmitted the legislative proposal to Congress in November.

Congressional staff has started reviewing the proposal. If Congress enacts amendments to the Code based on this position, at a minimum, conforming changes to the Bankruptcy Rules would be required.

(2) Proposed Rule Amendments Related to Remote Public Access to Witness Testimony

The Bankruptcy Advisory Committee has as new business a suggestion from the National Bankruptcy Conference proposing rule amendments addressing remote testimony in contested matters. The Bankruptcy Committee is very interested in the future of remote public access to court proceedings and remote witness testimony in certain types of proceedings. The committee will be interested in continuing to monitor the Rules Committee's consideration of this suggestion at future meetings and look forward to any updates Judge Connelly may share at their June meeting.

(3) *City of Chicago v. Fulton*

Finally, the Bankruptcy Committee has continued to receive updates on the status of proposed amendments to Rule 7001(a), which were just published for public comment and which respond to issues raised by Justice Sotomayor in her concurrence in City of Chicago v. Fulton. The Bankruptcy Committee continues to be willing to provide any input that our Committee requests regarding those public comments.

The Bankruptcy Committee looks forward to continuing to collaborate and work together in the future.

Judge Connelly suggested that the Bankruptcy Rules Committee will have to be ready to act quickly to make rule changes when and if the legislative proposal becomes law.

Subcommittee Reports and Other Action Items

4. Report by the Consumer Subcommittee

(A) *Recommendation to Republish Proposed Amendments to Bankruptcy Rule 3002.1 in Light of Public Comments*

Judge Harner introduced the recommendation, and Professor Gibson provided the report.

At the fall meeting and by email afterwards, the Advisory Committee approved for republication changes to the proposed Rule 3002.1 amendments made in response to comments submitted after the 2001 publication. Since that time, the Subcommittee has considered and approved additional changes to the amendments.

Many of the new changes are stylistic. They were suggested by the style consultants after they reviewed the rule approved in the fall. Form numbers were also filled in. The new substantive changes consist of the following:

- In (f)(1) the cut-off date for filing a motion to determine the status of a mortgage was changed from when the case is closed to when the trustee files the end-of-case notice under (g)(1). This change was made to prevent an overlap with the motion under (g)(4).

- In (g)(1), rather than restricting the applicability of the subdivision to cases in which "the trustee has made any payments on a claim described in (a)," it was changed to apply at the end of any chapter 13 case in which the debtor completes all payments to the trustee. This change was made because one purpose of the trustee's end-of-case notice is to trigger a response from the claim holder that reveals the status of the mortgage on its books. If the trustee or debtor disagrees with that response, either can seek a court determination under (g)(4). This procedure should be available in a non-conduit district even if the trustee made no default payments.

- Subdivision (g)(4) was expanded to refer to the required use of Official Forms and to prescribe requirements for the response to the motion. Also the provision about timing if the trustee does not file the required notice was deleted in order to avoid suggesting that not filing is permissible. If the trustee does not file, the debtor can still seek determination under (f).

- The Committee Note was changed to reflect the changes to the rule.

Judge Harner expressed her view that the revisions clarify the rule. Judge Connelly observed that (g)(1) does not require completion of payments "under the plan" but instead requires completion of payments to the trustee to trigger the obligation to file the end-of-case notice.

Judge Bates pointed out that, in line 129 on p. 94 of the Agenda Book, there is an extra word "based" that should be removed.

With that correction, the Advisory Committee recommended that the revised rule be sent to the Standing Committee for republication.

(B) ***Consider Proposed Amendment to Rule 5009(b) (Suggestion 22-BK-D and 23-BK-K)***

Professor Gibson provided the report.

Last summer the Subcommittee began considering a suggestion submitted by Professor Laura Bartell (22-BK-D) to change the timing of the notice to chapter 7 and 13 debtors under Rule 5009(b), which reminds them of their need to file a statement of completion of a course on personal financial management. Since that time Tim Truman, a chapter 13 trustee, has submitted a related suggestion (22-BK-K) to change the deadline for chapter 13 debtors to file the statement.

Professor Bartell examined all the chapter 7 and chapter 13 cases filed in 2019 on the interactive Federal Judicial Center Integrated Database. She discovered that several thousand cases—primarily chapter 7—were closed without a discharge because of the failure to submit a statement of completion of a course concerning personal financial management.

Professor Bartell suggested that, to reduce the number of cases where this problem occurs, the Rule 5009(b) notice should be earlier than 45 days after the first date set for that meeting when the debtors are still focused on the case and are in touch with counsel and are likely still at the address they had when they filed their petition.

Mr. Truman's suggestion focuses on the deadlines in Rule 1007(c) for filing the statement or certificate of course completion. He suggested that the deadline for chapter 13 debtors be the same as the one for chapter 7 debtors—60 days after the first date set for the meeting of creditors—rather than when the debtor makes the last payment required by the plan. He noted that, if the course is of value, it would have value to debtors as they attempt to complete their chapter 13 plans rather than at the end of the process.

Professor Gibson described the statutory provisions governing the financial management course and the rules adopted to implement those provisions. The Subcommittee shares Professor Bartell's desire to reduce the number of individual debtors who go through bankruptcy but do not receive a discharge because they either fail to take the required course on personal financial management or merely fail to file the needed documentation of their completion of the course.

Recognizing that probably no set of rules can achieve perfect compliance with the personal-financial-management-course requirements, the Subcommittee would like to improve compliance with them to the extent possible. To determine how the rules might best achieve this goal, the Subcommittee considered a series of issues:

- *Should the Rule 5009(b) notice be sent earlier?* Professor Bartell has made some persuasive arguments for why moving up the notice might increase compliance: it is likely to be more effective if it is received around the time of the meeting of creditors because it is more likely to reach the debtor and to be at a time when the debtor is still in touch with her lawyer.

- *Should more than one reminder notice be sent?* The answer to this question requires consideration of the additional burden that would be imposed on the clerk's office and the possible effectiveness of an additional prod to debtors that did not file a certificate of course completion after the first notice.

- *What date or dates should be selected?* The Subcommittee has decided that the timing of the reminder notice should not run from the conclusion of the meeting of creditors, but instead from the petition date or the first date set for the meeting of creditors. In considering the timing of one or two reminder notices, the Subcommittee sought a time period that would allow many debtors to comply on their own without the need for any reminder but would give chapter 7 debtors who needed reminding sufficient time to act.

- *Should the timing of the 5009(b) notice be the same for chapter 7 and chapter 13 debtors?* The Subcommittee thought yes. Whether or not the filing date for chapter 13 debtors is made the same as for chapter 7 debtors, as Mr. Truman suggests, an early reminder date is probably useful for chapter 13 debtors so that fewer will wait until the end of the case to take the course.

- *Should the deadlines for filing the certificates of course completion be changed?* Mr. Truman has suggested that the deadline for chapter 13 debtors be the same as the one for chapter 7 debtors—60 days after the first date set for the meeting of creditors—rather than when the debtor makes the last payment required by the plan. In the course of the Subcommittee's discussion, however, the idea was raised that the rules should impose no deadline for filing the certificate. The Code only requires that the course be taken before a discharge can be granted, and Subcommittee members were concerned that some debtors might be deprived of a discharge merely because they failed to file their certificates by the times specified in the rules. Many courts will extend the time, as they are permitted to do, but some courts hold the debtors to the current deadlines and close the case without a discharge.

The Subcommittee explored a number of approaches to the problem and coalesced around two proposals.

1) Remove the deadline for filing the certificate of course compliance currently contained in Rule 1007(c)(4) and make the deadline the date discharge would otherwise be issued. This change would be easy to accomplish by eliminating the deadline in Rule 1007(c)(4) and those rules that refer to the deadline. The official form amendments that put the deadlines in them would be changed.

2) Provide for two reminder notices to be send by the clerk under Rule 5009(b). One would be relatively early in the case, and then a follow-up notice.

The Subcommittee was divided on the timing of the two notices. The two alternatives were:

a) One at the time Rule 5009(b) currently provides (45 days after the date first set for the meeting of creditors under § 341) and a second one 75 days after that date.

b) One 45 days after the petition is filed and a second one 60 days after the date first set for the meeting of creditors (the current date).

Professor Gibson provided draft language to reflect both options and encouraged comments by the Advisory Committee.

Judge Harner thanked Professor Bartell for providing academic research to support the need for a change in the rules, something that is often lacking in the rules process. She noted that the Subcommittee had lengthy and robust discussions on this suggestion because it is so important. There is a strong consensus that the requirement should not be an impediment or barrier to discharge. She thinks eliminating the deadline for filing the certificate the districts that currently close the case immediately after the deadline and require a motion to reopen to file the certificate might not do that. But she noted that we need input from Ken Gardner on behalf of the clerks' offices as to how cases would be closed if there is no deadline for filing.

The Subcommittee also likes the idea of the same dates for both chapter 7 and chapter 13 cases and moving up the dates for the reminders. It just could not reach consensus on what those dates should be, so perhaps feedback from the Advisory Committee could help with that.

Judge Kahn said that he strongly supports the direction the Subcommittee is taking and wants maximum flexibility. He fears that some courts may view the reminder notices as deadlines and will be perhaps stricter than they have in the past about granting additional time to debtors. In chapter 13 cases no one can find the debtors 60 months after confirmation so an earlier date for compliance is certainly better. This is a difficult issue, and we should consider putting language in the rule to make clear that this is not to be interpreted strictly and extensions should be freely granted, as under Rule 4008(a) which allows the court to extend the time to file at any time. He is not opposed to the "no deadline" approach but is concerned about it.

Judge Harner agreed that, if there were no deadline, the notices could indicate that they are not to be interpreted strictly as an impediment to discharge and that the court has discretion to grant additional time or require additional notices.

Judge Isicoff stated that in her district they do not enforce strict guidelines for closing cases. If the certificate is not filed by the deadline, the case is closed without prejudice. With respect to chapter 13 plans, the problem is that many debtors file multiple plans before one is confirmed, so the timing of the notice should turn on plan confirmation rather than the filing or meeting of creditors, or it may impose an unnecessary burden on the clerk's office.

Judge McEwan suggested that the notice state that the case will be closed without discharge within a certain number of days, and emphasize that the debtor will be required to seek to reopen the case and will have to pay a reopening fee to do so. That gives the debtor a financial incentive to file the certificate promptly.

Deb Miller stated that she thinks the date for both notices needs to key off the same event. So if the first notice is so many days after the first date set for the meeting of creditors, the second notice should also be additional days after the same date. She said that those dates are automatically populated, and it would be much easier for the trustees and clerks' offices to use a single starting point for the notices.

Jenny Doling said that she has filed 7000 cases and since 2005 she has required her clients to take the financial management course before the meeting of creditors under § 341. In both chapter 7 and chapter 13 they make it mandatory and her staff calls debtors to ensure they take the course prior to that date. She suggested that the § 341 notice include language telling the debtors to take their credit counseling course by that date and that would eliminate having to send two notices.

Judge Harner invited Ken Gardner to provide a perspective from the clerk's office. Mr. Gardner stated that having the same dates for chapter 7 and chapter 13 makes a lot of sense. It is easier to administer and provides clarity to the debtors. The suggestion to put something in the § 341 notice is good, and some courts do that. He thinks the date for the notice should run from the petition date rather than the date set for the § 341 meeting. And he agrees that it should be

included in the § 341 notice. The problem is that there is a lot of information in the § 341 notice that nobody reads and he is not sure that it will be effective. But it is probably good and doesn't cost anything to include it. That is what the Advisory Committee approved in the fall for chapter 7 § 341 meeting notices. The rule should make it clear that no additional notice need be filed if the certificate has been filed. Good lawyers make sure their clients file early because they know that is required for the discharge. The second notice has been very effective for most courts in getting those certificates actually filed. So multiple notices are good, but one or two makes sense. As far as closing the case, every court closes cases a little bit differently, and a lot of that is judge-driven. Once the case is closed, the debtor cannot get a discharge without reopening and paying a reopening fee. This is kind of a "gotcha" situation, when the debtor has done everything they were supposed to do, but at the end of the case they don't get the discharge because they didn't file the financial management certificate. Perhaps there should not be a fee to reopen the case if the case is reopened within a certain number of days after closing in order to file the certificate.

Judge Harner suggested that perhaps if the certificate is filed with the motion to reopen the reopen fee should be waived. She thought some courts do that.

Judge Connelly noted that when there is a deadline for filing the certificate in a chapter 13 case it may be prior to the date when the payments are concluded and if the debtor does not meet the deadline the debtor will have no incentive to complete the plan because the debtor will not be able to get a discharge. That supports eliminating any deadline. As for the dates of the notices, sixty days after the first date set for the meeting of creditors is the deadline for objections to discharge, and the court is directed under Rule 4004(c) to issue a discharge in a chapter 7 case if there is no objection, so she does not think the second notice can be later than the date the court is supposed to enter the discharge. We are not trying to create confusion with different deadlines, or lengthen the process to get a chapter 7 discharge, or make it more difficult to get a chapter 13 discharge. We are just trying to encourage completion of the financial management course.

Judge Harner stated that the discussion had been very helpful, and she asked if Ken Gardner agreed that it makes no sense to require chapter 13 notices to be sent out before a plan is confirmed, given that there may be multiple plans submitted. He agreed. She then said that the Subcommittee will have to reflect on that, because if the time for the notice is moved up it may be before the plan is confirmed. It will also be well before plan payments have been made, so perhaps there should be a final reminder that the failure to file the certificate is holding up discharge.

Deb Miller stated that in her district the trustee objects to the closing of the case without discharge based on failure to file a financial management certificate. And that way the debtor gets one more opportunity to file. She does not know how many trustees do that, because the debtor is in fact not entitled to discharge if they have not filed the certificate, but the motion gives the debtors another last chance.

Judge Harner stated that there is no perfect solution, but the Subcommittee will consider all the discussion at the Advisory Committee. Professor Gibson stated that we should hold the

proposed amendment to the § 341 meeting notice until this suggestion is resolved because the amendment was to give notice of the deadline and there may not be a deadline. The Subcommittee will aim at having a proposal by the fall meeting.

There was some final discussion about whether the notice of plan completion in chapter 13 could include a final reminder to file the financial management certificate, or alternatively an additional notice from the clerk's office at the end of a chapter 13.

Judge Isicoff said that in her district if the financial management certificate has not been filed by the end of a chapter 13 case, the judges immediately issue an order to show cause why the case should not be closed without discharge. If they can find the debtor, that procedure works.

Jenny Doling asked whether a final notice could be included in the notice of intent to file a final report, but Deb Miller said that the notice of plan completion is before the final report so that final report is not a good vehicle for that notice. The notice of plan completion would be a better place for the notice and would place the burden on the trustee rather than the clerk's office.

Professor Bartell thanked the Advisory Committee for their attention to her suggestion and noted that in Judge Kahn's district the judges issue show cause orders in chapter 7 cases as well, before closing cases for failure to file the certificate, and that is a very effective technique. Districts that do that have very few cases in which discharge is denied for failure to file the certificate. But we cannot by rule require judges to hold show cause hearings before closing cases without discharge.

Judge Harner suggested that something might be said about that practice in the Committee Note.

(C) ***Consider Proposed Amendment to Rule 1007(h) (Suggestion 22-BK-H)***

Professor Gibson provided the report.

Judge Catherine McEwen has submitted a suggestion to require the reporting of a debtor's acquisition of postpetition property in the chapter 11 case of an individual or in a chapter 12 or 13 case. Judge McEwen noted that Rule 1007(h) (Interests Acquired or Arising After Petition) requires the filing of a supplemental schedule only for property covered by § 541(a)(5)—that is, property acquired within 180 days after the filing of the petition by bequest, devise, or inheritance; as a result of a property settlement with a spouse or a divorce; or as beneficiary of a life insurance policy. Not included within Rule 1007(h) are other postpetition property interests that become property of the estate under § 1115, 1207, or 1306.

Judge McEwen suggested that, for the sake of transparency, the rules should impose a deadline for the disclosure of these other postpetition property acquisitions. She pointed out that a number of bankruptcy courts have imposed such requirements by local rule or administrative order.

Professor Gibson noted that no Code or Bankruptcy Rule currently requires that a debtor has to disclose the acquisition of this additional postpetition property (although § 541(f) does require a chapter 7, 11 or 13 individual debtor to file with the court upon request a copy of his or her federal income tax returns while the case is pending which would give some indication that there had been a change in income). The reason it is not required is that it would be so sweeping. So during a chapter 13 case, every new purchase could trigger a disclosure requirement and every change in income. When there is a disclosure requirement, it has been limited to specific types of property or acquisitions that are sufficiently substantial to affect the debtor's financial circumstances, such as any substantial acquisitions of property or significant changes in monthly income.

The Subcommittee basically followed Judge Robert Dow's rule and questioned whether a problem exists that needs to be solved. There is no indication that courts are being prevented from requiring chapter 12 and 13 debtors and individual debtors in chapter 11 cases to supplement their schedules to report acquisitions of property or income increases while their cases are pending. Indeed, courts have found several ways to impose such a requirement. A change is not necessary to be consistent with the Code, because the Code does not require this disclosure. And when Congress imposed the requirement for the filing of postpetition tax returns in 2005, it did not require disclosure of postpetition property. Therefore, the only reason for a rule would seem to be to create uniformity because some districts require disclosure, and some do not.

But chapter 13 practice is notoriously nonuniform in a number of respects, and our experience with the national chapter 13 plan showed us that courts have well-developed practices and are reluctant to change them. Each thinks its own practice is the best.

The Subcommittee also considered the challenge of drafting an effective amendment to Rule 1007(h) to include property under §§ 1115, 1207, and 1306. It is not feasible to require disclosure of all postpetition property that comes within those provisions. Either specific types of property need to be stated, or the rule needs to describe some degree of impact on the debtor's financial condition, such as substantial or significant. A specification of types of property gives greater guidance, but it runs the risk of being underinclusive. The descriptive route may be too vague.

In the end, the Subcommittee concluded that bankruptcy courts have developed their own practices for whether and how they require disclosure of postpetition property by debtors in chapter 11, 12, and 13 cases, and it did not see any reason to disturb those practices in the interest of uniformity. Accordingly, the Subcommittee recommended that no further action be taken on this suggestion.

Judge Harner invited Judge McEwan to comment on her suggestion. Judge McEwan said that the Eleventh Circuit has interpreted the Bankruptcy Code to require ongoing disclosure because postpetition interests become part of the bankruptcy estate. She is not suggesting that every can of peas be disclosed, or a new yoga outfit; she thinks the proposed rule should require disclosure of significant assets, and that would go a long way to ensure that debtors and creditors are not harmed.

She noted that in the Eleventh Circuit there is a well-developed body of judicial estoppel law that is driven by non-disclosure in chapter 13 cases. Debtors lose the right to pursue undisclosed claims, and creditors lose the benefit of those claims. She said that she mostly sees nondisclosure of personal injury cases, employment discrimination cases and the like. There was a chapter 13 case in the Eleventh Circuit with a debtor who paid her creditors 100% and after she emerged from bankruptcy she sued Tyson Foods for postpetition employment discrimination and she was prevented from bringing that claim because of judicial estoppel even though her creditors were paid in full. So this is a problem in her circuit.

She noted that courts apply a rule of reasonableness to disclosure, even with respect to the initial statements and schedules in a case. Disclosure applies to meaningful assets. She said that she was asking for guidance not only for uniformity, but to solve the problem and to bring to the attention of debtors' counsel the importance of disclosure because it may end up hurting their own clients. She is making no suggestion on the appropriate drafting, and whether the standard should be "substantial" or "significant" or "meaningful" or "valuable" assets but suggests that there is a problem here that the Advisory Committee should address. She suggests that the Subcommittee look at the various approaches adopted by districts that require disclosure and pick the best one.

Judge Harner emphasized that the Subcommittee took the suggestion seriously, and she knows that these assets can have an impact on both debtor and creditors. From the Subcommittee's perspective it was a design challenge, and the Subcommittee thought it was best to leave the issue to local courts to resolve.

Deb Miller suggested that perhaps Schedule A/B could impose an obligation to amend if the information on it changes during the case. Or in the Statement of Financial Affairs it could say there is an ongoing duty to provide new information. Maybe if the requirement were on a form rather than in a rule, it would not be as objectionable to the local bars.

Judge Connelly asked whether an approach that would focus solely on claims or lawsuits might be a sort of middle ground rather than requiring disclosure of all types of assets? It sounds like that may be the major problem here.

Judge Kahn described a case in which a debtor failed to disclose receiving substantial insurance proceeds, and the case was dismissed with a bar to refiling for a period of one year. A rule would codify the requirement to make disclosure but wouldn't change what happens when disclosure is not made. Perhaps a materiality standard might be appropriate, and you could put it in Rule 1009 (requiring disclosure if the schedules become materially inaccurate).

Judge Harner suggested that the suggestion be remanded to the Subcommittee for further consideration. Without objection, the suggestion was remanded.

(D) ***Consider Recommendation for Final Approval of Proposed Amendments to Rule 7001 (Types of Adversary Proceedings)***

Professor Gibson provided the report.

In August 2022 the Standing Committee published a proposed amendment to Rule 7001 (Types of Adversary Proceedings) that would allow the turnover of certain estate property to be sought by motion rather than by adversary proceeding. The original suggestion for an amendment was prompted by Justice Sotomayor's concurring opinion in *City of Chicago v. Fulton,* 141 S. Ct. 585, 595 (2021), in which she wrote that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned."

Only one comment on the proposed amendment was submitted in response to publication (BK-2022-0002-0009). Bonial & Associates, P.C., a creditor law firm, wrote that it supported the amendment because it "will streamline the turnover process and should create consistency nationally." The comment noted the inconsistencies in current turnover practices from one district to another and stated that "[c]reditors would benefit from one national and consistent approach to turnovers across all jurisdictions." It was interesting to read this comment because the Subcommittee was focused on debtors and benefitting them, and the comment said that the change would be helpful to creditors as well.

The Subcommittee recommended final approval of the amendments and submission to the Standing Committee as published.

The Advisory Committee approved the proposed amendment to Rule 7001 as published and agreed to submit it to the Standing Committee for final approval.

(E) ***Consider Recommendation for Final Approval of Amended Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits), Eliminating the Need for Official Form 423, and Conforming Amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2) (Suggestion 19-BK-G)***

Professor Bartell provided the report.

In August 2022 the Standing Committee published a proposed amendment to Rule 1007(b)(7) to make the rule inapplicable to debtors who are not required to complete an instructional course concerning personal financial management as a condition to discharge and to require an individual debtor who has completed the course to file a certificate of course completion issued by the provider rather than a statement on Official Form 423.

Also published were conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2) to replace the word "statement" in each of those rules with the word "certificate."

There were no comments on the proposed amendments. The Subcommittee recommended final approval of the amendments and submission to the Standing Committee as published.

The Advisory Committee approved the proposed amendment to Rule 1007(b) and the conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2) as published and agreed to submit them to the Standing Committee for final approval.

5. **Report by the Forms Subcommittee**

(A) ***Consider Recommendation for Publication of New Official Forms Related to Proposed Rule 3002.1 (Official Forms 410C13-M1, 410C13-M1R, 410C13-M2, 410C13-M2R, 410C13-N, and 410C13-NR)***

Judge Kahn introduced the recommendation, and Professor Gibson provided the report.

In 2021 the Standing Committee published five forms drafted to implement proposed amendments to Rule 3002.1 (Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R). Because of the substantial number of comments that were submitted about the rule amendments, the Subcommittee deferred considering the comments submitted on the forms until after the Consumer Subcommittee completed its recommendations on changes to be made to the rule in response to comments. At last fall's Advisory Committee meeting, the Consumer Subcommittee presented its recommendations, which were approved. Since then, the Consumer Subcommittee has made some additional changes to the Rule 3002.1 draft, for which it is seeking approval at this meeting.

The Forms Subcommittee has now considered changes to the forms in response to the comments submitted after their publication and reflecting the proposed changes to the Rule 3002.1 amendments. The new forms no longer include a mandatory midcase-trustee notice of the status of the mortgage. Instead, either the trustee or the debtor may choose to file a motion to determine the status of the mortgage claim at any point during the case prior to the trustee's Final Notice of Payments Made. Official Form 410C13-M1 was drafted for that purpose. No distinction is made between conduit and non-conduit cases. The moving party—either the trustee or debtor—must only provide the information that she has knowledge of. Official Form 410C13-M1R is the form for the claim holder's response to that motion if it disputes anything in the motion to determine status.

At the end of a successful chapter 13 case, the trustee is required to file a notice of payments made on the mortgage. Official Form 410C13-N was drafted for that purpose. The trustee must also provide the disbursement ledger for all payments made to the claim holder or show how it can be accessed online. The claim holder then must file a response, using Official Form 410C13-NR. The claim holder must indicate whether the debtor has paid the full amount required to cover any arrearage and whether the debtor is current on all postpetition payments. If the claim holder says the debtor is not current, it must attach the itemized payment history. The

response must be filed as a supplement to the claim holder's proof of claim, and they should be able to do this without hiring a lawyer.

If either the trustee or debtor wants a final determination of the mortgage's status at the end of the case, he can file a Motion to Determine Final Cure and Payment, using Official Form 410C13-M2. If the trustee files the motion, the trustee must again disclose the payments the trustee made to the holder of the mortgage claim. The claim holder, if it disputes any facts in the motion, must then file a response, using Official Form 410C13-M2R.

The only mandatory forms would be Official Form 410C13-N, the end-of-case notice of payments made by the trustee, and any response to that notice by the claim holder. All other motions would be discretionary. The Subcommittee hopes that this approach responds to some of the concerns that were raised in the comments, particularly about non-conduit cases and how the trustee would be able to provide information in those districts.

The Subcommittee recommended that the revised forms be submitted to the Standing Committee for republication.

Judge Kahn stated that the Subcommittee tried to word the language in the six forms, not only to match the revisions to Rule 3002.1, but also to be flexible considering not only the conduit/non-conduit practices among different courts in the country, but also the different holdings of different courts regarding what are payments "under the plan" by ensuring there was no language in the forms that indicated a substantive conclusion on that issue. The Subcommittee also made the (f) process permissive rather than mandatory on the trustees and the trustees need not respond unless they disagree. That leaves it to the debtors who have been paying directly in non-conduit cases to file this notice to get a status. Then (g) is a mandatory process on both sides. So even in a non-conduit case where the trustee cannot provide information about the mortgage status at end of the case and files the information at zero, the claim holder must still respond with the mortgage status according its records.

Deb Miller said that an (f) or (g) motion is actually a RESPA request for information, and she suggested adding language to the forms that would make that clear to prevent claim holders from charging debtors for completing and filing the response. Creditors are not allowed to charge for payoff statements under RESPA.

Professor Bartell asked whether there was language Ms. Miller was suggesting, and Ms. Miller said she would supply it after the meeting. Professor Bartell then noted that, although the entire Subcommittee worked very hard on these amendments, everyone appreciated what Ms. Miller did on this project and that she went above and beyond what anyone could have expected of a subcommittee member. Others echoed that sentiment. Ms. Miller thanked all those chapter 13 trustees and others who provided input on the rule and forms, and she thinks they are better for it.

Judge Harner commended the Subcommittee for its work and said she sees a lot of Rule 3002.1 issues in her district. But she expressed concern about including language with respect to

RESPA on the forms because she fears that may be taking a view on a substantive issue. She suggested that the Subcommittee discuss that.

Judge Connelly emphasized that the forms were intended to be usable in all districts with different practices.

Judge Kahn asked whether the RESPA issue could be addressed in the Advisory Committee Notes, but then reflected that it would not be appropriate.

Professor Gibson suggested getting the proposed language from Ms. Miller and circulating it to the Subcommittee by email and then to the Advisory Committee for a vote if we wanted to get the forms before the Advisory Committee in June along with the rule for republication. Alternatively, the forms could wait for another meeting, because forms take one year less than rules for promulgation, so they could still go into effect at the same time as the amended rule even if we waited.

Judge Kahn suggested approving the forms as presented and considering the RESPA point when comments after publication are considered so the rule and forms would be published at the same time. If the Subcommittee and the Advisory Committee approve a change by email before we present these forms to the Standing Committee, we can still publish them together with the rule.

Jenny Doling commented that she often sees the lenders try to shift the cost of responding onto the debtors and that is a cost that debtors outside of bankruptcy would never bear, so she thinks language labeling these motions as RESPA requests is important. She suggested changing the title of the forms to include "Request for Information" in the title along with the description of the motion.

Judge McEwan noted that the form already requires the claim holder to itemize all fees and costs assessed to the date of the statement, and they would have to disclose this fee. Ms. Miller said that the claim holders take the position that the fee was incurred after the date of the statement, so it does not have to be disclosed.

Scott Myers stated that the RESPA issue could be raised as a comment in response to publication. Professor Gibson expressed concern that a post-publication change to add language referring to RESPA might itself be significant enough to require republication. Scott Myers said that republication of the forms would not delay the effective date of the amended rule and forms because the forms take a year less.

Deb Miller suggested adding "Request for Information" in the caption of the (f) and (g) motions forms, so they would be titled "Request for Information and Motion . . . ." Then we could get comments on the RESPA issue with publication. But Professor Struve questioned whether the motions are really "requests for information" under RESPA. It is her impression that requests for information must actually set forth the information that is requested, and she asked whether these motions forms do that. Professor Gibson agreed that this is a valid point, because the forms reveal information rather than asking for it.

Tom Byron asked about whether something would have to be added to the Committee Note as well. Professor Gibson said that she would be reluctant to do so, because such a note would be taking a substantive position on whether the form was subject to RESPA.

Judge Kahn again suggested approving the forms as presented but also sending them back to the Subcommittee for consideration on whether additional language regarding RESPA should be proposed. If no further changes are agreed upon, the forms will be published in their current form with the amended rule. If further changes are recommended, we can vote by email. Professor Gibson suggested that the Subcommittee meet within the next two weeks. Judge Bates stated that the worst outcome would be for the forms to be changed after publication next year in a way that required republication.

The Advisory Committee recommended that the revised forms be sent to the Standing Committee for republication in their current form, subject to any changes the Advisory Committee may approve upon recommendation of the Subcommittee before they are presented to the Standing Committee.

(B) ***Consider Recommendation for Final Approval of Amendment to Official Form 410A, Part 3 (Suggestion 22-BK-A)***

Professor Bartell provided the report.

In August 2022 the Standing Committee published a proposed amendment to Official Form 410A Proof of Claim Attachment A, Part 3 (Arrearage as of Date of the Petition) to replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."

We received one comment on the proposed amendment from William M.E. Powers III of Powers Kirn in Moorestown, NJ (BK-2022-0002-0011). Mr. Powers suggested that the change is unnecessary because the Bankruptcy Reform Act of 1994 abrogated *Rake v. Wade*, 508 U.S. 464 (1993). He also suggests that mortgage servicers do not routinely separate interest and principal components for delinquent installments and that this amendment will require them to upgrade their systems to accommodate the form change or make manual calculations. Such a change is also "likely to confuse many people, including pro se debtors" because the amounts may differ from those set out in the promissory note. He suggested that Official Form 410A already has so much information in it that it is "already difficult and confusing to individuals who do not work with it on a regular basis."

The proposed amendment is intended to further the requirements of § 1322(e). To the extent that the underlying agreement (which governs the amount of interest that must be paid to cure a default under a chapter 13 plan) provides for interest only on principal amounts that are in arrears, but not on interest or other amounts payable under the agreement, the court must be able to determine how much of the arrearages is principal. The amended form will facilitate that determination.

It is true that the change imposes an additional burden on the mortgage servicers, but it gives the debtor and the chapter 13 trustee the information necessary to determine whether the plan is treating the creditor's claim correctly.

The Subcommittee decided not to make any change in response to this comment and recommended that the Advisory Committee give final approval to the amended form and Advisory Committee Note and change in the Instructions and submit them to the Standing Committee for final approval.

Judge Isicoff stated that creditors often object to rules changes by saying "this is not the way we do it," so she did not put much credence in that comment. She has had lenders on the stand who could not testify as to what was principal and what was interest. She thinks this is an important change and supports it.

Ms. Doling also supported the change and said that her district is seeing a significant increase in "zombie" mortgages that went dormant for years and now there is equity in the property and the trustees cannot currently get this information from servicers.

The Advisory Committee gave final approval to the amended Official Form 410A with the accompanying Advisory Committee Note and change in the Instructions as published and agreed to submit them to the Standing Committee for final approval.

6. **Report of the Privacy, Public Access, and Appeals Subcommittee**

(A) ***Consider Suggestion 22-BK-I to Require Redaction of the Entire Social Security Number from Public Court Filings, Including the Last Four Digits of the Number, and Recommendation of No Action Regarding Suggestion 23-BK-A to Stop Sending the Debtor's SSN to Creditors***

Professor Bartell provided the report.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be "scrubbed of personal information before they are publicly available." Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number ("SSN") from court filings, have been filed as a suggestion with each of the Rules Committees. The Bankruptcy Rules suggestion has been given the label of 22-BK-I.

Michael Gieseke, an employee of a chapter 12 and chapter 13 trustee, goes further, suggesting in 23-BK-A that Rule 2002(a)(1) be amended to remove the requirement that creditors receive the full SSN of a debtor and instead receive only the last four digits of the SSN or taxpayer-identification number (with only the trustee receiving the full SSN).

There have been many amendments to the rules over the past twenty years intended to safeguard personal information. Extensive amendments were made to rules and forms in 2003 to limit disclosure of a party's SSN or other identifiers.

A new Rule 9037 was adopted in 2007 pursuant section 205(c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347. That section required the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of the documents and the public availability . . . of documents filed electronically." The Rule precludes inclusion in any electronic or paper filing with the court (among other identifying information) an individual's SSN, and allows only the last four digits of the SSN to be included unless the court orders otherwise. All versions of Official Form 309, Meeting of Creditors Notices, were amended to provide to the public only the last four digits of any individual debtor's SSN or taxpayer-identification number, though the full version of such number is provided to creditors in the case.

Suggestions have been made since then proposing that the full SSN not be included on the version of Official Form 309 sent to creditors, or that only the last four digits of the SSN be included on that notice. The Subcommittee has rejected those suggestions because creditors and other participants in the bankruptcy case need that information.

The Subcommittee sees no reason to revisit Mr. Gieseke's suggestion that creditors be denied the full SSN of a debtor. As for Senator Wyden's suggestion, the Subcommittee believes that there are two alternative approaches to the suggestion.

First, the Advisory Committee could decide not to act on the suggestion. That approach might be adopted if the Advisory Committee takes the view (as does the Subcommittee) that there does not seem to be any demonstrated problem of SSN fraud stemming from the disclosure of the truncated SSN in bankruptcy filings. In addition, the Subcommittee has been informed that the Committee on Court Administration and Case Management of the Judicial Conference of the United States (CACM) has requested the Federal Judicial Center to design and conduct studies regarding the inclusion of sensitive personal information in court filings and in social security and immigration opinions that would update the 2015 FJC privacy study and gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings. The Advisory Committee might choose to defer consideration of the suggestion until that study is completed.

Moreover, § 342(c)(1) statutorily requires that the truncated SSN be included on all notices "required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court." The Subcommittee is unsure how broadly § 342(c)(1) should be interpreted. What constitutes a "notice"? If the debtor sends a form, is that a "notice"? In many cases, courts order debtors to send documents to creditors that in other jurisdictions are sent by the clerk or its designee. Although rule changes could be made to eliminate truncated SSNs on notices sent by the clerk, if those same notices are sent by the debtor the truncated SSN would be required under § 342(c)(1). This would create a lack of uniformity between districts and within districts, depending on who was given the responsibility for sending the notice, and might require separate Official Forms to be used when the debtor sends them as opposed to someone else, a complication that—while not insurmountable—is undesirable.

An alternative approach would be for the Advisory Committee to respond to the suggestion by making changes to Bankruptcy Rules and forms eliminating the truncated SSN whenever possible on the grounds that the inclusion of the redacted SSN in bankruptcy court

filings (except where required by the Bankruptcy Code) is not necessary. However, the Subcommittee is not confident that it has sufficient information to reach the conclusion that there is no benefit to including the truncated SSN in bankruptcy filings. For example, it was suggested that including the truncated SSN on the notice of discharge (Official Form 318 and others) would benefit debtors by providing them a document that could be used to obtain new credit after the bankruptcy case is concluded. It is also possible that there may be some technological method for eliminating truncated SSNs from filed documents in CM/ECF. The Subcommittee would want to gather additional information, from the Advisory Committee, clerks' offices, bankruptcy judges, and perhaps the Federal Trade Commission, as to whether eliminating the truncated SSN would be problematic.

If the suggestion were adopted, it would require amending those rules that currently contemplate filing redacted SSNs.

Professor Bartell said that the Subcommittee invites comments from the Advisory Committee.

Judge Krieger suggested following Judge Robert Dow's three-part analysis for determining whether a rule change should be made and first ask whether there is a problem. At this point, we do not know whether there is a problem, nor do we know what remedy would be appropriate. She moved to defer consideration of this suggestion until the FJC study is completed and we can analyze then what the scope of the problem is and what action should be taken.

Tom Byron said that CACM and the FJC are still in the development stage about the project, and that we don't know the parameters or scope of what the FJC will be studying. One possibility will be the extent to which the current rules are being complied with. That information might not be relevant to the issue of full redaction raised by the suggestion. He would suggest that, until we know the scope of the FJC project, it might be hard to predict whether that study will be informative to the question presented by the suggestion. Judge Krieger said that is exactly why she supports deferring consideration of the suggestion until we know more.

Judge Harner supported Judge Krieger's motion as the only prudent course of action. But we do need to be responsive to Sen. Wyden and let him know what we are doing. She thinks it would be desirable if we could have input on the scope of the FJC study. Perhaps it could include an investigation of the extent to which disclosure of the last four digits of a social security number exposes individuals to potential identify theft. She doesn't think that occurs, but perhaps a study could be designed to test that. On the other hand, we have to consider the benefits to a debtor of having a document evidencing discharge that has the last four digits of the social security number on it. If we could have input on the study, we would want to know the rate at which the last four digits exposed individuals to identity theft or other harms, because that is what we want to protect against. Judge Krieger accepted the comment as a friendly amendment to her motion to request those designing the study to include that sort of information to the extent they can.

Carly Giffin said that Mr. Byron was correct that the project is still in its early stages, but right now they are looking at an update and an expansion of the earlier FJC studies. So they are going to be looking at more kinds of personally identifying information and also at types of forms and cases that weren't considered some at the last studies. Most importantly for bankruptcy, they are looking at the proof of claim, which was not looked at the last time. They will also be looking at whether the disclosure was by the person themselves just disclosing their own personal information, or whether it was a third party and what kind of documents and cases this is most likely to happen in. Right now the scope of this study would not include questions of how has this information been used or not been used. They do not contemplate a risk/benefit analysis of disclosing truncated social security numbers. She said she would relay this conversation to her colleagues who are designing the study.

Mr. Byron stated that the current proposal for study is quite extensive and he urged caution before adding anything to the broad, burdensome study they contemplate. Ms. Griffin agreed. She said that a risk/benefit analysis would be a separate study in itself.

Judge McEwan noted that use of truncated social security numbers for identification is pervasive in society and that if it really were an issue there would have been studies undertaken by now by the financial services, medical industries, and others who use those as a means of identification.

Judge Hopkins asked whether the DOJ has any insight on the risks of disclosure. Dave Hubbert said that although the Department can respond to specific requests for information and decide what they would choose to share, they have the same issues we are discussing (about how to gather information and its validity). The Department may not need the same information that we need for rulemaking in deciding where to put resources and how to attack certain problems, but they are happy to make inquiries and try to respond with any information that is useful to the Committee.

In light of the discussion, Judge Harner suggested that it is wise to get further information. As a Subcommittee member, she does not feel she has adequate information to make a decision. So she supports waiting for the CACM/FJC study and determining what other avenues of information are available to inform the Subcommittee’s decision, such as other agencies or organizations.

Ken Gardner stated that identity theft has not been an issue for the clerk’s office, which illustrates the question of whether there is a problem here that needs to be addressed. It isn’t an issue in his court.

Judge Kahn emphasized that one of the other issues discussed by the Subcommittee was the importance of this information to creditors to connect the filing with the right person. Banks and especially the IRS and other governmental entities feel strongly that they need this information to identify the debtor. He would hate for the clerk's office to get inundated with questions about the identity of a debtor, because that would be the worst thing that could happen.

Judge Wu said that the problem is not with the court system, but actually a lot of people make filings with the court that have this type of sensitive information. Attorneys should have redacted the social security number and they haven't. Should someone have to look at every single filing to make sure that the things that should have been done by the attorneys and other people were done? He doesn't know how to solve that problem.

There was some discussion about whether full social security numbers are being included on forms, as opposed to or as well as on attachments filed with forms and motions. The debtor can of course choose to disclose his or her own social security number, but there are concerns that attorneys are failing to redact when they should. Perhaps it is not a problem with the courts but with the debtors and their attorneys.

Ms. Doling stated that she really needs to see the last four digits of the social security number because in her district many debtors have the same last name and live at the same address and you need to determine the identity of the debtor for the filing.

The Advisory Committee approved the motion to defer consideration of the suggestion until after the CACM/FJC study is released and any additional information needed is acquired.

7. Report of the Appeals and Cross Border Insolvency Subcommittee

(A) *Consider Recommendation for Final Approval of New Rule 8023.1 (Suggestion 21-BK-O)*

Judge Bress and Professor Bartell provided the report.

In August 2022 the Standing Committee published a proposed new rule on substitution of parties to apply in bankruptcy cases much like FRAP 43 applies in appellate cases. We received no comments on the proposed new rule. The only changes since publication reflect comments of the style consultants. The Subcommittee recommended final approval of the new rule and submission to the Standing Committee.

The Advisory Committee gave final approval to the rule and agreed to submit it to the Standing Committee for final approval.

8. Report of the Restyling Subcommittee

(A) *Recommendation for Final Approval of the Restyled Bankruptcy Rules*

Judge Krieger noted that we are now at the end of the restyling process, and she praised the efforts of the Subcommittee members, the reporters, the style consultants, and the Administrative Office personnel who worked on this project. She noted that the number of bankruptcy rules restyled exceeded all of the civil, appellate, criminal and a good part of the evidence rules. We also used a methodology for our meetings that pre-pandemic was innovative with everyone looking at the rules on screens from their disparate locations and making

comments and changes in real time. Now that is commonplace, but then it was novel. It took the coordination of the FJC and AO to make that happen and she thanked them.

She singled out Judges Ben Kahn and Ben Goldgar for their work on the Subcommittee, noting that Judge Goldgar continued even after he was no longer a member of the Advisory Committee. She also thanked Deb Miller, Ramona Elliott, Ken Gardner and Carly Griffin for their perspectives. She made a presentation to the reporters of copies of Dreyer's English signed by all the members of the Advisory Committee with thanks for their work.

Professor Bartell then presented the report. She noted that there are two parts to the Subcommittee report.

First, the Subcommittee is presenting to the Advisory Committee the last group of rules that were published for comments. Parts VII-IX of the Restyled Federal Rules of Bankruptcy Procedure (the "Restyled Rules") were published for comments as USC-RULES-BK-2022-0002 in August 2022. There were five sets of comments. Professor Bartell apologized to career law clerk Jeffrey Cozard for not mentioning his comments in the cover memo to the Advisory Committee. Although his comments on Parts I–VI were untimely and not considered, all of his comments on Parts VII–IX are reflected in the draft rules.

All comments were carefully considered by the Associate Reporter and the style consultants, and recommendations on changes to the published rules were presented to the Restyling Subcommittee. The reactions of the Subcommittee were then reviewed again with the style consultants, and the drafts presented in the Agenda Book reflect these discussions.

Each rule included in the Agenda Book describes the changes made since publication and all comments received that were specific to that rule. Professor Bartell invited any questions or comments on those restyled rules. There were none.

Second, Parts I and II of the restyled Federal Rules of Bankruptcy Procedure were given final approval after publication by the Advisory Committee in March 2021 and by the Standing Committee in June 2021. Parts III–VI were given final approval after publication by the Advisory Committee in March 2022 and by the Standing Committee in June 2022. (Parts VII–IX are being presenting for final approval by the Advisory Committee at this meeting.)

Since they were approved, Parts I–VI have been modified in minor respects for three reasons.

1) there have been substantive amendments to the existing Federal Rules of Bankruptcy Procedure that needed to be reflected in the restyled versions of those rules;

2) the style consultants did a "top-to-bottom" review of all the rules, and made additional stylistic and conforming changes; and

3) in reviewing the proposed changes of the style consultants, the Subcommittee suggested its own additional corrections and minor changes.

The Subcommittee looked at all these rules and has approved the revisions to the amended restyled rules. It does not believe that any of the amendments require republication.

Professor Bartell again thanked Judge Krieger, Professor Gibson, the Subcommittee and the style consultants for their work on this project.

The Subcommittee asked for the Advisory Committee to give final approval to all the restyled rules and submit them to the Standing Committee for final approval.

The Advisory Committee gave final approval to the Restyled Bankruptcy Rules and agreed to submit them to the Standing Committee for final approval.

9. **Update on the Work of the Pro Se Electronic-Filing Working Group**

Professor Struve gave the report.

Professor Struve thanked the Committee for the excellent and really insightful discussion last fall. She said that this report is in the nature of a progress report on the investigations that we are making on questions that arose during the fall and winter discussions in the rules committees. Dr. Giffin, Dr. Tim Reagan, and Dr. Roy Germano conducted a study of many, many districts around the country, both the district courts and the bankruptcy courts, as well as information on the courts of appeals, and that study, which they have published and included within our materials, gave us a great basis for information and further investigation. And that coupled with the discussion in the advisory committees yielded a set of further questions. Those are identified in the memo in the agenda book.

Subsequently Dr. Reagan and Professor Struve spoke with 15 court personnel from 8 different districts to pursue some of these questions further. Professor Struve selected certain districts because she was looking to find out more information on the topic of the exemption from traditional service.

This topic arose because with the advent of CM/ECF, any participant in CM/ECF will receive a notice anytime anything is entered in the case's docket, including by filing not through CM/ECF. And the notice will provide them typically with a link where they can access the underlying filing. If all those who are in CM/ECF themselves are getting access to the filing, then why should a self-represented litigant who makes a filing not through CM/ECF be required to separately serve through some traditional method of service, like the mail, that paper on the other litigants in the case?

That seemed like an intuitively appealing idea to many of the participants in the fall 2022 discussions, but there were a few logistical questions raised. Some participants and other

advisory committee meetings had asked might this create some burden on the clerk's office, and how does it actually work? And does every filing actually become accessible via CM/ECF?

Professor Struve said that we're now in a position to answer some of those questions because six of the districts that they spoke with in this subsequent round of discussions do exempt non-CM/ECF filers from separately making traditional service on those who are in CM/ECF themselves and therefore are getting the filing. That exemption extends as well to any other litigants in the case who are getting the filing through an electronic noticing system that's an alternative to CM/ECF. The people they spoke with in those districts reported this did not burden the clerk's office at all. It was viewed as an unproblematic and common-sense measure. Filings made under seal are sometimes treated differently because they are accessible only by a restricted set of participants in the case and not the public in other districts. The participants in the case cannot access that filing through CM/ECF, and indeed would have to be traditionally served. But that's true even if a lawyer makes that sealed filing through CM/ECF.

The remaining question that some people raised in the fall was that, if this exemption from requiring personal service would extend to anyone else in the case who is on CM/ECF or enrolled in an electronic noticing program provided by the court, how would the self-represented filer know that they had to make that exceptional traditional service on a person who is not? Professor Struve said that issue just hadn't come up as a point of conversation in these offices. One reason may be that in order for the issue to arise, there needs to be more than one self-represented litigant in the case. Generally, everyone else in the case is on CM/ECF by default.

Second, even with multiple self-represented litigants in the same case, which a number of the people interviewed said is rare (though it might be less rare in a bankruptcy proceeding), if the person is enrolled in an electronic noticing program, they too will receive the filings. So again, we're not worrying about traditional service on them. Nonetheless, in some small subset of cases, there are multiple self-represented litigants, and some might not be in an electronic noticing program or on CM/ECF, and how would the filer know that? There was no uniform answer to that question. So that's something to take back to the working group just to talk about in crafting a proposal that might address this exception. One would not want to create a situation in which that other self-represented litigant is not getting service and nobody realizes it.

Professor Struve said that in the court interviews they also discussed the feasibility of obtaining CM/ECF access for self-represented litigants, as well as alternative methods of electronic access. Six of the 8 districts contacted were providing access to CM/ECF for non-incarcerated civil litigants in district court. They were enthusiastic and praised the benefits of this, which is consistent with the reactions of the advisory committees at their fall meetings. There are many benefits, such as the decrease in the volume of paper filings, the avoidance of the need to serve court orders on people who are getting the filings through CM/ECF, and having an electronic record of what was filed when and what went out from the court, all of which helped in avoiding disputes that arise in the paper world.

The question arose of whether it is hard to keep track of self-represented litigants in CM/ECF and whether they improperly share their credentials. The answer to both questions was unequivocally no and no.

They had an interesting discussion on the question of does this burden the clerk's office and how do you handle inappropriate filings. Professor Struve plans to come up with a writing that she can share with the working group, but the responses should not surprise participants in last fall's discussion. Those courts that provide an alternative of electronic noticing for those self-represented litigants not enrolled in CM/ECF are huge fans of it and in many instances actively promote it because it frees the court from sending out paper notices.

Five of the 8 districts also provide some alternative mode of electronic access for filing, whether through an upload to the court's website or via email. The benefits of these alternative modes—avoidance of paper and the creation of an electronic record—were described as similar to those for CM/ECF filings. And almost to a district they seemed to be very positive about such alternatives, though one district was not sure they would maintain the program going forward.

Professor Struve asked the committee members to look at the memo in the agenda book and if they can think of other question not summarized in that memo that should be asked about, please let her know. She hopes to have further information to share with the Advisory Committee as the process continues.

10. **New Business**

Suggestion 23-BK-C from the National Bankruptcy Conference dealing with remote testimony in contested matters was assigned to the Technology, Privacy, and Public Access Subcommittee.

11. **Future Meetings**

The fall 2023 meeting has been scheduled for Sept. 14, 2023, in Washington, D.C.

12. **Adjournment**

The meeting was adjourned at 1:12 p.m.

Proposed Consent Agenda

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

1. **Report of the Technology, Privacy and Public Access Subcommittee**

   (A) Recommendation to defer any action regarding Suggestion 22-BK-J to adopt national rules that permit debtors to sign petitions and schedules electronically and without retention by their attorneys of the original documents with wet signatures.