ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

September 14, 2023

AGENDA
Meeting of the Advisory Committee on Bankruptcy Rules
September 14, 2023 | Washington, D.C.

1. Greetings, Introductions, Service Acknowledgments (Judge Connelly)

   Announcement of new members (effective October 1) Judge Joan H. Lefkow and Attorney Nancy Whaley. Acknowledgment of service of Judge Marcia S. Krieger and Attorney Debra Miller.

   Tab 1 Committee Roster 6
   Subcommittee Liaisons 14
   Chart Tracking Proposed Rules Amendments 15
   Pending Legislation Chart 22

2. Approval of minutes of March 30, 2023, meeting (Judge Connelly)

   Tab 2 Draft minutes 34

3. Oral reports on meetings of other committees:

   A. Standing Committee – June 6, 2023 (Judge Connelly, Professors Gibson and Bartell).

   Tab 3A1 Draft minutes of the Standing Committee meeting 70
   Tab 3A2 September 2023 Report of the Standing Committee to the Judicial Conference (appendices omitted) 114

   B. Advisory Committee on Appellate Rules – Pending, October 19, 2023. No report.

   C. Advisory Committee on Civil Rules – Pending, October 17, 2023. No report.

   D. Bankruptcy Committee – June 8-9, 2023 (Judge Isicoff).

4. Report of the Consumer Subcommittee (Judge Harner)

   A. Reconsideration of proposed Rule 3002.1 sanctions provision in light of Standing Committee feedback.

   Tab 4A August 17, 2023, memo by Professor Gibson 138

   B. Continued consideration of suggestions 22-BK-D and 22-BK-K regarding course in personal financial management.

   Tab 4B August 21, 2023, memo by Professor Gibson 148
   Rules 1007(c), 5009(b), 9006(b) and (c), and committee notes.

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September 14, 2023 | Washington, D.C.

C. Continued consideration of proposed amendment to Rule 1007(h) concerning reporting of property acquired postpetition (Suggestion 22-BK-H).

Tab 4C August 21, 2023, memo by Professor Gibson. 157
Rule 1007(h) and committee note.

D. Consider suggestion 23-BK-B to require disclosure of corporate ownership statements in contested matters.

Tab 4D August 16, 2023, memo by Professor Bartell. 167

5. Report of the Forms Subcommittee (Judge Kahn)

A. Consider Comment BK-2021-002-0022 concerning amendment to Official Form 410S1 (Professor Gibson).

Tab 5A August 16, 2023, memo by Professor Gibson 171
Official Form 410S1 and committee note.....174

B. Consider endorsement of proposed changes to Director's Form 1340 (Suggestion 23-BK-I).

Tab 5B August 16, 2023, memo by Professor Bartell 178
Form 1340, instructions, and sample certificate of service 182

C. Possible reconsideration of proposed amendments to Official Forms 309A and 309B (Professor Gibson).

Tab 5C August 16, 2023, memo by Professor Gibson 191

6. Report of the Technology, Privacy, and Public Access Subcommittee (Judge Oetken)

A. Continued consideration of 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.

Tab 6A August 17, 2023, memo by Professor Bartell.....195

B. Consideration of Suggestions 23-BK-D and 23-BK-J to amend restyled Rule 2002(o) (currently Rule 2002(n)), to eliminate the requirement that all notices given under Rule 2002 comply with the caption requirements set forth in Rule 1005.

Tab 6B August 16, 2023, memo by Professor Bartell.....198

C. Consider suggestion 23-BK-C from the National Bankruptcy Conference dealing with remote testimony in contested matters.

Tab 6C August 16, 2023, memo by Professor Bartell.....201
Rules 9014(d), 9017, and new Rule 7043, and committee notes.

7. Report of the Business Subcommittee (Judge McEwen)

A. Consider suggestion 23-BK-F from the NBC regarding the method of voting in Chapter 9 and 11 cases under Rule 3018(c).

Tab 7A August 17, 2023, memo by Professor Gibson.....207
Rule 3018(c) and committee note.

8. Reporter memo

A. Recommendation from Professor Bartell concerning Suggestion 23-BK-E recommending legislative and rule amendments to address contempt proceedings.

Tab 8A August 16, 2023, memo by Professor Bartell.....217

9. Update on the work of the E-filing Deadline joint subcommittee (Professor Struve)

Tab 9A August 24, 2023, memo by Judge Bybee and Professor Struve.....221

10. Oral update on the work of the Pro-se-electronic-filing working group (Professor Struve).

11. Future meetings: The next meeting will be on April 11, 2024, location to be announced.

12. Adjourn.

TAB 1

RULES COMMITTEES — CHAIRS AND REPORTERS

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(Standing Committee)

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H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
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	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON BANKRUPTCY RULES

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	Associate Reporter
	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

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Honorable Michelle M. Harner United States Bankruptcy Court Baltimore, MD	Honorable Jeffery P. Hopkins United States District Court Cincinnati, OH
Honorable David A. Hubbert Deputy Assistant Attorney General (ex officio) United States Department of Justice Washington, DC	Honorable Ben Kahn United States Bankruptcy Court Greensboro, NC
Honorable Marcia S. Krieger United States District Court Denver, CO	Honorable Catherine P. McEwen United States Bankruptcy Court Tampa, FL
Debra L. Miller, Esq. Chapter 13 Bankruptcy Trustee South Bend, IN	Professor Scott F. Norberg Florida International University College of Law Miami, FL
Honorable J. Paul Oetken United States District Court New York, NY	Jeremy L. Retherford, Esq. Balch & Bingham LLP Birmingham, AL
Damian S. Schaible, Esq. Davis Polk & Wardwell LLP New York, NY	Honorable George H. Wu United States District Court Los Angeles, CA

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Honorable William J. Kayatta, Jr.
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United States Court of Appeals
Portland, ME

Clerk of Court Representative

Kenneth S. Gardner
United States Bankruptcy Court
Denver, CO

Advisory Committee on Bankruptcy Rules

Members	Position	District/Circuit	Start Date	End Date
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Daniel A. Bress	C	Ninth Circuit	2022	2025
Jenny L. Doling	ESQ	California	2023	2025
Michelle M. Harner	B	Maryland	2022	2025
Jeffery P. Hopkins	D	Ohio (Southern)	2023	2025
David A. Hubbert*	DOJ	Washington, DC	----	Open
Ben Kahn	B	North Carolina (Middle)	2021	2023
Marcia S. Krieger	D	Colorado	2017	2023
Catherine P. McEwen	B	Florida (Middle)	2021	2023
Debra Miller	ESQ	Indiana	2017	2023
Scott F. Norberg	ACAD	Florida	2022	2025
J. Paul Oetken	D	New York (Southern)	2019	2025
Jeremy L. Retherford	ESQ	Alabama	2018	2024
Damian S. Schaible	ESQ	New York	2021	2023
George H. Wu	D	California (Central)	2018	2024
S. Elizabeth Gibson Reporter	ACAD	North Carolina	2008	Open
Laura B. Bartell Associate Reporter	ACAD	Michigan	2017	2024

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
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Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
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(2022–2023)

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Appellate Rules Liaison: Judge Daniel A. Bress	**Bankruptcy Committee Liaison:** Judge Rebecca B. Connelly
Civil Rules Liaison: Judge Catherine Peek McEwen	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." The amendments would put the burden on the claim holder to identify the elements of its claim.	

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REA History:

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- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within … 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	

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REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
National Defense Authorization Act for Fiscal Year 2024	**H.R. 2670** *Sponsor:* Rogers (R-AL) *Cosponsor:* Smith (D-WA) **S. 2226** *Sponsor:* Reed (D-RI)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670eas.pdf https://www.congress.gov/118/bills/s2226/BILLS-118s2226es.pdf **Summary:** Section 9011(a)(2)(B) of H.R. 2670, as amended and passed by the Senate, and of S. 2226, as passed by the Senate, would deem that a "request for disclosure of unidentified anomalous phenomena, technologies of unknown origin, and non-human intelligence materials . . . constitute[s] a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure."	• 07/27/2023: Senate passed S. 2226 with an amendment (86–11); Senate amended H.R. 2670 by striking all after the Enacting Clause and substituting the language of S. 2226, as amended; Senate passed H.R. 2670, as amended, by unanimous consent • 07/26/2023: H.R. 2670 received in Senate • 07/14/2023: H.R. 2670 passed House (219–210) • 07/11/2023: S. 2226 introduced in Senate • 06/21/2023: H.R. 2670 ordered to be reported as amended (58–1). • 04/18/2023: H.R. 2670 introduced in House; referred to Armed Services Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* Nadler (D-NY) Quigley (D-IL) Cicilline (D-RI) **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359is.pdf **Summary:** Would require rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Would require expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief	• 07/20/2023: S. 359 ordered to be reported favorably, with an amendment • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			resulting in disqualification of justice, judge, or magistrate judge	
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4250** *Sponsor:* Kiley (R-CA) *Cosponsors:* 13 bipartisan cosponsors **S. 2074** *Sponsor:* Wyden (D-OR) *Cosponsors:* Lee (R-UT) Durbin (D-IL)	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4250/BILLS-118hr4250ih.pdf https://www.congress.gov/118/bills/s2074/BILLS-118s2074is.pdf **Summary:** Would require federal entities to obtain court authorization to compel testimony or certain documents from covered journalists or covered providers; court must find by preponderance of evidence that "there is a reasonable threat of imminent violence unless the testimony or document is provided"	• 07/19/2023: H.R. 4250 ordered reported (23–0) • 06/21/2023: H.R. 4250 introduced in House; referred to Judiciary Committee • S. 2074 introduced in Senate; referred to Judiciary Committee
Bring Our Heroes Home Act	**H.R. 3110** *Sponsor:* Pappas (D-NH) *Cosponsors:* Fulcher (R-ID) Houlahan (D-PA) Simpson (R-ID) **S. 2315** *Sponsor:* Crapo (D-ID) *Cosponsors:* Shaheen (D-NH) Risch (R-ID) Blackburn (R-TN) Thune (R-SD) Cassidy (R-LA) Rounds (R-SD)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3110/BILLS-118hr3110ih.pdf https://www.congress.gov/118/bills/s2315/BILLS-118s2315is.pdf **Summary:** Would deem that a "request for disclosure of [H.R. 3110: Missing Armed Forces Personnel; S. 2315: missing Armed Forces and civilian personnel] materials . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure"	• 07/13/2023: S. 2315 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 05/05/2023: H.R. 3110 introduced in House; referred to Oversight & Accountability Committee
LGBTQ+ Panic Defense Prohibition Act of 2023	**H.R. 4432** *Sponsor:* Pappas (D-NH) **S. 2279** *Sponsor:* Markey (D-MA) *Cosponsors:* 17 Democratic or Democratic-caucusing cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4432/BILLS-118hr4432ih.pdf https://www.congress.gov/118/bills/s2279/BILLS-118s2279is.pdf **Summary:** Would preclude the use of evidence of a "nonviolent sexual advance or perception of belief, even if inaccurate, of the gender, gender identity, or sexual orientation of an individual . . . to excuse or justify the conduct of an individual or mitigate the	• 07/12/2023: S. 2279 introduced in Senate; referred to Judiciary Committee • 06/20/2023: H.R. 4432 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			severity of an offense," except that a court may admit evidence "of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense"	
Judicial Ethics and Anti-Corruption Act of 2023	**H.R. 3973** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 40 Democratic cosponsors **S. 1908** *Sponsor:* Warren (D-MA) *Cosponsors:* 7 Democratic or Democratic-caucusing cosponsors	CV 26(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3973/BILLS-118hr3973ih.pdf https://www.congress.gov/118/bills/s1908/BILLS-118s1908is.pdf **Summary:** Would prohibit a court from entering an order otherwise authorized under Civil Rule 26(c) to restrict disclosure of information obtained through discovery unless the court makes certain findings regarding the protection of public health and safety and the tailoring of the order; would also prevent order from continuing in effect after entry of final judgment unless court makes similar findings	• 06/09/2023: H.R. 3973 introduced in House; referred to Judiciary, Oversight & Accountability, Rules, Financial Services, Agriculture, and House Administration Committees • 06/08/2023: S. 1908 introduced in Senate; referred to Judiciary Committee
National Guard and Reservists Debt Relief Extension Act of 2023	**H.R. 3315** *Sponsor:* Cohen (D-TN) *Cosponsors:* Cline (R-VA) Dean (D-PA) Burchett (R-TN)	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3315/BILLS-118hr3315ih.pdf **Summary:** Would extend the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023.	• 05/15/2023: Introduced in House; referred to Judiciary Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 13 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would establish Diwali (a/k/a Deepavali) as a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
Strengthening Transparency and Obligations to Protect Children Suffering from Abuse and Mistreatment (STOP CSAM) Act of 2023	**S. 1199** *Sponsor:* Durbin (D-IL) *Cosponsors:* Hawley (R-MO) Cruz (R-TX) Grassley (R-IA)	CR 32(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would require probation officer, in preparing PSR, to request information from multidisciplinary child-abuse team or other appropriate sources "to determine the impact of the offense on a child victim and	• 05/15/2023: Reported favorably with an amendment; placed on Senate Legislative Calendar under General Orders • 04/19/2023: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			any other children who may have been affected by the offense"	
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 17 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 17 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 40 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j)	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* D'Esposito (R-NY) Ryan (D-NY) Trone (D-MD) Gottheimer (D-NJ) **S. 1472** *Sponsor:* Blackburn (R-TN)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Federal Extreme Risk Protection Order Act of 2023	**H.R. 3018** *Sponsor:* McBath (D-GA) *Cosponsor:* Carbajal (D-CA)	CV? CR?	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3018/BILLS-118hr3018ih.pdf **Summary:** Would authorize a new kind of ex parte and permanent injunctive relief, albeit one sounding in criminal law, not civil law. The injunctive relief could also result in property forfeiture. May need new rulemaking to account for this kind of hybrid procedure	• 04/28/2023: Introduced in House; referred to Judiciary Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ)	AP 26, 45; BK 9006; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf	• 04/28/2023: Introduced in House; referred to Oversight &

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cosponsors: 11 Democratic cosponsors	6; CR 45, 56	**Summary:** Would make Workers' Memorial Day a federal holiday	Accountability Committee
Women in Criminal Justice Reform Act	**H.R. 2954** *Sponsor:* Kamlager-Dove (D-CA) *Cosponsors:* 6 Democratic & 1 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2954/BILLS-118hr2954ih.pdf **Summary:** Would create a pretrial diversion program for federal criminal cases; may need new rulemaking for criminal procedure (e.g., to allow for withdrawal of guilty plea under diversion program)	• 04/27/2023: Introduced in House; referred to Judiciary, Ways & Means, and Energy & Commerce Committees
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 21 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would create new Fed. Rule of Evidence to exclude "evidence of a defendant's creative or artistic expression, whether original or derivative" as evidence against that defendant (not restricted to criminal cases); would permit it on certain showings by the government by clear and convincing evidence (but not clear what would happen in a civil case if the government is not a party)	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 2782** *Sponsor:* Porter (D-CA) *Cosponsor:* Nadler (D-NY) Cicilline (D-RI) Jayapal (D-WA)	CV 8, 12	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2782/BILLS-118hr2782ih.pdf **Summary:** Would abrogate *Twombly*'s pleading standard, at least in antitrust cases	• 04/20/2023: Introduced in House; referred to Judiciary Committee
First Step Implementation Act of 2023	**S. 1251** *Sponsor:* Durbin (D-IL) *Cosponsors:* 10 bipartisan cosponsors	AP 4(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1251/BILLS-118s1251is.pdf **Summary:** Would provide that Appellate Rule 4(a) governs the time limit for an appeal of a final order on a motion to modify a term of imprisonment imposed for crimes committed before age 18	• 04/20/2023: Introduced in Senate; referred to Judiciary Committee
Securing and Enabling Commerce Using Remote and Electronic	**H.R. 1059** *Sponsor:* Kelly (R-ND) *Cosponsors:*	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1059/BILLS-118hr1059rfs.pdf https://www.congress.gov/118/bills/s1212/BILLS-118s1212is.pdf	• 04/19/2023: S. 1212 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
(SECURE) Notarization Act of 2023	30 bipartisan cosponsors **S. 1212** *Sponsor:* Cramer (R-ND) *Cosponsor:* Warner (D-VA)		**Summary:** Would establish national standards for remote electronic notarization; would make signature and title of notary prima facie or conclusive evidence in determining genuineness or authority to perform notarization.	• 02/28/2023: H.R. 1059 received in Senate; referred to Judiciary Committee • 02/27/2023: H.R. 1059 passed House by voice vote • 02/17/2023: H.R. 1059 introduced in House; referred to Judiciary Committee
Online Privacy Act of 2023	**H.R. 2701** *Sponsor:* Eshoo (D-CA) *Cosponsor:* Lofgren (D-CA)	CV 4, CV 23	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2701/BILLS-118hr2701ih.pdf **Summary:** Would permit service of "petition for enforcement" for civil investigative demand under § 401 to be served by mail, and proof of service would be permitted by "verified return" including, if applicable, any "return post office receipt of delivery" Would require a class action to be prosecuted by a nonprofit organization, not an individual, and mandates equal division of total damages among entire class	• 04/19/2023: Introduced in House; referred to Energy & Commerce, House Administration, Judiciary, and Science, Space & Technology Committees
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Terminates the national emergency declared March 13, 2020, by President Trump. Ends authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 04/10/2023: Signed into law • 03/29/2023: Passed Senate (68–23) • 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit, after JCUS promulgates guidelines, district court cases to be	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)		photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law (e.g., CR 53)	
Everyone can Notice-and-Takedown Distribution of Child Sexual Abuse Material (END CSAM) Act	**S. 823** *Sponsor:* Hawley (R-MO)	CV 4(i)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s823/BILLS-118s823is.pdf **Summary:** Would allow a private person to bring a qui tam civil action against a social-media company that does not disable access to or remove an offending visual depiction within 10 days of notice; complaint must be served on the government under Civil Rule 4(i)	• 03/15/2023: Introduced in Senate; referred to Judiciary Committee
Justice for Kennedy (JFK) Act of 2023	**H.R. 637** *Sponsor:* Schweikert (R-AZ)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr637/BILLS-118hr637ih.pdf **Summary:** Would deem that a "request for disclosure of assassination records . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure"	• 03/07/2023: Introduced in House; referred to Judiciary, Oversight & Accountability, Ways & Means, Foreign Affairs, Armed Services, and Intelligence Committees
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Would bar admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself)	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Would require "an audio or audio visual recording of interviews of aliens subject to expedited removal" and would require the recording's consideration "as evidence in any further proceedings involving the alien"	• 02/24/2023: Introduced in House; referred to Judiciary Committee
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf	• 02/14/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cosponsor: Buck (R-CO)		**Summary:** Would require rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel"	
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue. Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen.	• 02/07/2023: Referred to subcommittee • 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf	• 02/06/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cosponsors: Beyer (D-VA) Torres (D-NY)		**Summary:** Among other things, would bar use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; would create evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; and would bar use of federal body-cam footage from use as evidence if taken in violation of act or other law	
Save Americans from the Fentanyl Emergency (SAFE) Act	**H.R. 568** *Sponsor:* Pappas (D-NH) *Cosponsors:* 18 bipartisan cosponsors	CR 43	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr568/BILLS-118hr568ih.pdf **Summary:** Would permit reduction or vacatur of sentence for certain crimes involving controlled substances that are "removed from designation as a fentanyl-related substance"; would not require defendant to be present at any hearing on whether to vacate or reduce a sentence	• 02/03/2023: Referred to Health Subcommittee • 01/26/2023: Introduced in House; referred to Energy & Commerce and Judiciary Committees
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 02/01/2023: Referred to subcommittee • 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act	• 01/31/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.	
No Vaccine Passports Act	**S. 181** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee
No Vaccine Mandates Act of 2023	**S. 167** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	**S. 147** *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Would prohibit disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	**H.R. 461** *Sponsor:* Estes (R-KS) *Cosponsors:* 19 Republican cosponsors **S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:*	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed.	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee • 01/23/2023: S. 18 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	24 Republican cosponsors			
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act	**H.R. 241** *Sponsor:* Calvert (R-CA) *Cosponsors:* Waltz (R-FL) Grothman (R-WI)	CV 16	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr241/BILLS-118hr241ih.pdf **Summary:** Would require JCUS to "under rule 16 of the Federal Rules of Civil Procedure or any other applicable law, in consultation with property owners and representatives of the disability rights community, develop a model program to promote the use of alternative dispute resolution mechanisms, including a stay of discovery during mediation, to resolve claims of architectural barriers to access for public accommodations."	• 01/10/2023: Introduced in House; referred to Judiciary Committee
Kalief's Law	**H.R. 44** *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf **Summary:** Would impose strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth	• 01/09/2023: Introduced in House; referred to Judiciary Committee

TAB 2

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

TAB 3

TAB 3A1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 6, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Washington, D.C., on June 6, 2023. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter
Professor Liesa L. Richter, Consultant

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Demetrius Apostolis, Rules Committee Staff Intern; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director, Federal Judicial Center ("FJC"); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice ("DOJ") on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed members of the public who were attending in person. He also welcomed new Standing Committee member Judge Paul Barbadoro and bade farewell to two members soon to depart the committee, Robert Giuffra and Judge Carolyn Kuhl. Judge Kuhl and Mr. Giuffra gave brief departing comments, and Judge Bates thanked them for their service.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2023, meeting.**

Judge Bates remarked that a chart tracking the status of rules amendments commenced on page 52 of the agenda book. Mr. Thomas Byron, Secretary of the Standing Committee, noted that the latest set of proposed rule amendments had been transmitted from the Supreme Court to Congress in April.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Catherine Struve reported on this item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Professor Struve recalled that this project had benefited from discussions in the advisory committees, from which important questions arose about the practical logistics of electronic access to the courts. Armed with those questions, she and Dr. Tim Reagan of the FJC held conversations with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. Professor Struve expressed appreciation for Dr. Reagan's expert guidance concerning these inquiries.

One of their primary areas of inquiry was whether there is any reason to require traditional service by a self-represented litigant on other litigants who already receive notices of electronic filing ("NEFs"). Among the districts whose personnel they interviewed, seven districts exempt self-represented litigants from making such traditional service on CM/ECF participants: the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, the District of South Carolina, and the District of Utah.

In those districts, exempting self-represented litigants from paper service added no burden on the courts' clerk's offices. When self-represented litigants file non-electronically, the clerk's offices already scan those paper filings and upload them to CM/ECF. There are some exceptions to the exemption from making traditional service; notably, filings under seal that are not available to other litigants via CM/ECF must be served on the other litigants by traditional means, but in those circumstances the courts require paper service by anyone making such a sealed filing. That would be true for either a self-represented litigant or a CM/ECF participant.

Professor Struve observed that the exemption from making traditional service exists only when the recipient is receiving NEFs (because they are enrolled either in CM/ECF or in a court-

provided electronic-noticing system). A self-represented litigant who does not receive NEFs will need to be served by traditional means. A filer who is receiving NEFs will learn from the NEF who, if anyone, must be served by traditional means. But if a paper filer is not receiving NEFs, one must ask how that filer will know whether any other litigants in the case are also not receiving NEFs. The universal answer from court personnel was that it just is not an issue.

She thought that this question would likely be an issue only in a vanishingly small number of cases—in part because there would need to be multiple self-represented litigants in the case. She also believes there are ways to craft an exemption from the traditional service requirement to take care of that situation and to ensure that anybody who needs traditional service does get it without burdening non-CM/ECF-filing self-represented litigants with superfluous paper service. She plans to convene a Zoom working-group meeting over the summer to discuss a potential amendment about an exemption from service.

Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF. About six or seven of the districts covered in the interviews offer some degree of access to CM/ECF for self-represented litigants. At least two of those districts do not require any special permission from the court, and the other districts allow it with court permission. Interviewees from those districts identified a number of benefits from providing that access. It decreased the number of paper filings, saved the court time from scanning documents, avoided the need to have the court serve orders in paper, and averted disputes about what was actually filed and whether a filing had all its pages. There were some reports of burdens as well as notes about the need to make sure there is adequate staffing for technical support and training. There were also some interesting anecdotes about how the courts deal with inappropriate filings. But overall, the report from these districts was positive. As one respondent put it, the benefits outweigh the risks.

Professor Struve further reported that courts are experimenting with increasing electronic access by disaggregating the elements of access via CM/ECF and providing them "à la carte." For example, some courts permit other means of electronic submission through upload or through email, and interviewees from those courts listed a number of benefits from those programs. One prominent benefit was not having to scan paper filings. She noted that many of the respondent districts also provided their own electronic-noticing systems, which benefited the courts because the recipients of NEFs no longer need to receive paper copies of court orders.

Electronic-Filing Deadline

Judge Bates reported on this item.

Judge Michael Chagares, currently the Chief Judge of the Third Circuit, first raised this suggestion some years ago in his capacity as Chair of the Appellate Rules Committee. The suggestion was to change the presumptive electronic-filing deadline set by the time-counting rules to a time earlier than midnight. The objective was to promote a positive work environment for young associates who were working until midnight to get court filings done. A joint subcommittee considered this suggestion, but it did not take any action at the time.

Recently, the Third Circuit adopted a local rule making the filing deadline earlier in the day. The Standing Committee has therefore referred the matter back to the joint subcommittee,

which needs to be recomposed. The joint committee will re-examine the issue and decide whether to propose a rules amendment or perhaps whether it might be better to let the experiment in the Third Circuit run its course for a couple of years to see how things go.

A judge member noted that the Third Circuit's new local rule has elicited an almost entirely negative reaction from members of the bar. A practitioner member argued that this rule change, though well-intentioned, would not make people's lives better. Moving the deadline earlier will simply ruin the night before. Setting the deadline at five o'clock will really wreak havoc for many practitioners. Moreover, even if this deadline is not so bad for appellate lawyers—whose briefing schedule is more predictable and who are not engaged in fact development—it would play out differently in the district courts.

District-Court Bar Admission Rules

Judge Bates reported on this item. Several of the advisory committees received a proposal from Alan Morrison and others on a unified bar-admission rule. The proposal would make admission to one federal district court good for all federal district courts. It would also centralize the disciplinary process that goes along with court admissions.

A joint subcommittee has been formed with representatives from the Advisory Committees on Civil, Criminal, and Bankruptcy Rules to review the proposal over the course of the next year or two. That review may also require some work by the FJC. Professors Struve and Andrew Bradt will be the reporters for the joint subcommittee. Judge Bates thanked them and the members of the joint subcommittee for their work.

An academic member commented that a similar proposal had come up in the past and had a very fraught life. A consultant agreed with the academic member's remarks. A previous proposal had managed to unify all the local and state bar associations in America against it.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Jay Bybee and Professor Edward Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in West Palm Beach, Florida, on March 29, 2023. The advisory committee presented three action items and two information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 70.

Action Items

Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) and Conforming Changes to Rule 32 (Form of Briefs, Appendices, and Other Papers) and the Appendix of Length Limits. Judge Bybee introduced this item. The advisory committee sought final approval of these proposed amendments, which appeared starting on page 103 of the agenda book.

The advisory committee had received a handful of public comments, which were listed in pages 72–75 of the agenda book. The advisory committee did not recommend any changes in response to those comments.

The proposal consolidates Rule 35 into Rule 40. It does not make any substantive changes to the basis for seeking rehearing from the panel or rehearing en banc. The proposal tries to simplify and clarify the rules, particularly in response to several comments received about the multitude of pro se filings.

A judge member agreed with the rule's statement that rehearing en banc is disfavored. The member asked for additional background on that language. Judge Bybee noted that the language was already in the rule; the proposal did not add it. The judge member observed that some of the public comments had disagreed with that language. Professor Hartnett responded that the advisory committee had been unmoved by those comments because they were at such odds with the usual, uncontroversial practice in the courts of appeals.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 32, 35, and 40 and the Appendix of Length Limits.**

Amendment to Rule 39 (Costs). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 149 of the agenda book.

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court invited the advisory committee to clarify what costs are recoverable on appeal and who has the responsibility for allocating those costs. This proposed amendment does so. It makes a change in nomenclature by clarifying the distinction between "allocating" costs and "taxing" costs. "Allocating" means deciding who is going to pay, and "taxing" means deciding how much is going to be paid. The responsibility for taxing is divided, under the rules, between the district courts and the courts of appeals. The proposed amendment also clarifies the procedure for asking the court of appeals to reconsider the question of allocation.

A question not addressed by the proposed rule is what to do about requiring disclosure of the costs associated with a supersedeas bond, which was the context for *Hotels.com*. In that case, there was a very large bond, whose costs were shifted from one party to the other after the case was over. It was possible that the party that had not sought the bond was going to end up with significant costs that it may not have anticipated.

As the advisory committee considered this rule, it could not come up with a good mechanism within the appellate rules for ensuring that disclosure, so the proposed amendment does not address it. It is fairly rare, but when it does come up, it can be a serious problem, so the advisory committee recommended that the Civil Rules Committee consider whether an amendment to Civil Rule 62 might address disclosure.

An academic member asked whether any thought had been given to whether the change in terminology ("allocating" versus "taxing") might cause confusion. Judge Bybee reported that the advisory committee had carefully considered potential transition costs and had concluded that clarifying the terminology is worthwhile.

A judge member expressed concern that the phrasing "allocated against" (e.g., "if an appeal is dismissed, costs are allocated against the appellant") did not sound right. A style consultant

agreed, saying that the usual expression would be "allocated to." Professor Hartnett responded that "against" is in the existing language (e.g., "costs are taxed against the appellant"), and he explained that the advisory committee wanted to make clear who is on the hook to pay. Allocating something "to" someone might suggest that that person is receiving money rather than having to pay it. Judge Bybee agreed, and he suggested that if the public comments push back against the phrasing, the advisory committee could look for an alternative.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 39 for public comment.**

Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 128 of the agenda book.

Judge Bybee explained that appeals from the bankruptcy court generally go either to the district court or to the bankruptcy appellate panel ("BAP") in those circuits that have established one. But under 28 U.S.C. § 158(d)(2), a party may instead petition for direct review by the court of appeals.

Judge Bybee turned first to the proposed amendment to Rule 6(a), governing direct appeals from a district court exercising original jurisdiction in a bankruptcy matter. He drew attention to an important difference between bankruptcy appeals practice and ordinary civil appeals practice – namely, that the bankruptcy rules set a markedly shorter deadline (14 days instead of 28 days) for certain postjudgment motions that reset the appeal time. The proposed amendment to Rule 6(a) provides fair warning that the bankruptcy rules govern. The proposed committee note also provides a chart setting out relevant Bankruptcy Rules and applicable motion deadlines.

Judge Bybee next highlighted the proposed amendment to Rule 6(c), which governs permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Alluding to the fact that current Rule 6(c)(1) renders most of Rule 5 applicable to such appeals, Judge Bybee stated that Rule 5 did not fit this context very well. Instead, the advisory committee proposes amending Rule 6(c) to address petitions for review in the court of appeals. The changes are fairly extensive. The advisory committee had a subcommittee with specialists in bankruptcy appellate work who have carefully reviewed the proposal.

The representatives of the Bankruptcy Rules Committee said that they supported the proposal.

Professor Struve thought the proposal would helpfully address some real difficulties and complexities. She thanked the Appellate Rules Committee chair and reporter and also their colleagues on the Bankruptcy Rules Committee for their superb work. Judge Bates echoed that sentiment.

Judge Bates asked why the proposed amendments would change "bankruptcy case" to "bankruptcy case or proceeding" and whether that change should be explained in the committee note. Professor Hartnett responded that the advisory committee wanted to ensure that the rule would cover appeals from both bankruptcy cases and adversary proceedings within those cases.

He suggested that the proposed committee note's reference to "clarifying changes" encompassed this feature of the proposed amendments.

Judge Bates then asked whether the phrase "motions under the applicable Federal Rule of Bankruptcy Procedure" in proposed Rule 6(a) should say "Rules" because motions may be made under more than one rule. Professor Hartnett deferred to the style consultants on that, and the change was made.

An academic member asked whether the advisory committee had discussed and decided to endorse the First Circuit's position in *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 83 (1st Cir. 2021) (holding that "the Bankruptcy Rules"—including their shorter postjudgment motion deadlines and the implications of those deadlines for resetting appeal time—"apply to non-core, 'related to' cases adjudicated in federal district courts under section 1334(b)'s 'related to' jurisdiction"). Professor Hartnett responded that, leaving aside whether that case was correctly decided under the current rules, the advisory committee had been informed by bankruptcy specialists that the First Circuit reached the right outcome, so the advisory committee wanted to make that position explicit in the rule going forward.

Professor Hartnett noted one edit: in the committee note to subdivision (b), removing "(D)" in the sentence "Stylistic changes are made to subdivision (b)(2)(D)," on page 90, line 209, of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 6 for public comment with the above-noted changes to the text of subdivision (a) ("Rules") and the committee note to subdivision (b).**

Information Items

Amicus Disclosures. Judge Bybee reported on this item. The advisory committee again sought advice from the Standing Committee. The feedback received at the Standing Committee's January 2023 meeting was helpful. The proposal was still a working draft and not yet ready for the Standing Committee's full consideration.

On behalf of the advisory committee, Judge Bybee posed two questions for the Standing Committee. The first question related to draft Rule 29(b)(4) on page 99 of the agenda book. The draft rule required disclosure of any party, counsel, or combination of parties and counsel who contributed 25% or more of the gross annual revenue of an amicus filer in the prior 12-month period. At the January discussion, the Standing Committee asked whether the advisory committee should use a lookback period of the last 12-month period or the prior calendar year. Contrary to what appeared to be the Standing Committee's sentiments in January, the advisory committee believed that the prior 12-month lookback period works better because, although using the calendar year would be easier, disclosure could also be more easily avoided using a calendar year.

The second question related to draft Rule 29(d), governing disclosure of relationships between *nonparties* and an amicus filer. The advisory committee drafted two alternatives, labeled alpha and beta. Option alpha would require an amicus to disclose a contribution by anyone, including a member of an amicus organization, of over $10,000 that was earmarked for the

preparation of an amicus brief. Option beta would carry forward the existing rule, which requires disclosure of a contribution of earmarked funds but exempts contributions by members of the amicus. The thinking behind option alpha is that option beta makes it too easy to evade disclosure—someone who wants to fund an amicus brief need only become a member of the amicus group. In exchange, the floor for requiring disclosure of a contribution is increased to $10,000 under option alpha. That amount avoids requiring disclosure for a brief crowdfunded by many small contributions.

A practitioner member supported the advisory committee's rationale for the 12-month lookback period. The member also suggested that another option might be to require disclosure of contributions made *either* in the year the brief is filed or the year immediately prior. That way, the amicus could look at annual figures instead of having to create a new lookback window for each brief. Judge Bates asked whether that proposal would make the process of checking and making disclosures overly complicated. Professors Beale and Hartnett raised the question of what the right denominator for calculating the fraction of revenue contributed would be. Professor Bartell suggested using the entire period beginning January 1 of the calendar year before the date of filing.

A judge member preferred option alpha because option beta allowed someone to join an amicus and make a substantial contribution without disclosure being required.

Another judge member wondered whether trade associations keep clear demarcations of funds that are going to amicus work as opposed to general activities and how a donor would know to which of those uses its donations were directed. The member also thought that $10,000 in option alpha was a very high number. The member could understand not wanting to capture small amounts from crowdfunding, but why not a $5,000 or $7,500 floor?

On the first point, Professor Hartnett responded that the subdivision (b)(4) exception hinged more on the phrase "received in the form of investments or in commercial transactions in the ordinary course of business" than on the phrase "unrelated to the amicus curiae's amicus activities." A trade association's members' contributions are not generally thought of as investments or commercial transactions in the ordinary course of business.

As to the second point, the advisory committee had not settled on $10,000—that amount was set forth in brackets, along with $1,000 as another bracketed alternative. Advisory committee members who supported using $10,000 argued that, once the contribution reaches that number, the contributor is very likely to be driving the effort or at least to have a significant hand in it. Instead of funding coming from a broad membership base, it is coming from a small number of people who may not be representative of the entire membership. Some alternatives, such as a percentage of the cost of the brief, were also considered, but they were considered too difficult to implement.

The judge member again indicated a preference for a lower floor, something like $5,000 or $7,500, in case a small number of entities are pooling resources to be a collective driving force behind the brief. The member was also unsure what counted as a commercial transaction in the ordinary course of business. Funds could go into an entity, on a routine basis, to fund all of its activities, including the activities of its general counsel. The member was concerned that there would not be an administrable distinction between money to fund an amicus brief and money to fund the amicus's legal office.

Judge Bates remarked that the goal should be a rule that is clear to those subject to it. If it is unclear what funds do or do not trigger disclosure, the advisory committee should continue to talk about that.

A practitioner member thought that over-regulation of this area would be a big mistake. The committee seemed to be bringing into the realm of amicus briefs concepts that applied instead to lobbying a legislature. The best form of amicus-brief regulation is the discretion of Article III judges to read them or not read them. The advisory committee also ought to talk with at least the big trade associations to see whether the proposed requirements are feasible and how complicated it would be to implement them. And the proposed requirements will hurt smaller organizations.

The member asserted that proposed Rules 29(d) and (e) were a mistake. For example, lawyers who write amicus briefs for big trade associations do so for free or for a discounted amount—say, $5,000, $10,000, or maybe $20,000. They work on these briefs to be able to say that their work influenced a Supreme Court decision.

Judge Bybee asked the member to clarify whether the member was opposed to the beta alternative version of Rule 29(d), which tracked what is already in the current rule. The member responded that it was fine if it was already there, but the member would not try to set dollar or percentage thresholds.

Another practitioner member argued that proposed (b)(4) addressed a real concern—that is, situations in which big players in an amicus control its filings. As to the exception in proposed (b)(4), the member read it to exclude ordinary commercial transactions between the trade association and its members, such as renting space. If that reading is wrong, the member would view that as a problem.

As to (d), the practitioner member thought option alpha was both over- and underinclusive. A big problem with alpha was that it permitted nonmembers to contribute anything below $10,000 without triggering disclosure. The member thought that the concern was about background players who orchestrate large amicus campaigns by donating to many different organizations. The key control existing today (and in option beta) is that the organization can be seen as credibly speaking for its members—if a nonmember makes a contribution, the nonmember has to be disclosed.

The practitioner member said, though, that he is skeptical of tying disclosure requirements to contributions that are earmarked for a particular brief. Large organizations with large budgets will allocate a portion of annual dues to amicus briefs in general; no funds will ever be targeted to a single brief, so no disclosure will need to be made. Smaller groups or groups that do not regularly file amicus briefs probably will not have an allocation for those briefs in their budgets. If a case comes along that is important to them, they will have to "pass the hat" among their members, and they will have to disclose. So the rule's burden then falls disproportionately on different amicus groups. For many companies, disclosure will mean they will not contribute because they will not want to be singled out; and amici will be less willing to file if they will have to make a disclosure because they will believe disclosure will make the brief seem less credible. If the concern is with those who join just before or after contributing, perhaps the rule should expressly target that behavior.

Judge Bybee asked what contribution floor this practitioner member favored for option alpha. The member did not think crowdfunding was such a big issue, so the member suggested perhaps a $10 floor. Amicus briefs are not big profit centers, so they often do not cost that much. If the limit is $7,500, then four contributors who give $7,400 each can provide close to what the brief will cost without triggering disclosure. The contributors need not have anything to do at all with the amici, and that seems to be a problem. This member preferred option beta over option alpha.

A judge member remarked that the underlying concern is the opportunistic arrival of somebody who wants to control or have a voice in a particular case. Although having a set dollar amount might be attractive because it's arguably objective, the member did not know that it would address the concern.

Another judge member stressed the need for clarity, expressed doubt about how to apply a disclosure standard that hinges on the intent behind a contribution, and stated that requiring disclosure of an amicus's membership raises First Amendment issues. This member favored option beta.

Another judge member noted that in the courts of appeals, where amicus briefs are less common, those briefs may be more influential than they are in the Supreme Court. Anecdotally, amici can be very important and influential; this member reads amicus briefs. The member stressed once again that the committee should consider a lower dollar-amount threshold in option alpha. Another important reason to know about who is behind the brief is for recusal reasons—to ensure that a party for whom a judge should not decide cases does not come to the court through a third party instead. Asked for a preference between options alpha and beta, the member preferred option alpha because there needs to be an understanding of who is really driving amicus briefs; the member acknowledged the need for careful drafting of option alpha given, inter alia, potential First Amendment concerns. The member separately reiterated doubts about the meaning of the exception in proposed paragraph (b)(4).

Another judge member agreed that it was not clear what the exception in (b)(4) meant or how it would be calculated. That member also did not think that the courts of appeals were expressing a need for a change to Rule 29. The member has not sensed any problem with amicus briefs. Some members of Congress appear to be concerned about undisclosed backers funding multiple amicus briefs. By contrast, the problem that the member, as a judge, would be worried about is whether an amicus was merely another voice for a party in the case. The portion of the existing rule that would become proposed paragraph (b)(1) is aimed at the latter problem. Subdivision (d) instead tries to get at the concern voiced by the members of Congress. To solve that problem (and this member was not sure it was a problem in the courts of appeals), the existing language may be inadequate because it is limited to those who contribute or pledge money intended to fund the particular brief, as opposed to amicus briefs generally. Someone could set up arrangements so as not to pay for any particular brief; instead, they could just fund several organizations that file amicus briefs in dozens of cases. The member was not sure how best to address the concern voiced by the legislators.

Judge Bybee thanked the Standing Committee for its helpful input on these difficult problems.

Intervention on Appeal. Judge Bybee reported that the advisory committee will consider whether to add a new rule governing intervention on appeal. There currently is no rule, but the issue has come up several times in the courts of appeals. The issue was also recently briefed in the Supreme Court in a case that later became moot.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Rebecca Connelly and Professors Elizabeth Gibson and Laura Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in West Palm Beach, Florida, on March 30, 2023. The advisory committee presented eight action items and four information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 179.

Action Items

The Restyled Bankruptcy Rules. Judge Connelly introduced this item, and Professor Bartell reported on it. The advisory committee sought final approval of the fully restyled bankruptcy rules, which appeared starting on page 190 of the agenda book.

The restyling project had been an immense effort by the Restyling Subcommittee (chaired by Judge Marcia Krieger), the style consultants, and Rules Committee Staff. The total number of bankruptcy rules exceeded that of all the civil, appellate, criminal, and part of the evidence rules, combined. It was a major project.

Parts VII through IX of the restyled bankruptcy rules were published for public comment in August 2022. There were five sets of comments. The comments and any changes made since publication were shown in the agenda book starting on page 429.

The advisory committee was also asking for approval of Parts I through VI of the restyled rules. The Standing Committee had approved them already over the past two years with the understanding that the rules would return for approval after the entire restyling was completed.

There have been some modifications to the restyled Parts I through VI since those approvals were given. Some of the bankruptcy rules have been substantively amended since then, and the restyled rules now reflect those amendments. The style consultants also did a "top-to-bottom" review of all the rules, making additional stylistic and conforming changes. And the Restyling Committee also made corrections and minor changes.

The advisory committee did not believe that any of these updates to the proposed restyled Parts I through VI were substantive enough to warrant republication for public comment.

Judge Bates commented that the restyling project reflected a monumental collaborative effort by past and present members of the advisory committee, the leadership of the advisory committee and its Restyling Subcommittee, and the reporters and the style consultants on a sometimes-thankless yet important task.

Professor Kimble added that this is the fifth set of restyled rules over 30 years. The rules committees are done with comprehensive restyling, and that is cause for celebration.

Professor Garner noted that this is probably the most ambitious project in law reform and legal drafting that a rulemaking body like the Standing Committee had undertaken in the past 30 years. He noted that the late Judge Robert E. Keeton should be remembered for starting the restyling project in 1991–92. This could be the culmination of his ambition to see simpler, more straightforward rules.

An academic member commented that, as a prior reporter to the Bankruptcy Rules Committee, he participated in a minor restyling of the Part VIII rules. On account of that experience, he had dreaded the prospect of a complete restyling of the rules, and he wanted to congratulate everyone involved with this process. It went more smoothly than anyone could reasonably have hoped, so it really is a cause for celebration.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the restyled bankruptcy rules.**

Amendment to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), Conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423. Judge Connelly reported on this item. The advisory committee sought final approval of these proposed amendments, which appeared on pages 687–95 and 703–05 of the agenda book, and the accompanying form abrogation.

Rule 1007 sets deadlines for filing items in bankruptcy court. The change pertains to a requirement for individual debtors in Chapter 7 and Chapter 13 cases. To receive a discharge, a debtor must complete a course in personal financial management. The current Rule 1007 provides a deadline for the debtor to file a statement on an official form (Form 423) that describes the completion of the course. The proposed amendment would instead require that the course provider's certificate of course completion be filed.

Rules 4004, 5009, and 9006 would all need to be changed because they refer to a "statement" of completion, and they would need to refer to a "certificate" of completion. Further, Official Form 423 would be abrogated because it would no longer serve a purpose.

Professor Bartell noted that the provider of the course furnishes the certificate of course completion. Many of the course providers actually file the certificates directly with the court. But if a provider does not, then the debtor would have to file it instead. The advisory committee received no public comments on this set of proposed amendments.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 1007, 4004, 5009, and 9006, and the abrogation of Official Form 423.**

Amendment to Rule 7001 (Types of Adversary Proceedings). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 696 of the agenda book.

Rule 7001 lists the types of proceedings that count as adversary proceedings in a bankruptcy case. The amendment would exclude from the list of adversary proceedings actions

filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

This amendment responds to a suggestion by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). In that case, the Court decided that the automatic stay set by 11 U.S.C. § 362(a)(3) did not prohibit the city's retention of the motor vehicle of a consumer in a Chapter 13 bankruptcy case. Justice Sotomayor noted that a debtor could use a turnover action to recover such property, and opined that if the problem with bringing a turnover action is the delay and cumbersome nature of doing it as an adversary proceeding under Rule 7001, the rules committee could consider amending the bankruptcy rules. *Id.* at 594–95 (Sotomayor, J., concurring).

The amendment was published for comment this past year. The advisory committee received only one comment, which supported the amendment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 7001.**

New Rule 8023.1 (Substitution of Parties). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed new rule, which appeared starting on page 698 of the agenda book.

Rule 8023.1 would govern the substitution of parties when a bankruptcy case is on appeal to a district court or BAP. It had not been addressed previously in the rules. The rule is modeled after Federal Rule of Appellate Procedure 43.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved proposed new Rule 8023.1.**

Amendment to Official Form 410A (Mortgage Proof of Claim Attachment). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 706 of the agenda book.

This proposal amends a provision of the attachment for mortgage proofs of claim. The change would require that the principal amount be itemized separately from interest. Currently the form allows them to be combined on one line item, and the amended form would require separate lines. The advisory committee received one comment on the proposed amended form; it made no change to the proposed amendment after considering that comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410A.**

Amendment to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting on page 709 of the agenda book.

Rule 3002.1 pertains to cases involving individuals who have filed for Chapter 13 bankruptcy. Because of the structure of Chapter 13, mortgage debt is generally not discharged; but Chapter 13 debtors can cure mortgage defaults during the case. Even though a default can be cured, there can be confusion about the accounting of payments during a case and the status of the mortgage claim at the end of the case. That was the impetus behind the rule—to provide more information to the borrower and the lender about the status of mortgage claims in these cases.

Judge Connelly reminded the committee about the proposed amendments to Rule 3002.1 that had been published for comment in 2021. Those proposed amendments would have provided for a mandatory midcase notice issued by the Chapter 13 trustee and would have set a motion procedure for assessing a mortgage's status at the end of a Chapter 13 case. The advisory committee received numerous public comments, and the committee further revised the proposed amendments in response to those comments.

Although the revisions respond to comments submitted during the public-comment process, the advisory committee determined that the changes are significant enough to warrant republication. This is partly because the advisory committee has switched from a mandatory-notice scheme by one party, the Chapter 13 trustee, to optional motion practice throughout the case, by either the debtor or the trustee.

The end-of-case procedure is also changed to address concerns about the consequences for either failing to respond or failing to comply. The consequences are different enough that the committee thought it would benefit from additional public comments and also thought it was important to provide notice of the proposed changes.

Professor Gibson added that the advisory committee's years-long experience with this rule illustrates the value of notice and publication. Two organizations had suggested significant amendments to Rule 3002.1: the National Association of Chapter 13 Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy. Both organizations advocated a midcase assessment of the mortgage's status—the thought being that, if the debtor and the trustee found out then that, according to the creditor, the debtor had fallen behind in mortgage payments, there would be time to cure that before the case was over.

But the comment process revealed a lot of concern with that idea, especially from Chapter 13 trustees. A midcase review may not always be needed; there are other ways to get the information. And different districts handle postfiling mortgage payments differently—the debtor might continue to pay them directly to the mortgagee, or the trustee might make those mortgage payments. In districts with the former procedure, the trustee would not have information about payments made by the debtor. The biggest change is therefore that the midcase review is not mandatory anymore. It can occur at any time during the case, and either the debtor or the trustee can ask for it by motion. The subcommittee feels that these changes have improved the proposed amendments.

A judge member observed that the revised proposal adds a provision for noncompensatory sanctions. When the claim holder does not comply, there were already remedies making the other party whole, including attorney's fees, which would come at a cost to the claim holder. It is not clear why there should also be noncompensatory sanctions. The member also said that, if

something more like punitive sanctions were meant, a notice requirement should be considered, as is usually provided by the rules in such situations.

Judge Connelly said that the proposal for noncompensatory damages was in part a response to *In re Gravel*, 6 F.4th 503 (2d Cir. 2021), which held that current Rule 3002.1 does not authorize punitive sanctions. The new language was intended to clarify that the bankruptcy court could in appropriate circumstances assess noncompensatory damages. Public comment on this provision would be useful.

Professor Gibson added that these are cases where the mortgagees are repeat players and that the failure to comply with the rule in multiple cases might create a need for declaratory, injunctive, and punitive relief to address the problem. Another judge member stated, however, that punitive relief seems qualitatively different from declaratory and injunctive relief. Notice should be required before imposing punitive relief, and consideration should be given to the scope and framework for such relief. Judge Connelly responded that the rule reflects the approach taken in Civil Rule 37, and stressed the need for judges to be able to address willful noncompliance with court orders. The judge member suggested the value of seeking comment specifically on whether notice should be required before an award of punitive fines.

On the issue of prior notice, Professor Gibson raised the possibility of prefacing the provision with "if, after notice and a reasonable opportunity to respond," which Rule 11 uses. Although this would not spell out all the procedure, Professor Gibson did not think the rule needed to do so. Professor Struve quoted Rule 3002.1(h)—"If the claim holder fails to provide any information as required by this rule, the court may, after notice and a hearing, do one or more of the following:"—which is followed by paragraph (h)(2). She wondered if this provision addressed the concern with notice.

A judge member thought it did address the notice issue but that it did not explain the need for the punitive sanction. If a mortgage holder was noncompliant, couldn't it end up not only paying attorney fees but also taking a haircut on its claim? Judge Connelly responded that there would not be a haircut on the claim, because the mortgage would survive the discharge. The member rejoined that proposed (h)(1) authorizes precluding the claim holder from presenting information that should have been produced, and argued that this could affect the claim. Judge Connelly responded that the rule would prevent the claim holder from presenting the omitted information as a form of evidence in a contested matter or an adversary proceeding in the bankruptcy case, but that is different from making the debt unenforceable after the case ends. Although the claim holder might not be able to present the evidence in the bankruptcy case the rule would not prevent use of the evidence in state-court foreclosure proceedings.

A judge member stressed that adequate notice would require specific mention of punitive relief if that was under contemplation. "Noncompensatory sanctions," this member suggested, was unduly vague. Judge Bates asked what was contemplated by "noncompensatory sanctions" beyond declaratory and injunctive relief. Professor Gibson and Judge Connelly responded that it would include punitive damages payable to a party.

As to rules that authorize noncompensatory sanctions, Professor Gibson suggested, for example, that under Civil Rule 11 a lawyer could be required to attend continuing legal education.

A practitioner member read the text of Civil Rule 11(c)(4) and pointed out that payments to a party under that rule seemed to be limited to reasonable attorney's fees and other expenses; the potential "penalty" contemplated by that rule is paid to the court. The practitioner member further agreed with previous comments that nobody would read "noncompensatory sanctions" to mean equitable relief. If there is a desire that equitable relief be available, it should be spelled out and, as under Civil Rule 11(c)(2), there should be an opportunity to cure.

An academic member offered background about why courts occasionally need "baseball bats" in these cases. This rule goes back to the mortgage crisis in 2007–08. Many people filed for Chapter 13 bankruptcy in large part to save their homes by curing a default on a mortgage in Chapter 13, while also maintaining their ongoing monthly payments. But it was a huge problem to figure out the exact amount owed on the mortgage, and it was extremely difficult to get mortgagees to give that information in a way that could be processed by trustees, debtors, and the courts. Ongoing compliance was also often an issue because there were not deep-pocketed lawyers on the debtor's side. The Chapter 13 trustee is often, but not always, in the mix, and the court has a huge flow of information that it has to track. The amounts of money in these cases are just not enough, even if clawed back, to get a mortgagee's attention, so a stronger measure is necessary to get that attention.

A judge member questioned whether, if there is no precedent under Rule 11 for imposing punitive damages payable to another party, there were any authority for a bankruptcy court to impose such a sanction. Does that need to be authorized by Congress? Is it implicit in the statute? Such an award, this member suggested, was not a traditional kind of ancillary relief used to enforce court powers, unlike a fine to the court or contempt.

Another judge member suggested that Rule 11 could provide a model for potential language—perhaps "reasonable expenses and attorney's fees caused by the failure, nonmonetary directives, and, in appropriate circumstances, an order to pay a penalty into court." (A practitioner member later made a similar suggestion.)

Judge Bates remarked that there is nothing in the committee note that explains what "noncompensatory sanctions" means or how declaratory or injunctive relief fits into the scheme. After looking at Rule 11, which is much more elaborate in terms of certain requirements than this rule would be, he wondered whether more thought needed to be given to it.

Judge Connelly explained that the proposed amendment responded to the *Gravel* opinion. The idea was to allow the bankruptcy court to award something beyond attorney's fees. The advisory committee did not specify what that would be—the language "noncompensatory sanctions" was meant to be general. Judge Connelly agreed that there should be something in the committee note about that language.

After further discussion, Judge Connelly asked whether, if the language "in appropriate circumstances, noncompensatory sanctions" were removed, the Standing Committee would give approval to publish the rest of the rule. Professor Gibson said she would prefer to go forward without the change to (h)(2) because the rest of this amendment is important. Deferring a vote on the rest of the rule would delay those changes for another year.

Professor Capra remarked that the approval is only for public comment. He further suggested that, in the future, the advisory committee say "award other appropriate relief," period, and then add all the explanation in the committee note. The Standing Committee even has the authority to put the language in brackets and then invite comments on it.

A judge member expressed support for shortening the provision to "award other appropriate relief." Professor Bartell expressed concern that if the "including" clause is removed, an unintended negative inference is created that other appropriate relief no longer includes an award of expenses and attorney's fees. Judge Bates expressed concern about whether this suggestion could increase the likelihood of needing to republish again later.

A practitioner member thought it seemed riskier to take out (h)(2) and not make it an issue if the Standing Committee would still have to discuss it again in six months. Having public comment helps the committees improve the rule. Also, in approving something for publication, the Standing Committee does not necessarily give that same language approval. It is worth seeing what the reaction to it would be. A judge member demurred to that suggestion, arguing that a proposal should not be sent out for comment if the committee knows it could not accept that proposal as drafted.

Professor Hartnett asked whether, if the advisory committee had in mind Civil Rule 37, the rule could cross-reference Bankruptcy Rule 7037. For example, "any of the sanctions permissible under Rule 7037." Professor Gibson responded that some of the sanctions under Rule 37 would not be applicable here; she would be reluctant to have only a general reference to Rule 7037. Professor Hartnett said that he thought "appropriate circumstances" might cover that problem.

Professor Cooper asked whether it would work to publish the rule as proposed and specifically invite comment on the issue. Judge Bates asked what risks would be involved with that approach and whether it would lessen the risk of having to do any republication. Professor Gibson thought it would lessen the likelihood of coming back with another amendment. Judge Bates thought that that approach would give the impression the Standing Committee has approved that language, and he did not have the sense that the Standing Committee is prepared to give approval to that language.

Professor Coquillette noted that, in the past, there has been concern when the Standing Committee permits publication of something that it really would not ultimately approve. The harm is that people might wonder about the rules process. Simply putting something out to attract comment when the committee really will not do it is not a good idea. It is different if there is a real possibility that reading the comments during the comment period could convince the committee to approve the proposal.

Professor Struve agreed with Professor Gibson that, leaving aside (h), the rest of the rule seemed likely to provide significant benefit to a population that is a concern for the whole bankruptcy structure. That benefit has already been delayed past one publication cycle. She also agreed with those who said it would be peculiar to send something out for comment that the Standing Committee could not see a way to approve. She also saw the point about flagging that a piece of the rule may be subject to change in the future; but she was not sure that sending out the proposal currently in the agenda book could avoid the need for republication in the event that the

process ends up putting forward some very different proposal. It might be cleaner, if the Standing Committee agrees that there is a strong normative case for doing so, to publish the rest of the rule without (h).

An academic member remarked that, although the Standing Committee is historically reluctant to change a rule and then immediately afterward publish an additional change, doing so in this case may not pose a serious problem because the sanctions piece is separable. And it would show that the rules process takes seriously concerns about authority, notice, and operation.

Professor Gibson noted that there was relatively little discussion by the advisory committee of (h)(2) as opposed to the rest of this rule. So the advisory committee would likely be satisfied with that outcome.

Judge Bates asked whether a change to the committee note would be needed as well because the note refers to (h)(2). Professor Gibson answered in the affirmative. A judge member asked whether it is typical or permissible to issue a committee note on a provision without amending the provision's text. The judge member wondered if the advisory committee could issue a committee note that "other appropriate relief" should be interpreted broadly to include more than just attorney's fees, instead of adding "noncompensatory sanctions" to the text. Professor Gibson responded that a change to a committee note cannot be made by itself.

A style consultant suggested adding the word "any" before "other appropriate relief" and deleting "and, in appropriate circumstances, noncompensatory sanctions." The committee note would then state that "any" was added to show that the advisory committee did not intend to limit the recovery to reasonable expenses and attorney's fees—a diplomatic way of saying that the amendment was intended to address the Second Circuit's erroneous decision.

Professor Marcus observed that the 2015 committee note to the amendment of Civil Rule 37(e) stated that the amendment rejected certain Second Circuit caselaw.

Judge Bates asked the advisory committee's representatives whether that kind of change would be consistent with what the Bankruptcy Rules Committee decided to do here and whether it would simply ignore the issues raised with respect to what the further relief is, instead letting the courts deal with that. Professor Bartell responded that it would be consistent with the advisory committee's decision and that it would also be consistent with other bankruptcy rules that also call for other appropriate relief upon a violation. Those rules do not say what procedural mechanisms must be adopted to impose that other relief, but that is consistent with how the phrase is treated in other bankruptcy rules. Judge Bates then asked whether there had been discussion of whether punitive damages fell within "other appropriate relief." Professor Bartell said that she had not researched the question, and Judge Connelly said that the advisory committee had not discussed it.

Professor Struve admired the elegance of the proposal to add "any" and a change to the committee note. But she did wonder, if there are instances of "other appropriate relief" sprinkled throughout the bankruptcy rules, whether adding "any" to this one would create an unwanted negative inference. The style consultant responded that the committee note's express statement about why "any" was added would be the reason for the difference. Judge Bates noted that some

judges look at only the text of the rules to determine what they mean, not the committee notes—would that lead to a possible view that they have two different meanings?

A judge member commented that, if the committee note only disapproves of the *In re Gravel* decision, it is not clear what the note actually does. If the note is going to say that certain actions are authorized, the member would want to know what those actions are. Judge Bates agreed that a vague committee note that does not say expressly what the amendment authorizes would lead to divergent comments that the advisory committee would ultimately have to resolve.

A judge member was leery of making any substantive changes or hints right now. Normally in the rules process, this would have been a proposal, and then the Standing Committee would give feedback to the advisory committee. People would have talked about Civil Rules 11 and 37. If there is a Rules Enabling Act obstacle to creating a punitive damage remedy, that would have been discussed. But all of that was skipped because of how this issue, through no one's fault, has arisen. The member would rather hold off six months or a year and then deal with this issue separately rather than today without any preparation.

Another judge member agreed and added that, depending on what the scope of the relief under paragraph (h)(2) is, there may be a need to change the procedural protections. Just changing a word is not going to deal with the problem.

Judge Connelly thanked the Standing Committee for the helpful discussion. The proposed changes to Rule 3002.1 apart from proposed subdivision (h)(2) create a new, necessary, and beneficial mechanism, one in which there has been an interest for a while. Seeking republication of those provisions, excepting those in paragraph (h)(2), is warranted now. Given the comments today, it would be more appropriate to return to the advisory committee for more robust, thorough evaluation of Rule 3002.1(h)(2). It is unclear whether that will result in a proposed amendment at some point. An amendment may even be premature in light of the developing caselaw.

A member moved to approve the proposed amendment, without the proposed changes to paragraph (h)(2), for publication, and another member seconded the motion. Judge Bates opened the floor to further discussion.

Professor Struve asked whether, despite omitting the proposed changes to paragraph (h)(2), the semicolon and word "and" at the end of paragraph (h)(2) would remain. Judge Connelly answered that, yes, the semicolon and "and" would remain.

An academic member encouraged the committee members to read the Second Circuit's *In re Gravel* case, both the majority opinion and the dissent (with which the member agreed). As far as the member knew, that is the first appellate decision with that particular holding. The member also thought the committee members should congratulate themselves because the rules process was working well. The *Gravel* decision was driven in part by *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), which potentially destabilized a bankruptcy court's ability to enter sanctions. It would be appropriate to give greater and deeper thought to *Taggart*'s implications when considering a potential sanctions regime.

After further discussion it was clarified that the committee note would be modified by deleting the third sentence in the last paragraph—"It also expressly states that noncompensatory sanctions may be awarded in appropriate circumstances."

Upon a show of hands, with no members voting in the negative: **The Standing Committee gave approval to republish the proposed amendment to Rule 3002.1 for public comment with the following changes: No amendments to (h)(2) were retained, except for adding a semicolon and the word "and" at the end; and the third sentence in the last paragraph of the committee note was struck.**

Amendment to Rule 8006(g) (Request for Leave to Take a Direct Appeal to a Court of Appeals After Certification). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared on page 728 of the agenda book.

The proposed amendment would amend subdivision (g) so as to dovetail with the proposed amendments to Appellate Rule 6(c) approved for publication for public comment earlier in the meeting.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 8006(g) for public comment.**

Official Forms Related to Rule 3002.1. Judge Connelly reported on this item. The advisory committee sought approval to publish these proposed official forms for public comment. The proposed official forms appeared starting on page 729 of the agenda book.

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are the companion official forms to proposed amended Rule 3002.1. None of these forms was affected by the decision (described above) to withdraw the request to publish the Rule 3002.1(h)(2) proposal.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R for public comment.**

Information Items

Suggestion to Require Complete Redaction of Social Security Numbers from Filed Documents. Professor Bartell reported on this item.

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 the letter suggested that the rules committees reconsider a proposal to redact entire Social Security numbers from court filings.

The Bankruptcy Code requires that Social Security numbers be included on certain documents either in whole or only partially redacted. *See* §§ 110, 342(c)(1). The advisory

committee cannot change those requirements because they are statutory, but there may be some circumstances where full redaction is possible and appropriate.

But the Advisory Committee has become aware that the Judicial Conference's Committee on Court Administration and Case Management ("CACM") has asked the FJC to design and conduct studies regarding the inclusion of certain sensitive personal information in court filings. Those studies would update the privacy study issued by the FJC in 2015. They would gather information about compliance with privacy rules and the inclusion of unredacted Social Security numbers in court filings. The advisory committee has decided to defer consideration of the suggestion while those new studies are underway.

Suggestion to Adopt a National Rule Addressing Debtors' Electronic Signatures. Professor Gibson reported on this item.

An attorney suggested the adoption of a national rule to allow debtors to sign petitions and schedules electronically without requiring their attorneys to retain the original documents with wet signatures.

But only a year ago, in its Spring 2022 meeting, the advisory committee decided not to take further action on a suggestion by CACM to consider a national rule on electronic signatures of non-CM/ECF users. The advisory committee decided then that a period of experience under local rules addressing e-signatures would help inform any national rule, and it reasoned that e-signature technology would also probably develop and improve in the meantime.

In light of that recent decision, the advisory committee decided to defer further consideration of this suggestion to a later date. Nothing has changed since a year ago. Also, the project on electronic filing by self-represented litigants may also have implications for the e-signature issue.

Suggestions Regarding the Required Course on Personal Financial Management. Professor Gibson reported on this item.

The advisory committee continues to consider suggestions concerning the course on personal financial management discussed earlier.

Professor Bartell's research has shown that, in a single year, thousands of debtors' cases were closed without a discharge because of the debtors' failure to file proof that they have taken this course. Debtors in that situation have to pay to reopen their cases to file the certificates. The Consumer Subcommittee has been considering whether and how the rules might be amended to decrease that number.

One question is whether to change the deadlines for the filing of those forms—now certificates of completion—or perhaps to require simply that they be filed by the point at which the court rules on discharge. There is also a rule that requires the court to remind debtors of this requirement if they haven't filed it within 45 days after the petition. Another question is whether the date for that notice reminder should be changed or whether more than one notice should be given.

Proposed Amendment to Rule 1007(h) to Require Disclosure of Postpetition Assets. Professor Gibson reported on this item.

The advisory committee continues to consider requirements to disclose assets acquired after a petition is filed in an individual Chapter 11 case or in a Chapter 12 or 13 case. In such cases, which may last several years, the Bankruptcy Code specifies that the property acquired by the debtor during that period is property of the estate.

The current rule requires filing a supplemental schedule for only certain postpetition assets obtained within 180 days after filing the petition. Judge Catherine McEwen, a member of the advisory committee, suggested an amendment to cover all postpetition property in individual Chapter 11, Chapter 12, and Chapter 13 cases.

The Consumer Subcommittee thought that one of the problems with such a rule is how to capture what property needs to be disclosed. It would be impossible to report everything that comes into a debtor's ownership over a three-to-five-year period. Should the rule mandate disclosing only certain types of property, such as only property that has a substantial impact on the estate? Also, courts that currently impose a disclosure requirement by local rule do so in different ways, so there is a lack of uniformity.

The Consumer Subcommittee was not sure there was a problem that needed to be solved. The issue was further discussed at the advisory committee meeting. There, Judge McEwen noted that the Eleventh Circuit has strong case law about judicial estoppel when a debtor has not revealed property in the bankruptcy case. Debtors can lose the right to pursue an undisclosed claim, such as a tort action based on a postpetition injury, and creditors can lose the benefit of such claims. By requiring disclosure, that problem could be avoided. So the advisory committee asked the subcommittee to consider the matter further.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robin Rosenberg and Professors Richard Marcus, Andrew Bradt, and Edward Cooper presented the report of the Advisory Committee on Civil Rules, which last met in West Palm Beach, Florida, on March 28, 2023. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 784.

Action Items

Amendment to Rule 12(a) (Time to Serve a Responsive Pleading). Judge Rosenberg reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 826 of the agenda book.

The amendment makes clear that the times to serve a responsive pleading set by Rules 12(a)(2)–(3) are superseded by a federal statute that specifies another time. It came about because some litigants in Freedom of Information Act cases had difficulty obtaining summonses that called for responsive pleadings within the statute's 30-day deadline; without the amendment, it was not clear if a statute prescribing a different time would apply to the United States under this rule.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 12(a).**

Amendments to Rules 16(b)(3) (Scheduling and Management) and 26(f)(3) (Discovery Plan) Related to Privilege Logs. Judge Rosenberg reported on this item. The advisory committee sought approval to publish these proposed amendments for public comment. The proposed amendments appeared starting on pages 828 and 846 of the agenda book.

These amendments deal with the privilege-log problem and address early in the case how the parties will comply with the requirements of Rule 26(b)(5)(A). The goal is to get the parties to address issues pertaining to privilege logs during their Rule 26(f) conference, in order to reduce burdens while still providing sufficient information about documents being withheld and to reduce the number of unexpected problems at the end of discovery.

The proposed amendments were presented for approval for publication at the Standing Committee's January 2023 meeting. There were concerns about the committee notes' length, so the advisory committee took the amendments back for further consideration. The notes are now half as long.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish for public comment the proposed amendments to Rules 16(b)(3) and 26(f)(3).**

New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The advisory committee sought approval to publish for public comment this proposed new rule, which appeared starting on page 831 of the agenda book.

Since 2017, the Multidistrict Litigation ("MDL") Subcommittee and the advisory committee have considered whether to propose a rule to govern MDLs. The MDL Subcommittee has heard many times from attorneys in both the plaintiffs' and defense bars, experienced and first-time transferee judges, and groups including Lawyers for Civil Justice and the American Association for Justice. Judge Rosenberg thanked them for all of the time and meaningful input that they have given the subcommittee. The proposed rule has been well received by all of these groups and was overwhelmingly supported by the transferee judges at the recent transferee-judge conference last fall.

Judge Rosenberg addressed a common question: why is an MDL rule needed? MDLs account for a large portion of the federal docket: 69.8% as of May 2023, up from about 1.3% in 1981. Many judges will be assigned MDLs and will look to the rules for guidance. The Judicial Panel on Multidistrict Litigation is making a concerted effort to expand assignments of MDLs to new judges, and there are more leadership appointments to diverse groups of lawyers. From January 1, 2019, to May 31, 2023, out of 96 new MDLs, 40 went to first-time transferee judges. In 2023 alone, the panel has centralized eight MDLs before eight different judges, six of whom are first-time transferee judges.

The advisory committee and the groups with which it has been working feel it is essential for the court to take an active and informed role early in an MDL proceeding. There are issues that become problematic unless addressed at the outset of the action, particularly in large MDLs.

Transferee judges have also expressed concern that they lack clear, explicit authority for some of the things that they are doing, which most agree are necessary to manage an MDL.

Rule 16 just addresses two-party litigation, and Rule 23 addresses class actions, but we have nothing for MDLs. Managing an MDL is broader than managing a non-MDL proceeding. It is critical for a transferee judge to have a more active management role in an MDL.

The advisory committee used a three-part test to determine whether to go forward with this new rule. First, is there a problem? Yes, there are circumstances in which courts start off on the wrong foot in an MDL and that could cause many problems down the road. Second, is there a rules-based solution? Yes, this proposed rule helps solve the problem by addressing issues early and laying the groundwork for effective case management. Third, would a rules-based solution avoid causing harm? Yes, the advisory committee believes that the proposed rule avoids harm by using the word "should" (with respect to the court's management of MDLs).

Rule 16.1 focuses the court and the parties on the management issues that can effectively move an MDL forward from an early point, yet the rule recognizes that not all MDLs are alike, that no one size fits all. So the rule is drafted to provide both helpful guidance and flexibility in managing the proceeding.

The advisory committee carefully considered the helpful comments of the Standing Committee at its January 2023 meeting, and many of those comments were incorporated into the revised rule.

In subdivision (a), the advisory committee settled on the word "should"—in most but not all MDLs, the court should schedule an initial management conference. The term "should" indicates that reality, while still providing some flexibility. "Should" has been interpreted as a clear directive in many instances and several of the civil rules already use it.

As for subdivision (b), the advisory committee's view is that appointing coordinating counsel helps the court get the case moving. The role of coordinating counsel is limited to the initial conference. The rule provides flexibility both to the court, to determine what issues coordinating counsel should address, and to the parties, to inform the court about the case's status. The advisory committee settled on "may" because an MDL may or may not need coordinating counsel for the initial management conference.

For subdivision (c), the advisory committee chose the first of the two alternatives of the version of Rule 16.1(c) presented at the January 2023 Standing Committee meeting. Most comments preferred this alternative, which lists a cafeteria-style menu of options (reflecting that there is no one-size-fits-all framework for an MDL). It is not a mandatory checklist. Paragraph (c)(1) was modified to say "whether leadership counsel should be appointed" rather than assuming they would be. More specifics were added to the subparagraphs and the committee note to clarify the issues to consider at the initial stages of the MDL. The committee note to paragraph (c)(1)(A) lists factors to consider when selecting leadership counsel. Paragraph (c)(4) was revised in direct response to comments from the Standing Committee about identifying issues, vetting claims, and exchanging information early in the case. Rather than the previous reference to "whether" the parties will exchange information, (c)(4) now refers to "how and when" they will do so. Paragraph

(c)(6) (concerning discovery) was modified to eliminate the word "sequencing" and make it more general. Paragraph (c)(9) is newly added. The court can play a significant role in making sure the settlement process is fair and transparent. Rule 16 already authorizes the court to play some role in the process. In paragraph (c)(12), the advisory committee did not include the word "special" with "master." It recognizes that the court may make decisions and appointments using its inherent authority. The committee note, in its opening paragraph, uses the phrase "just and efficient conduct" in response to a comment from the Standing Committee about directing the parties to adhere to the Rule 1 principles of just, speedy, and inexpensive determinations.

Professor Marcus added that this draft rule is the product of long deliberations, and the advisory committee needs public comment on it. Professor Bradt, as both an outsider and a recent insider to the process of developing the rule, thought it extraordinary how much information and outreach and response from interested parties there has been. He thought it an extensive and admirable process.

A practitioner member expressed continuing concerns about the proposal. The member's primary concern was with the committee note, which the member felt was doing the rulemaking rather than the rule. The member gave several examples of portions of the committee note that caused the member concern. These included examples of sentences that the member felt could be omitted as superfluous or confusing, language in the note indicating that a single management conference might suffice for a given MDL, a sentence discussing individual-class-member discovery in class actions, and language suggesting that the court may have a right to know about the status of settlement negotiations. The most important issue for the member was the standard for selecting leadership counsel. The committee note to subdivision (c)(1)(A), this member argued, should not require each leadership counsel to responsibly and fairly represent *all* plaintiffs, because there can be conflicts among the plaintiffs. Further, the criteria should include the number and value of claims that counsel represents in the MDL; when the leadership counsel include those representing the greatest financial interests, that can help avoid a problem with opt-outs.

Another practitioner member countered that the proposed Rule 16.1 fills an important gap. This member, too, could suggest specific changes, but would resist the temptation to do so because the proposed rule was ready for publication. The newer judges and practitioners who are playing important roles in contemporary MDL practice need such a rule, particularly in the absence of an updated version of the Manual for Complex Litigation. This member felt it was useful for the committee note to mention discovery in class actions, because MDLs often encompass class actions. Judge Bates responded that the other member had raised legitimate questions whether the committee note to a rule on MDLs should address discovery in class actions, and also whether the list of criteria for leadership counsel should include the size and number of claims represented.

A judge member stated that the rule is ready for publication. An effort is ongoing to broaden the MDL bench, and training for new judges is important. Professor Coquillette agreed that the rule was ready for publication and he congratulated the advisory committee, though he also expressed concern that committee notes should not try to fill the role of a treatise. Another judge member praised the rule for setting a conceptual framework and focusing on the basics. This member suggested requesting comment on the compensation of counsel. Taken together, this member said, the rule text and committee note might be read to authorize the use of common benefit funds, and there is debate on whether that mechanism can be used in an MDL. Another

judge member predicted that the rule would be very helpful but also warned that the committee note would be cited more often than the rule, because the note addresses the most nettlesome issues; if the committee wished to deal with those issues, this member suggested, it should do so in rule text. Judge Bates predicted that the committee would receive disparate comments on the notes' best practices advice, and wondered how it would address those contending viewpoints. Another judge member said that the rule was ready for publication, and it would help to protect district judges from being reversed on appeal, but this member voiced some uneasiness about the committee notes.

Judge Bates commented that the rule's title, "Managing Multidistrict Litigation," promises more than the rule delivers. The rule really concerns just the initial management conference.

The practitioner member who had initially raised several concerns asked to change, in the second paragraph of the committee note to paragraph (c)(1), the phrase "responsibly and fairly represent all plaintiffs" to "adequately represent plaintiffs." In the same paragraph, the member also asked to replace "geographical distributions, and backgrounds" with "geographical distributions, backgrounds, and the size of the financial interests of plaintiffs represented by such counsel." The member further suggested, in the second paragraph of the portion of the committee note to paragraph (c)(4), striking the third sentence (concerning discovery in class actions).

A judge member asked whether the practitioner member's suggested term "adequately" was intended to incorporate adequacy as the term is understood in Rule 23(a)(4)? In doing so, a lot of the class-action case law might implicitly be incorporated. The practitioner member responded that he found the terms "responsibly and fairly" problematic because those words do not appear anywhere else and their meaning is unclear. He also objected to addressing the appointment of leadership counsel in the committee note instead of in rule text. Judge Rosenberg confirmed that the advisory committee stayed away from "adequately" because it did not want there to be confusion with Rule 23.

As to the practitioner member's suggestion that the note to (c)(1) should advise the judge when selecting leadership counsel to keep in mind "the size of the financial interests of plaintiffs represented by … counsel," Judge Rosenberg noted that the next sentence, beginning with "Courts have considered the nature of the actions and parties," showed that the nature of the actions is contemplated as a factor, though perhaps it is not clear enough for the point being made about the size of the financial interest. She also did not know how a judge would know the size of the plaintiffs' financial interests. An early census might disclose the *number* of claims represented by someone under consideration for leadership, but would not disclose their size. The practitioner member responded that, in securities cases, it is done all the time for appointing lead counsel at the start of a case. Professor Marcus interjected that securities cases are different. An article by Professor Jill E. Fisch in the *Columbia Law Review* contrasted them with mass torts in particular. And some of the people attending this meeting had previously urged that it was important not to accept numbers as indicative of valid claims, whatever the size of the claims.

The practitioner member responded that, rather than having rules to deal with all of these difficult issues, the committee is burying those issues in the committee note. These topics are contentious, and the financial interest is a factor that a judge could take into account in a products-liability case or in any other MDL. If one lawyer represents $5 billion in claims and another

represents $100 million in claims, and the judge selects as lead counsel the one with $100 million, there will be opt-outs.

Judge Rosenberg still was not clear how a judge would know the financial value. And including language like that could encourage people to simply get lots of claims filed, even nonmeritorious ones, if the word on the street is that, if the judge sees that someone has a lot of dollars and a lot of claims, that person will get leadership. She understood the practitioner member's point and wondered if there were a way to word the committee note to capture it. The language was intended to be comprehensive and to take a lot of factors into account. The closest the committee note got was referring to the nature of the actions—looking at what the applicant for leadership has in the way of actions. Are there a lot of them? Are they high-enough value such that the applicant should be in leadership?

Judge Bates thought this to be a debatable point with merit to each side. There has not yet been a suggestion of language that resolves the debate; public comment may help.

A judge member remarked that mass-tort cases are not the same as securities cases. If a judge goes with the number or value of claims, that will favor those plaintiffs' counsel who have advertiser relationships. In the member's state, in coordinated proceedings in which counsel organize themselves, counsel do not always select as leaders the lawyers with the biggest numbers—they may not be the ones who will make the best presentation on the issues that will decide the case. The member agreed with Judge Rosenberg that relying on claim numbers or value could incentivize putting in massive numbers of cases. Further, a judge may not always know at the beginning who will have the most clients. Sometimes, particularly if there are both a federal and a state MDL, parties wait for the initial rulings to see where they want to file.

Professor Bradt observed that MDLs vary and are fluid. An MDL may be created at different times in a controversy's lifecycle. Sometimes an MDL is created after it is already known who will be involved, and sometimes an MDL is created very early in anticipation of the filing of a lot of future cases. Moreover, one of the things that the rule anticipates is that leadership is also fluid. As the circumstances of the case change, the transferee judge may find it necessary to change the leadership structure. The leadership piece of the rule is capacious in order to account for that.

The practitioner member who had been proposing revisions to the committee note suggested that, if the committee note stopped after paragraph one or paragraph two, the rule would then do what it was intended to do—identify topics for the initial conference. It would be a modest rule, not an attempt to cover the waterfront. But right now, the note is trying to cover the waterfront. Instead, a rule on each one of these topics should be made.

Judge Bates asked the advisory committee's representatives what changes, if any, they would like to adopt before asking the Standing Committee to approve the proposal for publication.

As to the rule's title ("Managing Multidistrict Litigation"), Judge Rosenberg remarked that the advisory committee had gone back and forth. Although the lion's share of the proposed rule is about the initial management, the rule does address later proceedings as well. For example, paragraph (c)(8) speaks of a schedule for additional management conferences with the court. So the advisory committee had stuck with "Managing Multidistrict Litigation" instead of "Initial

Management." A judge member suggested changing the rule's title to simply "Multidistrict Litigation." Rule titles usually do not include gerunds. Judge Rosenberg accepted this suggestion on behalf of the advisory committee.

Professor Marcus responded to a previous remark that there is always more than one management conference. He noted that the rule is not a command to have more than one. Paragraph (c)(8) lets the judge order the lawyers to provide a schedule for further management meetings. Subdivision (d) also advises the judge to be more flexible than under Rule 16 in making revisions to the initial management program. Of the two kinds of issues raised about the rule at today's meeting—smaller wording issues versus more fundamental issues about what should be included in the rule—the wording issues seemed more promising to look at today. Professor Marcus suspected that there would be a long compilation of public comments if the rule were published.

In response to a suggestion by Judge Bates, Judge Rosenberg stated that subdivision (c)'s text would say simply "any matter listed below" rather than "any matter addressed in the list below."

Professor Marcus agreed with Judge Bates that the reference to Rule 16(b) in the fourth paragraph in the committee note on paragraph (c)(1) should instead be a reference to Rule 16.1(b).

Judge Bates had asked whether paragraph (c)(6) should say "to handle discovery efficiently" instead of "to handle it efficiently"; after discussion with the style consultants, the advisory committee representatives decided not to make that change.

Judge Rosenberg agreed with Judge Bates that "Even if the court has not" in the committee note to paragraph (c)(9) should be changed to "Whether or not the court has."

A practitioner member asked if the advisory committee wanted to retain (in the second paragraph of the committee note to paragraph (c)(4)) the sentence about discovery from individual class members. Another practitioner member supported deleting that sentence because it concerned class actions, not MDLs. The practitioner member who had previously expressed support for keeping the sentence suggested that the problem with the sentence was its statement that "it is widely agreed" that such discovery is often inappropriate. There is nothing in Rule 23 law about this, but there is a lot of caselaw. This member suggested that perhaps better language would be, "For example, it may be contended that discovery from individual class members is inappropriate in particular class actions." An academic member questioned why the example should be included in the note. Whether it is accurate or not, it may be better to take it out or find another example. The practitioner member responded that it comes up in hybrid class MDLs in which there are both class actions and individual claims arising from the same product or course of conduct. The example is a way of reminding courts that they may be dealing with different standards, issues, terminology, and decisions based on whether they are dealing with the individual component or the class component of an MDL.

A practitioner member again raised the question whether all leadership counsel must responsibly and fairly represent all plaintiffs. Another practitioner member responded that it might be wiser to say that they will fairly and reasonably represent the plaintiffs or the group of plaintiffs they are appointed to represent. The reason there are diverse leadership groups in MDLs is that

some will represent class plaintiffs, for example, while others will represent a particular type of claim. "All" plaintiffs may be too literal.

Judge Rosenberg agreed that the proposed committee note should be modified to remove the word "all" in the phrase "responsibly and fairly represent all plaintiffs" in the second paragraph of the committee note to paragraph (c)(1). She also agreed that the second paragraph of the committee note to paragraph (c)(4) should be modified to remove the sentence about class-member discovery.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed new Rule 16.1 for public comment with one change to the title of the proposed rule (striking "Managing"), one change to the text of subdivision (c) (replacing "any matter addressed in the list below" with "any matter listed below"), and the following changes to the committee note as printed in the agenda book:**

- In the second paragraph of the note to paragraph (c)(1), "all" was struck from the phrase "responsibly and fairly represent all plaintiffs."

- In the fourth paragraph of the note to paragraph (c)(1), "Rule 16(b)" was changed to "Rule 16.1(b)."

- In the second paragraph of the note to paragraph (c)(4), the third sentence (which concerned class-member discovery and began "For example, it is widely agreed") was struck.

- In the note to paragraph (c)(9), the phrase "Even if the court has not" was changed to "Whether or not the court has."

Information Items

Discovery Subcommittee Projects. Professor Marcus reported on this item. This subcommittee is considering four issues, of which one may not pan out, and the others are in various states of evolution.

One issue is how to serve a subpoena. Rule 45(b)(1) says that service requires "delivering" the subpoena to the witness. Does that mean in-hand? By Twitter? Perhaps there are amendments that could improve the rule. Rules Law Clerk Chris Pryby wrote an excellent memorandum on state practices for serving subpoenas. The subcommittee will consider that new information.

Second, the subcommittee is considering whether to make rules about filings under seal. The agenda book shows how the subcommittee's thinking has evolved. When the subcommittee first learned about an Administrative Office project on sealed filings, the subcommittee thought it should wait for that project to finish; now the subcommittee has been told it should not wait. One question is: what standard should be used? The subcommittee's initial effort provides simply that the standard is not the same as that governing issuance of a protective order for information exchanged through discovery. Another question is: what procedures should be used? The subcommittee identified a wide variety of procedural issues, listed on pages 810–11 of the agenda book, that could be addressed by a uniform national rule. But the scope of what would ultimately

be addressed is uncertain. Professor Marcus asked for input on whether clerk's offices would welcome a national rule on this.

Third, Judge Michael Baylson submitted a proposal concerning discovery abroad under Rule 28 (Persons Before Whom Depositions May Be Taken). This is not a rule that most attorneys often deal with. The subcommittee is beginning to look at this proposal.

Finally, the FJC has completed a thorough study of the mandatory-initial-discovery pilot project. Its findings do not appear to support drastic changes to the rules. The subcommittee will consider whether any changes to the rules are warranted in light of the study.

* * *

After the Civil Rules Committee delivered this information item, it temporarily yielded the floor to the Evidence Rules Committee. The Report of the Civil Rules Committee continued after the conclusion of the Evidence Rules Committee presentation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Patrick Schiltz and Professors Daniel Capra and Liesa Richter presented the report of the Advisory Committee on Evidence Rules, which last met in Washington, D.C., on April 28, 2023. The advisory committee presented five action items and one information item. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 910.

Action Items

New Rule 107 (Illustrative Aids). Judge Schiltz reported on this item. The advisory committee sought final approval of new Rule 107, which appeared starting on page 920 of the agenda book.

Illustrative aids are not themselves evidence. They are instead devices to help the trier of fact understand the evidence. Illustrative aids are used in virtually every trial, but the Federal Rules of Evidence do not address them. Nor do the other rules of practice and procedure. The new rule would fill this gap.

The rule as published would do five things. First, it would define illustrative aids, and it would give judges and litigants a common vocabulary and at least a touchstone in trying to distinguish illustrative aids from admissible evidence.

Second, it would provide a standard for the judge and the parties to apply in deciding whether an illustrative aid may be used: the utility of the aid in assisting comprehension must not be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. The advisory committee specifically asked commentators to address whether it should be just an "outweighed" standard or a "substantially outweighed" standard.

Third, the new rule as published provided a notice requirement. Before showing the jury an illustrative aid, a litigant would first need to show it to the other side and give the other side a chance to object.

Fourth, the rule bars illustrative aids from going to the jury room unless the parties consent to it or the court makes an exception for good cause.

Finally, the rule would require that, where practicable, illustrative aids be made part of the record so that, if an issue about an illustrative aid comes up on appeal, the appellate court has it in the record.

Professor Capra listed several changes to the proposed rule's committee note made since its publication for public comment but not noted in the agenda book. (These changes are among those listed at the end of this section.) He then discussed the public comments on the proposed new rule. There were many comments and much opposition to the notice requirement. Commenters gave various arguments against the notice requirement, including that it would make litigation more expensive, that it was unnecessary, and that it would steal attorneys' thunder. The advisory committee decided to delete the notice requirement from the proposed rule and instead discuss the issue of notice in the committee note.

Professor Capra also discussed the advisory committee's decision to use the "substantially outweighed" standard. This standard tracks that in Rule 403, and it is geared toward admitting illustrative aids. Based on the public comment, the advisory committee decided that it did not make sense for different tests to apply to evidence and illustrative aids.

Public comment also led the advisory committee to choose the new rule's location within the Federal Rules of Evidence. The rule was published for public comment as Rule 611(d) because Rule 611(a) is frequently used by courts to regulate illustrative aids. But Rule 611, which is in Article Six, is about witnesses, and illustrative aids are not really about witnesses. The new rule fits better in Article One, which is about rules of general applicability. Therefore the proposed rule was designated as new Rule 107.

Last, Professor Capra noted that a new subdivision (d) was added to new Rule 107 to direct courts and litigants to Rule 1006 for summaries of voluminous evidence because there is a lot of confusion in the courts about the difference between summaries and illustrative aids.

A practitioner member observed that he, like other members of the trial bar, had been very concerned about the proposed rule as published. He supported the deletion of the notice requirement and the use of "substantially outweighed" as the standard; he hoped that the latter would encourage the use of illustrative aids. The member stressed that some illustrative aids equate to a written version of the lawyer's actual presentation, such that providing advance notice of the aid would equate to a preview of that presentation. Such disclosures, he argued, would impair truth-seeking and increase the number of objections. So this member had concerns about the seventh paragraph of the committee note (shown on page 923 of the agenda book), which addressed the question of notice in a way that this member thought put too much of a thumb on the scale in favor of advance notice. The member suggested adding the following as the penultimate sentence of the paragraph: "In addition, in some cases, advance disclosure may

improperly preview witness examination or attorney argument or encourage excessive objections." Asked to explain what number of objections would be optimal, the member modified his suggested sentence by deleting "or encourage excessive objections." The member also suggested revising the last sentence of the paragraph to reflect the fact that often the parties will resolve issues concerning advance notice by agreement; Professor Capra expressed reluctance to make that change because the potential for the parties to resolve an issue by agreement exists for many types of disputes.

A judge member suggested cutting the entire paragraph discussing notice. The member thought that the paragraph reflected an increasingly outdated view, and it was heavily leaning in a direction objected to by so many commenters. At the least, this member argued, the sentence beginning with the word "ample" should be replaced with the sentence suggested by the practitioner member.

Another judge member likened issues surrounding the definition of "illustrative aid" to issues prevalent in disputes about summary witnesses. The member suggested refining the definition of illustrative aid so that it cannot be used as a vehicle to bring in extra-record information. Professor Capra thought that such a situation would be prevented by Rule 403: if an aid contained additional evidence not yet in the record, that additional evidence would be evaluated under Rule 403. The practitioner member suggested that the "substantially outweighed" standard would address this problem; a purported aid that contained evidence not in the record would be subject to multiple objections, including that it would create unfair prejudice. Professor Capra noted that the Rule 403 and Rule 107(a) balancing tests would work the same way.

Judge Bates asked what would happen if someone used some type of illustrative aid containing certain terms and added a definition not in evidence—supplying additional information beyond what had been admitted into evidence in the case. Professor Capra thought that Rule 403 would prevent that from happening because of the added information's prejudicial effect.

Judge Schiltz remarked that it is difficult to define illustrative aids to exclude those sorts of situations. The rule gives a negative definition of illustrative aids—that they are not evidence. The rule has to state the idea fairly generally and let trial judges apply it. For instance, the rule cannot say illustrative aids are limited to summaries or compilations because they are much broader than that.

The judge member who had raised the concern about the inclusion of extra-record information again suggested stating explicitly that an illustrative aid cannot include information not already in the record. Professor Capra asked if putting "admissible" on line 4—"understand *admissible* evidence or argument"—would be satisfactory. The judge member responded that, no, someone could help the trier of fact understand admissible evidence by introducing extra-record evidence, as in Judge Bates' earlier illustration. The judge member also thought that whether the aid's utility in assisting comprehension is substantially outweighed by the danger of unfair prejudice is not the correct test for introducing unadmitted evidence through illustrative aids; rather, the presence of that unadmitted evidence should disqualify the aid from being used altogether. But the rule currently does not have anything that prevents that.

The judge member further commented that it might be worth adding a requirement in (b) to tell the jury that illustrative aids are not evidence. Professor Capra responded that it was in the committee note instead because most rules of evidence do not address jury instructions in the text.

A practitioner member commented that it was important to keep in mind that the rule as it now stood encompassed illustrative aids used throughout a trial, including during opening and closing arguments. An illustrative aid during a closing argument will typically include argument; it may for example include headings that characterize evidence a certain way.

Professor Bartell suggested taking the fourth sentence of the first paragraph of the committee note and placing it in the rule text to define "illustrative aid." A judge member expressed support for that suggestion. Professor Capra said that the advisory committee, after repeated consideration, felt that the definition did not work as well in the rule text as in the committee note.

A judge member expressed appreciation for the proposed new rule, and predicted that it would clear up confusion concerning when an exhibit goes back to the jury. The rule does a good job of balancing the interests on that issue. The member also thought that attorneys would generally use common sense to know not to add unadmitted evidence to an illustrative aid. One textual addition that might help reinforce that behavior could be to add the word "the" before the word "evidence" in line 4 of Rule 107(a) as shown on page 920 of the agenda book—"understand *the* evidence or argument." The member further noted that it would probably be necessary to give limiting instructions to ensure that the jury uses illustrative aids properly. Professor Capra accepted the proposed edit of adding the word "the" before "evidence."

Judge Bates wondered if the concern about adding extra-record information evidence could be addressed by adding to the first paragraph of the committee note: "An illustrative aid may not be used to bring in additional information that is not in evidence." Judge Schiltz responded that that would limit argument too much—a lot of argument brings in information not technically in evidence. Judge Bates amended the suggested addition to refer to "additional factual information." Professor Capra reiterated his belief that if there is other evidence offered in the guise of an illustrative aid, it would be analyzed under Rule 403, not 107.

A judge member understood the concern raised about adding unadmitted evidence to an illustrative aid but thought it was not worth worrying about. It is like closing arguments—there is not a rule saying that something not in evidence cannot be mentioned in closing argument, yet any attempt to do so is met with an objection.

An academic member worried about the possibility that confusion about exactly what an illustrative aid is—how it is different, what it captures, what it does not capture, and how it is implemented—would create a flurry of objections and litigation. The answer might be to monitor the caselaw and anecdotal reports so as to learn how the rule is implemented.

Ms. Shapiro commented that the DOJ trial attorneys with whom she had spoken were thrilled to have a rule like this because the courts' treatment of illustrative aids—even their vocabulary—has been inconsistent.

Judge Bates asked whether the last sentence of the third paragraph of the committee note should be revised by adding "or argument" after "evidence" on page 922. Professor Capra accepted this change.

As to the seventh paragraph of the committee note (on page 923), Judge Bates also pointed out that a decision had to be made concerning the suggestions to delete or amend that paragraph's discussion of advance notice. Judge Schiltz recalled that a majority of the advisory committee members had favored a notice requirement; the committee understood the opposition to such a requirement, and had meant to accomplish a compromise by deleting the requirement from the rule text but including the notice discussion in the committee note. He was concerned about changing the committee note too much after achieving that compromise. He thought that adding the sentence about the possible downsides of advance notice and maybe other modest changes would be acceptable, but cutting the paragraph altogether would go too far.

A judge member suggested cutting the sentence that was the penultimate sentence of the seventh paragraph as shown on page 923 (the sentence that began "Ample advance notice"). Judge Schiltz agreed to that change. A judge member expressed support for retaining that sentence because it helpfully illustrated different scenarios for the use of illustrative aids; Professor Capra added that the sentence presented a balanced viewpoint. Another practitioner member, though, supported deleting the sentence because it focused on whether requiring advance notice *can* be done rather than whether it *should* be done—the latter being, in this member's view, the more important question. Judge Schiltz agreed that he would rather take out the sentence than possibly lose the support of those concerned about the notice issue.

A judge member questioned the use of the term "infinite variety" in the fourth sentence of the note paragraph concerning advance notice. Professor Garner suggested "wide variety," which Professor Capra accepted.

Professor Capra summarized the amendments to the proposal. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 107 with one change to the proposed rule to add "the" before "evidence" on line 4 on page 920 of the agenda book, and the following changes to the committee note as printed on pages 921–24 of the agenda book:**

- In the first paragraph, fifth line, in the phrase "as that latter term is vague and has been subject," the language "is vague and" was struck.

- In the second paragraph, third line, the word "factfinder" was changed to "trier of fact."

- In the second paragraph, last line, the language "to study it, and to use it to help determine the disputed facts" was changed to "and use it to help determine the disputed facts." The comma preceding this line was also struck.

- In the third paragraph, third line, the word "factfinder" was changed to "trier of fact." In the third paragraph, second-to-last line, the phrase "finder of fact" was changed to "trier of fact," and the phrase "or argument" was added after "understand evidence."

- In the fourth paragraph, second line, the word "information" was changed to "evidence."

- In the seventh paragraph (which commences "Many courts require"), the sentence "That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used," was changed to "That said, there is a wide variety of illustrative aids and a wide variety of circumstances under which they might be used."

- In the seventh paragraph, the sentence beginning "Ample advance notice" was struck and replaced with the sentence: "In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument."

Amendment to Rule 1006 (Summaries to Prove Content). Judge Schiltz reported on this item. The advisory committee sought final approval for an amendment to Rule 1006, which appeared on page 965 of the agenda book.

Rule 1006 allows a summary of voluminous admissible evidence to be admitted into evidence itself. Unlike an illustrative aid, these summaries are evidence and may go to the jury room and be used like any other evidence. The summary may be used in lieu of the voluminous underlying evidence or in addition to some or all of that voluminous underlying evidence.

Courts have had a great deal of difficulty with Rule 1006. Some incorrectly say that a Rule 1006 summary is not evidence; some incorrectly say that a Rule 1006 summary cannot be admitted unless all the underlying voluminous evidence is first admitted; and some incorrectly say that a Rule 1006 summary cannot be admitted if any of the underlying evidence has been admitted.

The proposed amendment would not change the substance of Rule 1006. It would instead clarify the rule in order to reduce the likelihood of errors.

Professor Richter reported that the advisory committee received seven public comments on the proposed amendment. Those comments were largely supportive. There was one note of criticism. A longstanding part of the foundation for a Rule 1006 summary is that the underlying voluminous materials must be admissible in evidence, even though they need not actually be admitted. Courts were not having a problem with that foundational requirement, so the advisory committee did not include it in the version published for public comment. The advisory committee recognized this omission and, at its Fall 2022 meeting, unanimously agreed to add the requirement of admissibility to the rule text. This addition was shown on page 965, line 5. That was the only change to the proposed amendment since the public-comment period.

Judge Bates asked whether, in line 4, the word "offered" should be added, so that the text reads, "The court may admit as evidence a summary, chart, or calculation *offered* to prove . . . ."

Turning to the fourth paragraph of the committee note, a judge member asked whether the verb "meet" in the phrase "meet the evidence" was sufficiently clear. After some discussion among the committee members and the advisory committee's representatives, the advisory committee's representatives agreed to replace the word "meet" with "evaluate."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 1006 with the following changes: in**

the rule text, adding the word "offered" after "calculation" as shown on page 965, line 4, of the agenda book; and in the fourth paragraph of the committee note, replacing the word "meet" with "evaluate."

Amendment to Rule 613(b) (Extrinsic Evidence of a Prior Inconsistent Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 613(b), which appeared on page 952 of the agenda book.

Rule 613(b) addresses the situation in which a witness takes the stand and testifies, and a party wants to impeach that witness by introducing extrinsic evidence—for example, the testimony of another witness, or a document— that the witness made an inconsistent statement in the past. Under the common law, before that party is allowed to bring in that extrinsic evidence to show that the witness made an inconsistent statement in the past, the witness had to be given a chance to explain or deny making the statement. This is called the requirement of prior presentation.

Rule 613(b) took the opposite approach: as long as sometime during the trial the witness had a chance to explain or deny the prior inconsistent statement, the extrinsic evidence could come in. But most judges ignore this rule—Judge Schiltz admitted ignoring it himself—and follow the common law. The common-law rule makes sense because the vast majority of the time, the witness will admit making the inconsistent statement, obviating the need to unnecessarily lengthen the trial by admitting the extrinsic evidence. Further, if the extrinsic evidence is admitted after the witness testifies, then someone has to bring the witness back for the chance to explain or deny it—and the witness may have flown across the country.

The proposed amendment therefore restores the common-law requirement of prior presentation. But it gives the court discretion to waive it—for example, if a party was not aware of the inconsistent statement until the witness finished testifying.

Professor Richter reported that the advisory committee received four public comments on Rule 613(b), all in support of restoring the prior-presentation requirement. The comments noted that it would make for orderly and efficient impeachment and impose no impediment to fairness. The proposal would also align the rule's text with the practice followed in most federal courts. There was no change to the rule text from the version that was published for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 613(b).**

Amendment to Rule 801(d)(2) (An Opposing Party's Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 801(d)(2), which appeared starting on page 956 of the agenda book.

Rule 801(d)(2) provides an exception to the hearsay rule for statements of a party-opponent. Courts are split about how to apply this rule when the party at trial is not the declarant but rather the declarant's successor in interest. For example, suppose the declarant is injured in an accident, makes an out-of-court statement about the incident that caused the declarant's injuries, then dies. If the declarant's estate sues, may the defendant use the deceased declarant's out-of-court statement against the estate? Some courts say yes because the estate just stands in the shoes of the declarant and should be treated the same. Some courts say no because it was technically the

human-being declarant who made the out-of-court statement, not the legal entity (the estate) that is the actual party.

The proposed amendment would adopt the former position: if the statement would be admissible against the declarant as a party, then it's also admissible against the party that stands in the shoes of the declarant. The advisory committee thought that the fairest outcome, and it also eliminates an incentive to use assignments or other devices to manipulate litigation.

Professor Capra reported that there was sparse public comment. Some comments suggested that the term "successor in interest" be used, but that was problematic because the term is used in another evidence rule, where it is applied expansively. Because it is not supposed to be applied expansively here, the committee did not adopt that change.

Judge Bates highlighted the statement in the committee note's last paragraph, that if the declarant makes the statement after the rights or obligations have been transferred, then the statement would not be admissible. He asked whether that was a substantive provision and whether there was an easy way to express it in the rule's text. Professor Capra responded that there was not an easy way to express it in the text, and this issue would arise very rarely. Furthermore, the rationale for attribution would not apply if the interest has already been transferred. The advisory committee decided in two separate votes not to include that issue in the rule text and instead to keep it in the committee note.

Turning back to the proposed rule text on line 29 of page 957 ("If a party's claim, defense, or potential liability is directly derived …"), Professor Hartnett asked whether "directly" was the appropriate term to use. For example, if a right passes through two assignments or successors in interest, would "directly derived" capture that scenario? Professor Capra responded that the term comes from the case law, and "derived" on its own seemed too diffuse.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 801(d)(2).**

Amendment to Rule 804(b)(3) (Statement Against Interest). Judge Schiltz reported on this item. The advisory committee sought final approval of a proposed amendment to Rule 804(b)(3), which appeared starting on page 960 of the agenda book.

Rule 804(b)(3) provides an exception to the hearsay rule for declarations against interest. The proposed amendment addresses a particular application of that rule.

In a criminal case in which the out-of-court statement is a declaration against penal interest—typically, a statement by somebody outside of court that the declarant was the one who actually committed the crime for which the defendant is now on trial—then the proponent of that statement must provide corroborating circumstances that clearly indicate the trustworthiness of the statement.

There's a dispute in the courts about how to decide if such corroborating circumstances exist. Some courts say that the judge may only look at the inherent guarantees of trustworthiness underlying the statement itself, not at any independent evidence (such as security-camera footage

or DNA evidence) that would support or refute the out-of-court confession. But most courts say the judge can look at independent evidence.

The proposed amendment resolves the split. It takes the side of the courts that say that the judges *can* look at independent evidence.

Professor Richter noted that the advisory committee received five public comments on this proposal, all of them in support. But several expressed confusion because, as originally drafted, the proposed rule used the term "corroborating" twice in the same sentence. The distinction was not clear between the finding of "corroborating circumstances" that a court had to make and the corroborating "evidence" that a court could use to make that finding.

The advisory committee modified the text slightly to avoid using the term "corroborating" twice and to clarify the distinction between the finding and the evidence. The revised rule text directs the court to consider "the totality of circumstances under which [the out-of-court statement] was made and any evidence that supports or contradicts it." Conforming changes were made to the committee note. The committee note also explains that a 2019 amendment to the residual hearsay exception (Rule 807) that does the same thing—expanding the evidence a court may use to find trustworthiness under that exception—should be interpreted similarly, even though amended Rules 804(b)(3) and 807 use slightly different wording.

A judge member observed that the criterion in the rule—that the statement tends to expose the declarant to criminal liability—was broader than Judge Schiltz's explanation that the statement exposes the declarant to criminal liability for the crime for which the defendant is being tried; the member asked which was the intended test. Judge Schiltz responded that his explanation was just the most common example, and the rule still reaches all statements exposing the declarant to criminal liability.

Judge Bates asked whether it is correct to say in the committee note that the language used in Rule 807, speaking only of "corroborating" evidence, is consistent with the "evidence that supports or contradicts" language in the proposed amendment to Rule 804. "Supporting or contradicting evidence" includes evidence that is not "corroborating." Professor Capra responded that, because Rule 807's committee note also discusses an absence of evidence, courts applying the post-2019 Rule 807 have considered evidence contradicting the account. Thus, the two rules, though not identical, are consistent. Judge Schiltz noted that the current proposal gets to the same point in a cleaner way. Professor Capra also remarked that the phrase "corroborating circumstances" was not changed because it has been in the rule for 50 years and there is a lot of law about it.

A judge member asked why the proposed rule uses a narrow term like "contradicts" instead of a broader term like "undermines," given that "supports" is a broad statement and the opposing term ought to have similarly broad scope. After some discussion, the advisory committee representatives agreed to replace "contradicts" with "undermines" (in line 27 on page 961 of the agenda book) and to make a corresponding change to the committee note.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 804(b)(3) with the following changes:**

in the text of Rule 804(b)(3)(B), replacing "contradicts" with "undermines," and making the same change in the committee note.

Information Item

Juror Questions. Judge Schiltz reported on this item. The advisory committee proposed an amendment that would have established minimum procedural protections if a court decided to let jurors pose questions for witnesses. The proposed rule was clear that the advisory committee did not take any position on whether that practice should be allowed.

The advisory committee presented this proposal at a previous meeting of the Standing Committee. Some members of the Standing Committee expressed concern that putting safeguards in the rules would encourage the practice.

The matter was returned to the advisory committee for further study. It held a symposium on the topic at its Fall 2022 meeting. The advisory committee then discussed the issue at its Spring 2023 meeting and decided to table the proposal. There was significant opposition to it even within the advisory committee.

Professor Capra noted that the advisory committee has sent its work to the committee updating the Benchbook for U.S. District Court Judges. Judge Schiltz explained that the advisory committee suggested that the proposed procedural safeguards may be appropriate for inclusion in the revision of the Benchbook that is currently being worked on.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

Information Items (Continued)

Rule 41(a)(1)(A) (Voluntary Dismissal by the Plaintiff Without a Court Order). Professor Bradt reported on this item.

The question under this rule is: what and when may a plaintiff voluntarily dismiss without a court order and without prejudice? The rule refers to the plaintiff's ability to voluntarily dismiss an "action." What does that word mean? Does it mean the entire case, all claims against all defendants? Or can it mean something less? The circuits are split on whether a plaintiff could dismiss all claims against one defendant in a multidefendant case. There's also a district-court split about whether a plaintiff may voluntarily dismiss even less without a court order, such as an individual claim.

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, is trying to figure out whether and to what extent this is a real-world problem rather than one that courts effectively muddle through. That is, can judges effectively narrow cases, despite the fact that Rule 41(a)(1)(A) speaks only of an "action"? Since the January 2023 Standing Committee meeting, the Rule 41 Subcommittee has conducted outreach with Lawyers for Civil Justice and the American Association for Justice, and it has an upcoming meeting with the National Employment Lawyers Association.

If this is a real problem, the next step would be to ask whether it can be solved by consensus. The subcommittee may need to consider the deeper question of how much flexibility a plaintiff ought to have. And if a plaintiff does have that flexibility, by when must it be exercised? The rule currently says that a plaintiff has until the answer or a motion for summary judgment is filed. But there might be a good reason to move that deadline up to the filing of a Rule 12 motion to dismiss. Further, an amendment to Rule 41 might have downstream effects on other rules designed to facilitate flexibility during litigation, such as Rule 15.

Judge Bates observed that the Eleventh Circuit in Rosell v. VMSB, LLC, 67 F.4th 1141, 1143 (11th Cir. 2023), recently held that an "action" means the whole case and therefore dismissed an appeal for lack of jurisdiction. It seems to be an issue that is live in the courts and could be causing problems for litigants.

Professor Bradt noted that the word "action" also appears in, and the interpretive questions thus extend to, Rule 41(a)(2) (concerning dismissals by court order).

Rule 7.1 (Disclosure Statement). Professor Bradt reported on this item.

The advisory committee has formed a subcommittee to examine Rule 7.1, which requires corporate litigants to disclose certain financial interests. The rule helps inform judges whether they must recuse themselves because of a financial interest in a party or the subject matter. It requires a party to disclose its ownership by a parent corporation. The problem is that the rule may not accurately reflect all of the different kinds of ownership interests that may exist in a party. One topic under discussion is when a "grandparent" corporation owns the parent corporation.

This issue has gotten a great deal of attention from the public and from Congress. At the last advisory-committee meeting, a subcommittee to investigate the issue was appointed, and it will be chaired by Justice Jane Bland of the Texas Supreme Court. The subcommittee will have its first meeting soon. It will initially research the relevant case law and local rules in the federal courts, and it will also look to state courts for insight into how best to resolve the issue.

Professor Beale wondered whether the Administrative Office or some other entity could create a database in which one could query a corporation and find all ownership interests in the corporation, in the corporation's owners, and so on, rather than depending on parties' disclosures. Professor Bradt responded that the subcommittee is going to look at this possibility, but a technological solution may be challenging because of the proliferation of many kinds of corporate structures.

Professor Bradt noted that it might make sense for the subcommittee to work with the Appellate Rules Committee on this issue because many of the questions addressed during the report about amicus disclosures parallel the questions the subcommittee will be addressing in this project.

A practitioner member commented that law firms have to investigate corporate ownership for conflict purposes. Services already exist with this information. The wheel does not necessarily need to be reinvented. Professor Bradt agreed, but also noted that the subcommittee wants to be mindful of whether those services would be sufficiently accessible to parties with fewer resources.

Additional Items. Professor Marcus briefly reported on several additional items.

Rule 23, dealing with class actions, is before the advisory committee again, this time with respect to two different issues. First, in a recent First Circuit opinion, Judge Kayatta addressed the question of incentive awards for class representatives. Because the Supreme Court has so far declined to grant certiorari on this issue, it remains before the advisory committee. Second, the Lawyers for Civil Justice suggested a change to Rule 23(b)(3) on the "superiority" prong to let a court conclude that some nonadjudicative alternative might be superior to a class action.

The advisory committee also continues to look at methods to sensibly handle applications for in forma pauperis ("IFP") status. Perhaps it should even be called something different so that people who are eligible will understand what IFP means.

Finally, three suggestions have been removed from the advisory committee's agenda. The first, suggested in 2016 by Judge Graber and then-Judge Gorsuch, would have amended Rule 38, dealing with jury-trial demands, in response to the declining frequency of civil jury trials. But studies suggest that Rule 38 is not the source of the problem, so an amendment to the rule did not seem the appropriate solution.

Second, Senators Tillis and Leahy wrote to the Chief Justice about a district judge who was extremely active in patent-infringement cases. This judge purportedly held several *Markman* hearings a week, using deputized masters or judicial assistants to assist him with that caseload. The senators did not believe that Rule 53 authorized that kind of use of special masters. But the senators did not suggest that Rule 53 should be changed. Also, the relevant court has revised its assignment of patent-infringement cases in a way that can reduce this problem. This item is therefore no longer on the advisory committee's agenda.

Third, an attorney proposed amending Rule 11 to forbid state bar authorities to impose any discipline on anyone who is accused of misconduct in federal court unless a federal court has already imposed Rule 11 sanctions. Because this proposal misconstrues the function of Rule 11, the advisory committee removed this proposal from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge James Dever and Professors Sara Sun Beale and Nancy King presented the report of the Advisory Committee on Criminal Rules, which last met in Washington, D.C., on April 20, 2023. The advisory committee presented three information items and no action items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 875.

Information Items

Rule 17 and Pretrial Subpoena Authority. Judge Dever reported on this item. Judge Jacqueline Nguyen chairs the Rule 17 Subcommittee. Rule 17, which deals with subpoenas in criminal trials, has not been updated in about 60 years. The New York City Bar Association's White Collar Crime Committee submitted a proposal to amend it.

The advisory committee responded to the proposal by first asking whether there is a problem with how Rule 17 currently works. It began gathering information in its October 2022 meeting, and it has continued that information-gathering by asking how companies that deal with big data respond to subpoenas.

About a third of the states have criminal-subpoena rules that are structured differently than the federal rules. The Rule 17 Subcommittee reported on the topic at the advisory committee's April 2023 meeting.

The advisory committee is considering how to appropriately distinguish procedurally between protected information, such as medical records, personnel records, or privileged information, and other information, such as a video of events occurring outside a store.

Professor Beale added that the subpoena issue is an important question. Defense attorneys have very little means to get information from third parties because Rule 17 has been so narrowly interpreted.

Rule 23 and Jury-Trial Waiver Without Government Consent. Judge Dever reported on this item.

The American College of Trial Lawyers' Federal Criminal Procedure Committee submitted a proposal to amend Rule 23(a) to eliminate the requirement that the government consent to a defendant's request for a bench trial.

Currently, a defendant must waive a jury trial in writing, the government must consent, and the court must also approve the waiver. About a third of the states do not require the prosecution's consent to waive a jury trial. The federal rules have always required it.

The advisory committee has not yet appointed a subcommittee to review the proposal. It has asked the Federal Defenders and Criminal Justice Act lawyers on the advisory committee to gather more information. One premise of the proposal was that there is a backlog of trials because of COVID, but none of the district judges on the advisory committee had had that experience. So the advisory committee wanted to gather more information. That process is ongoing.

The advisory committee is also trying to gather information on what rationales, if any, the DOJ gives for not consenting to a jury trial. Part of what animates the discussion is that, although the Sixth Amendment talks about the accused's right to a jury trial, Article III, Section 2's directive that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" does not mention the defendant. So the United States actually has its own, independent interest in having a jury trial.

Professor Beale predicted that the Rule 23 proposal would generate interesting discussion about whether it is appropriate for parties to be adversarial about demands or waivers of juries or whether there is something different about the jury as an institution that makes it inappropriate for parties to try to demand it or waive it for strategic advantage. There are also apparently differences in the government's practices among the 94 judicial districts. She thought that the advisory committee's attention to the issue might spur the DOJ to change its process on its own.

Judge Bates asked to clarify whether the Rule 23 investigation would only focus on the government's consent to bench trials, not court approval. Professor Beale confirmed that the proposal focused only on government consent.

Professor Marcus remarked that the proposal seems to expand the court's power by letting it decide whether to grant the defendant's request for a bench trial even though the government does not consent.

Judge Dever reiterated that only a minority of the states' practices currently align with the proposal. The federal rule had always required the government's consent, and the Supreme Court has rejected a constitutional challenge to it.

Judge Bates concluded by noting that the DOJ, whose practices vary from district to district, had volunteered to provide information about what they do and have done with respect to requests for bench trials.

Rule 49.1 (Privacy Protections for Filings Made with the Court). As to this item, Judge Dever deferred to Professor Bartell's previous report on Senator Wyden's suggestion concerning privacy protections and court filings.

OTHER COMMITTEE BUSINESS

Information Item

Legislative Update. Judge Bates and Mr. Pryby stated that there was no significant legislative activity to report since the last meeting of the Standing Committee.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to provide input to the Judicial Conference's Executive Committee about the strategic plan for the federal judiciary. Judge Bates requested comment, either then or after the meeting, on the draft report that began on page 1005 of the agenda book.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff and Professor Struve to move forward with the report. Without objection: **The Standing Committee so authorized Judge Bates.**

New Business

No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the committee members for their contributions and patience. The Standing Committee will next convene on January 4, 2024.

TAB 3A2

Agenda E-19 (Summary)
Rules
September 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3

2. a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law

   b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

   c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 5-9

3. Approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 12-13

4. Approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 17-19

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 6, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee (9th Cir.), chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz (D. Minn.), chair, Professor Daniel J. Capra, Reporter, and Professor Liesa Richter, consultant, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Christopher Ian Pryby, Law Clerk to the Standing Committee;

John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. An additional update concerned the start of coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees to evaluate a proposal to adopt a unified standard for admission to the bar of federal district and bankruptcy courts. Finally, the Standing Committee approved a brief report regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 32 (Form of Briefs, Appendices, and Other Papers), Rule 35 (En Banc Determination), Rule 40 (Petition for Panel Rehearing), and Appendix of Length Limits

The Advisory Committee completed a comprehensive review of the rules governing panel and en banc rehearing, resulting in proposed amendments transferring the content of Rule 35 to Rule 40, bringing together in one place the relevant provisions dealing with rehearing. The proposed amendments to Rule 40 would clarify the distinct criteria for rehearing en banc

and panel rehearing, and would eliminate redundancy. Rule 32 and the Appendix of Length Limits would be amended to reflect the transfer of the contents of Rule 35 to Rule 40. The proposed amendments were published in August 2022. The Advisory Committee reviewed the public comments and made no changes.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rule 6 (Appeal in a Bankruptcy Case) and Rule 39 (Costs on Appeal) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Appellate Rule 6 would clarify the treatment of appeals in bankruptcy cases. A proposed amendment to Appellate Rule 6(a) would account for the fact that the time limits for certain post-judgment motions that reset the time to take an appeal from a district court to a court of appeals are different when the district court was exercising bankruptcy jurisdiction under 28 U.S.C. § 1334 than when it was exercising original jurisdiction under other statutory grants. The proposed committee note provides a table showing which Bankruptcy Rule governs each relevant type of post-judgment motion and the time allowed under the current version of the applicable Bankruptcy Rule. Proposed amendments to Appellate Rule 6(c) would address direct appeals in bankruptcy cases, which are governed by 28 U.S.C. § 158(d)(2). The Advisory Committee determined that Rule 6(c)'s current reliance on Rule 5 (Appeal by Permission) was misplaced and that there is considerable confusion in applying the Appellate

Rules to direct appeals. For that reason, the proposed amendments to Rule 6(c) would address direct appeals in a largely self-contained way. Finally, the proposed amendments also provide more detailed guidance for litigants about initial procedural steps once authorization is granted for a direct appeal to the court of appeals.

Rule 39 (Costs)

The proposed amendments to Rule 39 would clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals or the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments would codify the holding in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021)— that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court— and would provide a clearer procedure to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments would make Rule 39's structure more parallel by adding a list of the costs taxable in the court of appeals to the current rule, which lists only the costs taxable in the district court.

Information Items

The Advisory Committee met on March 29, 2023. In addition to the proposals noted above, the Advisory Committee discussed several other matters. The Advisory Committee has been considering potential amendments to Rule 29 (Brief of an Amicus Curiae) for several years and considered possible amendments requiring the disclosure by amici curiae of information about contributions by parties and nonparties. In addition, the Advisory Committee completed a draft of amended Form 4 to create a more streamlined and less intrusive form to use when seeking to proceed in forma pauperis. Because the Rules of the Supreme Court require litigants to use the same form, the draft has been provided to the Clerk of the Supreme Court for review.

Finally, the Advisory Committee discussed new suggestions, including a suggestion regarding the redaction of Social Security numbers in court filings, a suggestion for a possible new rule regarding intervention on appeal, a suggestion regarding third-party litigation funding, and a suggestion to follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the court.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: the proposed Restyled Bankruptcy Rules;[1] proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006; new Rule 8023.1;[2] the abrogation of Official Form 423; and a proposed amendment to Bankruptcy Official Form 410A. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Restyled Rules Parts I–IX (the 1000–9000 series of Bankruptcy Rules)

The Bankruptcy Rules are the fifth and final set of national procedural rules to be restyled. The Restyled Bankruptcy Rules were published for comment over several years in three sets: the 1000–2000 series of rules were published in August 2020, the 3000–6000 series in August 2021, and the final set, the 7000–9000 series, in August 2022. After each publication period, the Advisory Committee on Bankruptcy Rules carefully considered the comments received and made recommendations for final approval based on the same general drafting

[1]The Restyled Bankruptcy Rules are at Appendix B, pages 1-454. They are in side-by-side format with the existing unstyled version of each rule on the left and the proposed restyled version shown on the right. The unstyled left-side versions of the following rules reflect pending rule changes currently on track to take effect December 1, 2023, absent contrary action by Congress: Amended Rules 3011, 8003, 9006, and new Rule 9038.

[2]The proposed substantive changes to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1 are set out separately and begin at Appendix B, page 455. The changes, underlining and strikeout, are shown against the proposed restyled versions of those rules.

guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules, as outlined below. The Restyled Bankruptcy Rules as a whole, including the revisions based on public comments and a final, comprehensive review, are now being recommended for final approval.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996), and Bryan A. Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). S*ee also* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure*, Mich. Bar J., Sept. 2005, at 56 and Mich. Bar J., Oct. 2005, at 52; Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using consistent formatting to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules clearer and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words, as well as redundant "intensifiers"—expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the

restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Advisory Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Advisory Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. One example is "meeting of creditors," a term that is widely used and well understood in bankruptcy practice.

Rules Enacted by Congress. Where Congress has enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 361), and Rule 7004(b) and (h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4118), the Advisory Committee has not restyled the rule.

<u>Amendments to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), related amendments to Rules 4004 (Grant or Denial of Discharge), 5009 (Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied), and 9006 (Computing and Extending Time; Time for Motion Papers), and abrogation of Official Form 423 (Certification About a Financial Management Course)</u>

The amendments to Rule 1007(b)(7) delete the directive to file a statement on Official Form 423 (Certification About a Financial Management Course) and make filing the course certificate itself the exclusive means showing that the debtor has taken a postpetition course in

personal financial management. References in other parts of Rule 1007 and in Rules 4004, 5009, and 9006 to the "statement" required by Rule 1007(b)(7) are changed to refer to a "certificate." Because Official Form 423 is no longer necessary, the Advisory Committee recommends that it be abrogated.

Rule 7001 (Scope of Rules of Part VII)

The amendment to Rule 7001(a) creates an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need an order requiring the prompt return by a third party of tangible personal property—such as an automobile or tools of the trade—in order to produce income to fund a plan or to regain the use of exempt property. As noted by Justice Sonia Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585, 592–95 (2021), the procedures applicable to adversary proceedings can be unnecessarily time-consuming in such a situation. Instead, the proposed amendment allows the debtor to seek turnover of such property by motion under § 542(a), and the procedures of Rule 9014 would apply. [3]

Rule 8023.1 (Substitution of Parties)

New Rule 8023.1 is modeled on Appellate Rule 43. Neither Appellate Rule 43 nor Civil Rule 25 applies to parties in bankruptcy appeals to the district court or bankruptcy appellate panel. This new rule is intended to fill that gap by providing consistent rules (in connection with such appeals) for the substitution of parties upon death or for any other reason.

Official Form 410A (Proof of Claim, Attachment A)

Part 3 of Form 410A is amended to provide for separate itemization of principal due and interest due. Because under Bankruptcy Code § 1322(e) the amount necessary to cure a default

[3]As noted by Justice Sotomayor, "Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days [citation omitted]. One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments." *Fulton*, 141 S. Ct. at 594.

is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages under § 1325(a)(5) to know which portion of the total arrearages is principal and which is interest.

Recommendation: That the Judicial Conference:

a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1 and 8006 and proposed six new Official Forms related to the Rule 3002.1 amendments, Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation with one change, discussed below, to Rule 3002.1.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

In response to suggestions submitted by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy, the Advisory Committee proposed amendments to Rule 3002.1 that were published for comment

in 2021. The proposed amendments—intended to encourage a greater degree of compliance with the rule's provisions—included a new midcase assessment of the mortgage claim's status in order to give the debtor time to cure any postpetition defaults that may have occurred, new provisions concerning the effective date of late payment-change notices, and requirements concerning notice of payment changes for a home equity line of credit ("HELOC"). Additionally, the proposed amendments would have changed the assessment of the status of the mortgage at the end of a chapter 13 case from a notice to a motion procedure that would result in a binding order.

There were 27 comments submitted in response to the proposed amendments. Many of them identified concerns about the midcase review and end-of-case procedures. The comments led the Advisory Committee to recommend several changes to the rule as published. Among those changes, the provision for giving only annual notices of HELOC changes is made optional. The proposed midcase review procedure is also made optional, can be sought at any time during the case, is done by motion rather than by notice, and can be initiated either by the debtor or the trustee, not just the trustee as initially proposed. Changes are also made to the end-of-case procedures in response to the comments, including initiating the process by notice rather than by motion from the case trustee.

In addition to the changes discussed above, the Advisory Committee also recommended changes to current Rule 3002.1(i) (which would become Rule 3002.1(h)) to clarify the scope of relief that a court may grant if a claimholder fails to provide any information required under the rule. Following concerns raised during the Standing Committee meeting, the Advisory Committee chair withdrew one aspect of those proposed changes to allow for further consideration and possible resubmission at a later time.

Because the changes to the originally published amendments are substantial, and further public input would be beneficial, the Advisory Committee sought republication of the new proposed amendments to Rule 3002.1. After the Advisory Committee chair withdrew the portion of the proposed amendments noted in the preceding paragraph concerning current Rule 3002.1(i), the Standing Committee unanimously approved for publication the remainder of the proposed amendments to Rule 3002.1.

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

The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.

Official Forms Related to Proposed Amendments to Rule 3002.1

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-N (Trustee's Notice of Payments Made),
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made),
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim),
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)

The proposed amendments to Rule 3002.1 that were published for comment in 2021 called for five Official Forms to implement the proposed procedures. As a result of its recommendation to republish proposed Rule 3002.1, and the substantial changes to the proposed

procedures, the Advisory Committee now seeks publication of six proposed implementing Official Forms.

Information Items

The Advisory Committee met on March 30, 2023. In addition to the recommendations discussed above, the Advisory Committee gave preliminary consideration to a suggestion to require redaction of the entire Social Security number from filings in bankruptcy, a new suggestion to adopt national rules addressing electronic debtor signatures, changes to the timing of clerk notices of a debtor's failure to file the certificate showing completion of a personal financial management course, and a rule amendment that would require the debtor to disclose certain assets obtained after the petition date.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rule 12(a). The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language could be read to suggest unintended preemption of statutory time directives. While it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. The current rule fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Thus, the current language could be mistakenly interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) are intended to supersede inconsistent statutory provisions, especially because paragraph (1) includes specific language deferring to different periods established by statute.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1)---namely, that a different response time set by statute supersedes the response times set by those rules. After public comment, the Advisory Committee recommended final approval of the rule as published.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b)(3) would provide that the court may address the timing and method of such compliance in its scheduling order. During the January 2023 Standing Committee meeting, members expressed differing views concerning the length of, and level of detail in, the committee notes that would accompany the proposed amendments. The Advisory Committee subsequently reexamined the notes in light of that discussion, and at the June 2023 Standing Committee meeting, the Advisory Committee presented shortened notes to accompany the proposed amendments.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings, which the Civil Rules do not expressly address. After several years of work by its MDL Subcommittee, extensive discussions with interested bar groups, and consideration of multiple drafts, the Advisory Committee unanimously recommended that new Rule 16.1 be published for public comment.

Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after transfer. An initial MDL management conference allows for early attention to matters identified in Rule 16.1(c), which may be of great value to the transferee judge and the parties. Because not all MDL proceedings present the same type of management challenges, there may be some MDL proceedings in which no initial management conference is

needed, so proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b) recognizes that the transferee judge may designate coordinating counsel---before the appointment of leadership counsel—for the initial MDL conference. The court may appoint coordinating counsel to ensure effective and coordinated discussion and to provide an informative report.

Rule 16.1(c) encourages the court to order the parties to submit a report prior to the initial MDL conference. The court may order that the report address, inter alia, any matter under Rules 16.1(c)(1)–(12) or Rule 16. The rule provides a series of prompts for the court to consider, identifying matters that are often important to the management of MDL proceedings, including (1) whether to appoint leadership counsel; (2) previously entered scheduling or other orders; (3) principal factual and legal issues; (4) exchange of information about factual bases for claims and defenses; (5) consolidated pleadings; (6) a discovery plan; (7) pretrial motions; (8) additional management conferences; (9) settlement; (10) new actions in the MDL proceeding; (11) related actions in other courts; and (12) referral of matters to a magistrate judge or master.

Rule 16.1(d) provides for an initial MDL management order, which the court should enter after the initial MDL management conference. The order should address matters the court designates under Rule 16.1(c) and may address other matters in the court's discretion. This order controls the MDL proceedings until modified.

Information Items

The Advisory Committee met on March 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 23 (Class Actions) regarding awards to class representatives in class actions and

the superiority requirement for class certification, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, and Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena. The Advisory Committee also discussed issues related to sealed filings, the standards for in forma pauperis status, and the mandatory initial discovery pilot project.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 20, 2023. The Advisory Committee considered several information items.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17 (Subpoena). On issues related to third-party subpoenas, the Advisory Committee has heard from a number of experienced attorneys, including defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. Through its Rule 17 Subcommittee, the Advisory Committee has collected information from experts regarding the Stored Communications Act and other issues relating to materials held online, as well as issues affecting banks and other financial service entities.

A new proposal from the American College of Trial Lawyers would allow the defendant to waive trial by jury without the government's consent. The Advisory Committee discussed this proposal and its previous consideration of this issue in connection with deliberations over new Criminal Rule 62 (part of the set of proposed rules—currently on track to take effect December 1, 2023, absent contrary action by Congress—that resulted from the CARES Act directive that rules be considered to address future emergencies).

Finally, the Advisory Committee voted to remove two items from its study agenda: a suggestion to clarify Rule 11(a)(2), which governs conditional pleas, and a suggestion to amend Rule 11(a)(1) to provide for a plea of not guilty by reason of insanity.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening

and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also

any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

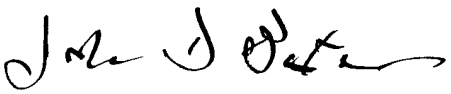
The Advisory Committee on Evidence Rules met on April 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed possible amendments to add a new subdivision to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) to address permitting jurors to submit questions for witnesses. Proposed amendments setting forth the minimum safeguards that should be applied if a trial court decided to allow jurors to submit questions for witnesses were under consideration for some time, but doubts about the practice of allowing jurors to submit questions for witnesses led the Advisory Committee to table any possible proposed amendments. The Advisory Committee referred the issue to the committee

updating the Benchbook for U.S. District Court Judges, and it is being considered for inclusion in the Benchbook.

JUDICIARY STRATEGIC PLANNING

The Standing Committee approved a brief report on the strategic initiatives that the Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler (N.D. Ala.), judiciary planning coordinator.

Respectfully submitted,



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TAB 4

TAB 4A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: NONCOMPENSATORY SANCTIONS UNDER RULE 3002.1(h)

DATE: AUGUST 17, 2023

At the spring Advisory Committee meeting, amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence) were approved for republication. This recommendation was presented to the Standing Committee at its June meeting, and the Standing Committee accepted it, with one deletion. As proposed by the Advisory Committee for amendment, subdivision (h)[1]—governing sanctions for the claim holder's failure to give notice or respond—would have expressly authorized courts to award, "in appropriate circumstances, noncompensatory sanctions." After a lengthy discussion at the Standing Committee meeting about the purpose and appropriateness of this provision, Judge Connelly withdrew it so that the Advisory Committee could give it further consideration. The Standing Committee then approved the rest of the proposed amended rule for publication in August.[2]

The Advisory Committee added the noncompensatory sanctions provision at the fall 2022 meeting in response to several comments received after the 2021 publication of the Rule 3002.1 amendments. The commenters suggested this addition in order to override the Second Circuit's decision in PHH Mortg. Corp. v. Sensenich *(In re* Gravel*)*, 6 F.4th 503 (2021), which held that

[1] The sanction provision is in subdivision (i) of the current rule. As proposed for amendment, it is in subdivision (h).

[2] The text of Rule 3002.1(h), as published, follows this memo in the agenda book.

"[p]unitive sanctions do not fall within the 'appropriate relief' authorized by Rule 3002.1." *Id.* at 515.

The Subcommittee was asked to reconsider the noncompensatory sanctions provision in light of the Standing Committee comments, and it did so at its August 7 meeting. This memorandum summarizes the Standing Committee's discussion, reviews the *Gravel* decision and other authority on the question whether Rule 3002.1(i) currently allows the award of punitive sanctions, and suggests possible analogs in the Civil Rules that might provide some guidance. The memo concludes with a discussion of the Subcommittee's consideration of possible next steps and its recommendation for how to proceed.

Standing Committee Discussion

After Judge Connelly and the reporter presented the recommendation for republication of amendments to Rule 3002.1, two Standing Committee members raised questions about the noncompensatory sanction provision in subdivision (h). They asked why the rule didn't require notice before such sanctions could be imposed. When it was pointed out that the beginning of subdivision (h) says "after notice and a hearing," one of the judges questioned whether there was a need for this type of sanction. We explained that the provision was added in response to the Second Circuit's *Gravel* decision, which involved noncompliance with Rule 3002.1 by a repeat player in bankruptcy cases. The other judge asked what relief was included within the term "noncompensatory sanction." She suggested that the term was too vague and would not put mortgage claim holders on notice that they might be subject to punitive damages or injunctive or declaratory relief. An attorney member of the Standing Committee added that if equitable relief is to be authorized, it should be spelled out.

After the academic member of the Standing Committee—a former assistant reporter for the Advisory Committee—spoke in support of the need for noncompensatory sanctions in some bankruptcy cases, alternative wording was suggested by different Standing Committee members, including the following:

- using the language of Civil Rule 11;
- substituting "nonmonetary directives or an order to pay a penalty into the court";
- adding a cross-reference to Rule 7037; and
- adding more explanation to the Committee Note.

In the end, it was agreed that the provision in question would be withdrawn and the proposed amendments would be published without it. This would give the Advisory Committee the opportunity to consider the provision further.

Gravel and Other Authority

The impetus for the noncompensatory sanctions provision—the Second Circuit's *Gravel*, decision—involved a bankruptcy court's imposition of punitive sanctions on PHH Mortgage Corp. for violating Rule 3002.1(c)'s requirement to provide notice of postpetition fees.[3] At the end of a chapter 13 bankruptcy case, the bankruptcy court entered an order declaring that the debtors were current on their mortgage ("Current Order"). Despite the order, after the bankruptcy case was over, PHH sent the debtors 25 mortgage statements showing inspection fees that had not been properly noticed during the bankruptcy case. On the motion of the chapter 13

[3] The appeal involved three separate bankruptcy cases in which the same conduct was challenged. For the purposes of this memo, the procedural history has been simplified.

trustee, the bankruptcy court imposed a $1000 sanction on PHH for each violation of Rule 3002.1, for a total of $25,000 payable to the trustee.[4]

In a 2-1 decision, the Second Circuit reversed the sanction for violating Rule 3002.1, holding that the language in subdivision (i)—"award other appropriate relief"—"does not authorize punitive monetary sanctions." 6 F. 4th at 508. Writing for himself and Judge Park, Judge Jacobs reasoned that "[b]ecause 'other appropriate relief' is a general phrase amid specific examples, it is best 'construed in a fashion that limits the general language to the same class of matters as the thing illustrated.' Reasonable expenses and attorney's fees are compensatory forms of relief." *Id.* at 514 (citation deleted). That suggested to the court that any other appropriate relief should be compensatory as well. The court found further support for that reading in the other express sanction in the rule, the preclusion of evidence about fees and charges that were not noticed in compliance with the rule. According to the court, that sanction "serves the remedial goal of shielding the debtor from unforeseen charges, and thus is also not a punishment." *Id*. at 515.

The majority also rejected the argument that the sanction provision in Rule 3002.1(i) is analogous to Civil Rule 37(c)(1), which also uses the phrase "other appropriate sanctions." First the opinion noted that the Second Circuit had never held that punitive monetary sanctions are appropriate under Rule 37. But more importantly, said the court, Rule 3002.1

> does not share the aims and functions of Federal Rule 37. Bankruptcy Rule 3002.1 protects a debtor's interest in fully resolving the debtor's current status as to particular financial obligations; Federal Rule 37 protects "the integrity of our judicial process" with an array of far harsher sanctions.

[4] The bankruptcy court also imposed a $150,000 sanction on PHH for violating the Current Order. That sanction was overturned by the Second Circuit because the only directive in the order was that PHH was "precluded from disputing that the debtors are current (as set forth herein) in any other proceeding." PHH brought no other proceeding. *See Gravel*, 6 F. 4th at 513.

Id. at 516.

Judge Bianco wrote a lengthy opinion dissenting from the reversal of the sanction for violating Rule 3002.1. He concluded that

> the "other appropriate relief" language in the sanctions authority conferred upon bankruptcy courts under Rule 3002.1(i) provided a proper basis to impose the [monetary] punitive sanction against PHH based upon its flagrant and repeated violations of the Rule.

Id. at 518.

Judge Bianco's reasoning began with the observation that Rule 3002.1(i) on its face is a sanction provision, intended to punish violations of the rule. He said that the evidence-preclusion provision "is not required to be proportionate to the harm – *i.e.*, compensatory in nature – but rather seeks to punish with the broad brush of evidence-preclusion to deter such violations in the future." *Id.* at 521.

Citing the Consumer Subcommittee's 2010 memo to the Advisory Committee about the origin and purpose of Rule 3002.1(i), Judge Bianco said that it was based on Civil Rule 37(c)(1). That rule, he said, has been interpreted to authorize noncompensatory punitive sanctions. *See id.* at 523 (collecting cases). The majority's rejection of the analogy to Rule 37 was not persuasive, he asserted, because he could "find no daylight between the deterrent purpose of the sanctions provisions in Bankruptcy Rules 3002.1 and 3001(c) and the identical purpose of Rule 37, upon whose language they were modeled." *Id.*

Judge Bianco concluded that

> the plain meaning of "other appropriate relief" under Rule 3002.1, as confirmed by its modeling after both Rule 37 and that Rule's purpose, authorizes a bankruptcy court to use its discretion to impose punitive monetary sanctions in appropriate circumstances for violations of Rule 3002.1.

Id. at 526.

The majority in *Gravel* said that the bankruptcy court's imposition of a monetary punitive sanction under Rule 3002.1(i) was the first and only time that such a sanction had been imposed under the rule. Since *Gravel* was decided, however, several bankruptcy courts have disagreed with the Second Circuit and have concluded that the rule does authorize the award of punitive damages. *See In re* Dewitt, 651 B.R. 215, 232-35 (Bankr. S.D. Ohio 2023); Harlow v. Wells Fargo & Co. *(In re* Harlow*)*, 2022 WL 17586716, at *5 (W.D. Va. 2022); *In re* Legare-Doctor, 634 B.R. 453, 462 (Bankr. D.S.C. 2021); Blanco v. Bayview Loan Servicing *(In re* Blanco*)*, 633 B.R. 714, 755 (Bankr. S.D. Tex. 2021).

Civil Rule Analogs

Several members of the Standing Committee suggested that, in drafting an amendment to Rule 3002.1 to expressly authorize noncompensatory monetary sanctions, we should look to the Civil Rules for a model. The Advisory Committee did just that in drafting existing subdivision (i). As this Subcommittee's 2010 memo to the Advisory Committee stated, the sanction provision was modeled on Civil Rule 37(c)(1). *See* https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-bankruptcy-procedure-april-2010 (p.63) (Referring to the parallel provision in Rule 3001(c)(2)(D): "The proposed sanctions most closely resemble the sanction available under Civil Rule 37(c)(1) for the failure to provide information required under the disclosure provisions of Rule 26(a).").

The question then becomes whether Rule 37(c)(1)—in authorizing "other appropriate sanctions"—allows the imposition of noncompensatory punitive sanctions. It is not clear that it does. Neither the Wright & Miller nor the Moore treatise on civil procedure mentions punitive damages or fines as an available sanction under Rule 37(c)(1). *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2289.1 (2023) (quoting Second

Circuit case stating that "other appropriate sanctions" gives the court discretion to impose "less drastic sanctions" than evidence exclusion); 7 MOORE'S FEDERAL PRACTICE – CIVIL § 37.61 (2023) (listing types of sanctions). And the authority for the award of punitive monetary sanctions under that provision cited by the bankruptcy court and the dissent in *Gravel* is pretty thin. Almost all of the cited cases involved the imposition of a punitive sanction under the court's inherent authority or a rule other than Rule 37(c)(1).

Other sanction provisions in the Civil Rules that might serve as a model for Rule 3002.1 include Rule 11(c)(4) ("The sanction may include nonmonetary directives; an order to pay a penalty into the court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."); Rule 16(f)(1) ("On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii) . . . ."); and Rule 26(g)(3) ("If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.").

Next Steps

The Advisory Committee is not under great time pressure to resolve this issue. It was suggested at the Standing Committee meeting that, if a noncompensatory sanction provision were added to Rule 3002.1(h) next spring, along with any changes in response to comments, the rule would likely have to be published yet again. That would further delay the effective date of the proposed amendments published this summer. A better course might be to let the published

amendments proceed to promulgation and seek to amend the sanction provision further down the road.

Another issue the Subcommittee considered is that an amendment to Rule 3002.1's sanction provision probably will require an amendment to Rule 3001(c)(2)(D). This identically worded provision authorizes sanctions for the failure of a creditor to provide the required information regarding its proof of claim. An amendment of Rule 3002.1(h) without amending Rule 3001(c)(2)(D) would create an inference that the two provisions have different meanings.

The Subcommittee considered several possible next steps, including the following:

- Recommend that no additional amendment to Rule 3002.1(h) be proposed because punitive damages should not be authorized.
- Recommend that no additional amendment to Rule 3002.1(h) be proposed because some courts have held that punitive damages are authorized under the current rule, and only one court of appeals has held otherwise. Let the issue percolate in the courts.
- Ask the rules law clerk to do a thorough survey of sanctions under the Civil Rules to get a better sense of how they have been interpreted and what due process safeguards are needed.
- Recommend to the Advisory Committee the same provision that was deleted or a revised version, such as one modeled on Rule 11(c)(4).

The Subcommittee concluded that the best approach now is to keep the issue on its agenda but wait and see how the case law develops. The noncompensatory sanctions provision was just a small piece of an important revision of Rule 3002.1. The Subcommittee recommends letting the proposed amendments proceed to promulgation without creating possible disruption by seeking to reintroduce an additional sanction provision to subdivision (h).

(h~~i~~) **Claim Holder's Failure to Give Notice or Respond**. If the claim holder fails to provide any information as required by ~~(b), (c), or (g)~~this rule, the court may, after notice and a hearing, ~~take one or bothof these actions~~do one or more of the following:

(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case—unless the court determines that the failure was substantially justified or is harmless; ~~and~~

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure; and

(3) take any other action authorized by this rule.

TAB 4B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTIONS REGARDING REQUIRED COURSE ON PERSONAL FINANCIAL MANAGEMENT

DATE: AUGUST 21, 2023

During its virtual meeting on August 7, the Subcommittee continued considering two suggestions regarding the personal-financial-management-course requirement for discharge of individual debtors. These suggestions were Professor Bartell's Suggestion 22-BK-D, regarding the timing of the clerk's reminder notice under Rule 5009(b), and Tim Truman's Suggestion 22-BK-K to amend Rule 1007(c) to change the chapter 13 deadline for filing the certificate to 60 days after the first day set for the meeting of creditors.

The Subcommittee received feedback on these suggestions at last spring's Advisory Committee meeting, and it took those comments into consideration in arriving at its recommendations, which are discussed below.

Issues Considered by the Subcommittee

In order for the Subcommittee to arrive at a recommendation, it considered a series of questions.

1. *Should the deadlines in Rule 1007(c) for filing the certificate of course completion be eliminated?* This was the issue on which the Subcommittee had the clearest consensus based on its prior discussions. The Code only requires that the course be taken before a discharge can be issued, 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.

The Subcommittee recommends the following amendment to Rule 1007 to accomplish this change:

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File[1]

* * * * *

(b) Schedules, Statements, and Other Documents.

* * * * *

(7) ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition or the debtor is not required to complete one as a condition to discharge, an individual debtor in a Chapter 7 or 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a certificate of course completion issued by the provider.

* * * * *

(c) Time to File.

* * * * *

~~(4) *Financial-Management Course*. Unless the court extends the time to file, an individual debtor must file the certificate required by (b)(7) as follows:~~

~~(A) in a Chapter 7 case, within 60 days after the first date set for the meeting of creditors under § 341; and~~

~~(B) in a Chapter 11 or Chapter 13 case, no later than the date the last payment is made under the plan, or the date a motion for a discharge is filed under § 1141(d)(5)(B) or § 1328(b).~~

[1] The changes indicated are to the restyled version of Rule 1007, not yet in effect.

* * * * *

Committee Note

The deadlines in (c)(4) for filing certificates of completion of a course in personal financial management have been eliminated. When Code § 727(a)(11), 1141(d)(3), or 1328(g)(1) requires course completion for the entry of a discharge, the debtor must demonstrate satisfaction of this requirement by filing a certificate issued by the course provider, unless the provider has already done so. The certificate must be filed before the court rules on discharge, but the rule no longer imposes an earlier deadline for doing so.

If this amendment is approved, references to the deadlines in Rule 9006(b) and (c) will need to be deleted, as follows:

Rule 9006. Computing and Extending Time; Motions[2]

* * * * *

(b) Extending Time.

* * * * *

(3) ***Extensions Governed by Other Rules.*** The court may extend the time to:

(A) act under Rules 1006(b)(2),1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033—but only as permitted by those rules; and

(B) file the ~~certificate required by Rule 1007(b)(7), and the~~ schedules and statements in a small business case under § 1116(3)—but only as permitted by Rule 1007(c).

(c) Reducing Time.

[2] The changes indicated are to the restyled version of Rule 1007, not yet in effect.

* * * * *

(2) ***When Not Permitted.*** The court may not reduce the time to act under Rule 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, or 9033(b). ~~Also, the court may not reduce the time set by Rule 1007(c) to file the certificate required by Rule 1007(b)(7).~~

* * * * *

Committee Note

The references in (b)(3)(B) and (c)(2) to the certificate required by Rule 1007(b)(7) have been deleted because the deadlines for filing those certificates have been eliminated.

2. *Should Rule 5009(b) require two reminder notices to be sent, rather than just one?* No one at the spring Advisory Committee expressed an objection to adding a second reminder notice to the rule, and the discussion seemed to accept this change as desirable. The Subcommittee concluded that there was a consensus for making this change in order to reduce the number of debtors who fail to comply with the filing requirement.

3. *Should the dates for sending the notices be the same for chapter 7 and chapter 13 cases?* Earlier drafts of possible amendments to Rule 5009(b) that were circulated to the Subcommittee did not distinguish between chapters. That approach may be the least burdensome for the clerk's office. However, members of the Advisory Committee suggested the possible need for different timing of the notices because of the longer duration of a chapter 13 case. In order to provide one last chance for compliance with the personal-financial-management-course requirement, several events at the end of a chapter 13 case were suggested as triggers for a second reminder notice. And while the time for sending an early first notice might be the same

for both chapters, there was a suggestion that no notice be sent in a chapter 13 case before plan confirmation.

The Subcommittee concluded that the initial notice should be sent at the same time for both chapter 7 and chapter 13 cases for ease of implementation by clerk's offices. But because of the differences in the length of chapter 7 and chapter 13 cases, the Subcommittee favored different timing for the second notice in those cases.

4. *When should Rule 5009(b) require the notices to be sent?* Having resolved the issues listed above, the Subcommittee had to decide the precise details of an amendment to Rule 5009(b). Among the considerations the Subcommittee took into account for determining the timing of the notices were the following:

- The first notice should be sent when many debtors will have had time to take the course and file the certificate—thus reducing the number of notices the court will have to send—but also at a time when most debtors are still reachable at the address known to the court.
- A preference has been expressed for having the timing of both notices triggered by the same event.
- The timing of the notices in a chapter 7 case must take into account the time under Rule 4004(c) for the court to grant or withhold a discharge, which could be shortly after 60 days following the first date set for the meeting of creditors.
- There is no perfect solution that will ensure 100% compliance with the personal-financial-management-course requirement, but there may be rule changes that can reduce the number of cases closed without a discharge.
- Because any recommended amendments will be published, there will be an opportunity to receive additional input from a broader group.

The Subcommittee concluded that the first notice should be sent to any chapter 7 or chapter 13 debtor for whom a certificate of course completion has not been filed within 45 days after the petition was filed. This date will be 21 to 50 days earlier than Rule 5009(b)'s current requirement.[3]

The Subcommittee concluded that the second notice in a chapter 7 case should be sent to any creditor for whom a certificate has not been filed within 90 days after the petition was filed, and it should advise the debtor that the case is subject to dismissal without the entry of a discharge if the certificate is not filed within the next 30 days.

In a chapter 13 case, the Subcommittee decided that the second notice should be sent as part of the closing process. It proposes amending the rule to require the notice to be sent to any debtor for whom a certificate has not been filed by 60 days before the case will be closed and to advise the debtor that the case is subject to being closed without the entry of a discharge at the end of 60 days.

Rule 5009(b) as proposed for amendment appears on the next page. **The Subcommittee recommends that it be approved for publication, along with the proposed amendments to Rule 1007(c) and 9006(b) and (c) set out above.**

[3] Under the current rule, the 5009(b) notice is sent to debtors for whom a certificate has not been filed within 45 days after the first date set for the meeting of creditors. Under Rule 2003(a), the U.S. trustee must call the meeting between 21 and 40 days after the order for relief in a chapter 7 case and between 21 and 50 days after the order for relief in a chapter 13 case.

Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied[1]

* * * * *

(b) Chapter 7 or 13—Notice of a Failure to File a Statement About Completing a Course on Personal Financial Management.

(1) ***Applicability.*** This subdivision (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a certificate under Rule 1007(b)(7). ~~and~~

(2) ***Clerk's First Notice to the Debtor.*** If the certificate is not filed ~~fails to do so~~ within 45 days after the ~~first date set for the meeting of creditors under § 341(a)~~ petition is filed. ~~The~~ the clerk must promptly notify the debtor that the case ~~will~~ can be closed without entering a discharge if the certificate is not filed ~~within the time prescribed by Rule 1007(c)~~.

(3) ***Clerk's Second Notice to the Debtor.***

(A) *Chapter 7.* In a Chapter 7 case, if the certificate is not filed within 90 days after the petition is filed, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 30 days after the notice's date.

(B) *Chapter 13.* In a Chapter 13 case, if the certificate is not filed at least 60 days before the case closing, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 60 days after the notice's date.

* * * * *

[1] The changes indicated are to the restyled version of Rule 1007, not yet in effect.

Committee Note

Subdivision (b) is amended in order to reduce the number of cases in which a discharge is not issued solely because a certificate of completion of a personal-financial-management course is not filed as required by Rule 1007(b)(7). When that occurs, a debtor who is otherwise entitled to a discharge must get the case reopened—at added cost—in order to obtain the ultimate benefit of the bankruptcy.

Subdivision (b) now provides for two reminder notices to be sent to debtors who have not satisfied the requirement of Rule 1007(b)(7). The clerk must send the first notice to any chapter 7 or 13 debtor for whom a certificate has not been filed within 45 days after the petition was filed, an earlier date than under the prior rule. Then if a chapter 7 debtor has not complied within 90 days after the petition date, the clerk must send a second reminder notice. In a chapter 13 case, as part of the case closing process, the clerk must send a second notice to any debtor who has not complied by 60 days before case will be closed. Both notices must explain that the consequence of not complying with Rule 1007(b)(7) is that the case is subject to being closed without a discharge being entered.

Nothing in the rule precludes a court from taking other steps to obtain compliance with Rule 1007(b)(7) before a case is closed without a discharge.

TAB 4C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTION FOR AMENDING RULE 1007(h)

DATE: AUGUST 21, 2023

Judge Catherine McEwen has submitted a suggestion (22-BK-H) 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. This suggestion was considered by the Subcommittee last winter, and at the spring Advisory Committee meeting, the Subcommittee recommended that no further action be taken on it. Following the Advisory Committee's discussion of the matter, the suggestion was referred back to the Subcommittee for further consideration. The Subcommittee did so during its August 7 meeting and now recommends an amendment to Rule 1007(h), as discussed below.

The Suggestion and the Subcommittee's Previous Recommendation

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.[1]

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

[1] These provisions bring property into the estate that "the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted" and "earnings from services performed by the debtor" during that period.

a number of bankruptcy courts have imposed such requirements by local rule or administrative order.

After careful consideration of the suggestion, the Subcommittee recommended that no further action be taken on it for the following reasons. The Subcommittee questioned whether a wide-spread problem exists that needs to be solved on a national basis. 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.

Nor does it appear that the Bankruptcy Rules need to be amended in this regard in order to be consistent with the Code. There is no express statutory obligation to report acquisitions of property covered by §§ 1115, 1207, and 1306. The Subcommittee noted that in 2005, when Congress imposed the requirement for the filing of postpetition tax returns upon request, it did not impose a broader requirement regarding the reporting of all postpetition property acquisitions.

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 include within a supplementation requirement 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.

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.

The Advisory Committee's Discussion

After the presentation of the Subcommittee's recommendation at the spring meeting, Judge McEwan spoke in support of her suggestion. She pointed out that the Eleventh Circuit has interpreted the Bankruptcy Code to require ongoing disclosure in chapter 13 cases because postpetition interests become part of the bankruptcy estate. 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, so she is not suggesting that every minor asset be disclosed.

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 the issue arise from the nondisclosure of personal injury and employment discrimination cases. She thought an amendment to Rule 1007(h) would help bring to the attention of debtors' counsel the importance of disclosure since failure to do so could end up hurting their own clients.

Other committee members suggested alternative means of addressing the problem. Deb Miller said that an instruction to supplement schedules if circumstances changed could be added to Schedule A/B or the Statement of Financial Affairs. Judge Connelly suggested that a middle ground might be to amend Rule 1007(h) to require the disclosure of only postpetition claims or lawsuits, while Judge Kahn responded that the acquisition of other significant postpetition assets,

such as insurance proceeds, should be disclosed. He suggested that Rule 1009(a) could be amended to require disclosure if the schedules become materially inaccurate.

Is There a Duty to Disclose Postpetition Acquisitions?
Caselaw and Commentary

As Judge McEwan stated, the Eleventh Circuit has held that there is a duty for a chapter 13 debtor to disclose postpetition assets that become property of the estate under § 1306. Robinson v. Tysons Food, Inc., 595 F.3d 1269, 1274 (11th Cir. 2010) ("[T]his circuit's precedent holds that a Chapter 13 debtor has a statutory duty to amend her financial schedule to reflect her current assets."). The Eleventh Circuit is joined in this view by the Fifth Circuit, Flugence v. Axis Surplus Ins. Co. *(In re* Flugence*)*, 738 F.3d 126, 129 (5th Cir. 2013) ("Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action."); the Eighth Circuit, Jones v. Bob Evans Farms, Inc., 811 F.3d 1030, 1033 (8th Cir. 2016) ("[A] Chapter 13 debtor who does not amend his bankruptcy schedules to reflect a post petition cause of action adopts inconsistent positions in the bankruptcy court and the court where that cause of action is pending."); and perhaps the Ninth Circuit, Balthrope v. Sacramento County Dep't of Health & Human Servs., 398 Fed. Appx. 285, 286 (9th Cir. 2010) (unpublished opinion) (Debtor "was required to amend his bankruptcy petition to include the post-petition claim because his Chapter 13 bankruptcy proceeding had not been closed, dismissed, or converted, and the property of the bankruptcy estate had not revested in him. *See* 11 U.S.C. § 1306(a)(1).").

All of these cases involved the application of judicial estoppel based on the chapter 13 debtor's failure to disclose in the bankruptcy court a postpetition claim that the debtor later pursued outside of bankruptcy. In none of them did the court of appeals cite a statutory provision that says an asset acquired postpetition must be disclosed by a chapter 13 debtor.

Instead, the courts relied on either the definition of property of the estate in § 1306 or the general bankruptcy policy of transparency and disclosure.

A leading bankruptcy treatise has criticized these courts' holdings. After stating that "[t]here is no requirement that property coming into the estate only due to the operation of section 1306(a) be listed in the schedules," the Collier treatise goes on to criticize the Fifth Circuit's *Flugence* decision:

> Noting that the cause of action was property of the estate under section 1306, the court held that it should have been disclosed. The court cited several cases emphasizing the need for complete disclosure of property that exists at the time of the petition, but the court then did not distinguish property that is acquired later. It also gave no guidance on how valuable a property interest would have to be to require postconfirmation disclosure. The court cited no statutory provision or rule that required disclosure of property that becomes property of the estate solely under section 1306. It also seemed unaware of section 521(f), which puts the burden of initiating disclosure of information about the debtor's postpetition income and expenditure on parties other than the debtor.

8 Richard Levin & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶ 1306.01 (16th ed. 2022). The treatise goes on to say that the Eighth Circuit's *Bob Evans Farms* case also "relied on prior case law that, like *Flugence*, never discussed the differences between prepetition and postpetition causes of action." *Id.*

A bankruptcy court has explained in detail the basis for concluding that a chapter 13 debtor has no statutory obligation to amend schedules to disclose postpetition property:

> Interested parties clearly have a right to a debtor's updated financial information during the course of a chapter 13 case. As the Sixth Circuit explained,
>
> > Presumably designed in part to assist creditors and the Chapter 13 trustee in deciding whether to bring motions to modify, § 521(f)(4)(B), which was added by BAPCPA, requires Chapter 13 debtors (at the request of the Court, the United States Trustee or any party in interest) to provide annual statements (after the case is confirmed and until it is closed) of their income and expenditures. . . .

> Baud v. Carroll, 634 F.3d 327, 353 fn. 21 (6th Cir. 2011). Nothing in § 521(f)(4) requires a debtor to do more than furnish information upon request. . . .
>
> Many courts force self-reporting through a plan provision, by separate order, or in a confirmation provision. . . . If a reporting duty existed, it would render § 521(f)(4) superfluous and the external vehicles used by the courts would be unnecessary. The lack of an affirmative duty may reflect the burden that would result from requiring a debtor to report changes in income and expenses throughout a plan.

In re Poe, 2022 Bankr. LEXIS 2338, at *7-9 (Bankr. N.D. Ohio Aug. 22, 2022) (unpublished opinion).

Should the Rules Impose a Duty of Disclosure?

Whether or not one agrees with those who have concluded that the Code does not impose a duty on a chapter 13 debtor to disclose the postpetition acquisition of property of the estate, absent a request under § 521(f), such a duty could be imposed by the Bankruptcy Rules, just as Rule 1007(h) does for property covered by § 541(a)(5). The question for the Subcommittee was whether the rules should do so.

The Subcommittee acknowledged that Judge McEwen had made a strong argument that in jurisdictions such as hers—where the court of appeals has held that there is a duty of disclosure and on that basis applies judicial estoppel—having a rule that requires the supplementation of schedules would be helpful for debtors and creditors. It would increase awareness of the obligation to disclose postpetition claims and make it more likely that lawyers would advise their debtor clients of the need to disclose, thus preventing the later invocation of judicial estoppel. And, where appropriate, it would yield increased payments to creditors.

On the other hand, in jurisdictions that have not found a statutory duty to disclose postpetition claims, the imposition of such an obligation under the rules would provide a basis for applying judicial estoppel that does not currently exist. In *In re* Boyd, 618 B.R. 133 (Bankr.

D.S.C. 2020), for example, the court concluded that because there was no duty for the debtor to disclose his postpetition personal injury claim, the grounds for judicial estoppel were absent. *See id.* at 156 ("Certainly, without an express obligation [to disclose a postpetition cause of action], this is not a requirement for which Debtor can be penalized nor may the failure to disclose or amend his schedules constitute a representation to the Court which has been accepted or relied upon."). A rule change imposing such a duty could lead to a different result if not complied with.

The differing impact of a national rule on bankruptcy courts led the Subcommittee to conclude that the issue should continue to be left to local regulation. To clarify that courts have the authority to require debtors to disclose postpetition property that becomes property of the estate under § 1115, 1207, or 1306, **the Subcommittee recommends that the Advisory Committee approve for publication the amendment to § 1007(h) that appears on the next page.**

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File[1]

* * * * *

(h) Interests in Property Acquired or Arising After a Petition Is Filed.

(1) ***Property Described in § 541(a)(5).*** After the petition is filed in a Chapter 7, 11, 12, or 13 case, if the debtor acquires—or becomes entitled to acquire—an interest in property described in § 541(a)(5), the debtor must file a supplemental schedule and include any claimed exemption. Unless the court allows additional time, the debtor must file the schedule within 14 days after learning about the property interest. This duty continues even after the case is closed but does not apply to property acquired after an order is entered:

(~~1~~A) confirming a Chapter 11 plan (other than one confirmed under § 1191(b)); or

(~~2~~B) discharging the debtor in a Chapter 12 case, a Chapter 13 case, or a case under Subchapter V of Chapter 11 in which the plan is confirmed under § 1191(b).

(2) ***Property That Becomes Estate Property Under § 1115, 1207, or 1306.*** The court may also require the debtor to file a supplemental schedule to list property or income that becomes property of the estate under § 1115, 1207, or 1306.

* * * * *

Committee Note

Subdivision (h) is amended to authorize a court to require an individual chapter 11 or a chapter 12 or 13 debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 1115, 1207, or 1306. Because those statutory provisions are broad

[1] The changes indicated are to the restyled version of Rule 1007, not yet in effect.

in their coverage, an order requiring such supplementation should specify the types of property to be disclosed or the degree of impact on the estate, such as "significant" or "material."

TAB 4D

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: CONSUMER SUBCOMMITTEE

SUBJECT: 23-BK-B – CORPORATE OWNERSHIP STATEMENT

DATE: AUG. 16, 2023

We received a suggestion from Michael Gieseke, Staff Attorney for the Office of Chapter 12 & 13 Bankruptcy Trustee Kyle L. Carlson in Barnesville, MN, suggesting adoption of a proposed new rule requiring all non-governmental corporations to make the same disclosures with respect to their corporate ownership as is currently required for a corporation that is a party to an adversary proceeding in Fed. R. Bank. P. 7007.1. He proposes a new Rule 9013-2 to read as follows:

> **Rule 9013-2. Corporate Ownership Statement**
>
> **The requirements of Rule 7007.1 apply to a nongovernmental corporation, as defined by section 101(9), that requests relief in non-adversary bankruptcy court proceedings. The nongovernmental corporation must file the corporate ownership statement with its first pleading, motion, response, or other request addressed to the court.**

The restyled version of Rule 7007.1(a) provides as follows:

Rule 7007.1. Corporate Ownership Statement

(a) Required Disclosure. Any nongovernmental corporation—other than the debtor—that is a party to an adversary proceeding must file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of its stock or stating that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Time for Filing; Supplemental Filing. The statement must:

(1) be filed with the corporation's first appearance, pleading, motion, response, or other request to the court; and

(2) be supplemented whenever the information required by this rule changes.

The rule was originally drafted in 2001 at the direction of the Standing Committee acting at the request of the Committee on Codes of Conduct. It was modelled on Fed. R. App. P. 26.1, and similar rules were published by the Advisory Committee on Civil Rules (Rule 7.1) and the

Advisory Committee on Criminal Rules (Rule 12.4) in August, 2000. It was published in August, 2001 and became effective Dec. 1, 2003. (It was amended in 2007 to clarify that a party must file a corporate ownership statement with its initial paper filed with the court, even if it is not a "pleading" as defined in Fed. R. Civ. P. 7, and to parallel the language of Fed. R. Civ. P. 7.1).

The same disclosure is required of the debtor in connection with the initial filing of a voluntary case under Fed. R. Bankr. P. 1007(a)(1):

> (1) ***Voluntary Case.*** In a voluntary case, the debtor must file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H of the Official Forms. Unless it is a governmental unit, a corporate debtor must:
>
> (A) include a corporate-ownership statement containing the information described in Rule 7007.1; and
>
> (B) promptly file a supplemental statement if changed circumstancesmake the original statement inaccurate.

The decision to limit the scope of Rule 7007.1 to adversary proceedings was intentional. As the minutes of the Meeting of March 15-16, 2001 of the Advisory Committee indicated:

> The subcommittee had decided to limit the scope of the rule to adversary proceedings only, Professor Morris said, because in many circumstances that arise in contested matters it would be difficult - or even impossible - to obtain compliance and afford the court time to review the volume of disclosures that could be received. In motions seeking relief from the automatic stay, for example, the motion may be filed on behalf of a national organization by a local attorney who does not have access to the information required. There is no requirement in Rule 9014 that a party file a response, and bankruptcy cases present many situations - such as multiple liens on the same collateral, settlements, plan confirmations - in which affected creditors fail to respond or respond shortly before the commencement of a hearing, effectively preventing the disclosure rule from operating. Moreover, Rule 9014 would authorize the presiding judge to direct that Rule 7007.1 should apply in any particular contested matter in which disclosures appeared to be warranted. The subcommittee determined that the debtor should make its disclosures at the beginning of the case, so the judge could review them before signing the orders presented on the first day of the case. A proposed amendment to Rule 1007 had been drafted to accomplish that, the Reporter said.

The Subcommittee continues to find compelling the rationale for limiting Rule 7007.1 to adversary proceedings, and recommends no action be taken on the suggestion.

TAB 5

TAB 5A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: OFFICIAL FORM 410S1 (NOTICE OF MORTGAGE PAYMENT CHANGE)

DATE: AUGUST 16, 2023

In response to the publication in 2021 of amendments to Rule 3002.1 and implementing forms, John Rao of the National Consumer Law Center ("NCLC") filed a comment that suggested an amendment to existing Official Form 410S1. The amendment is intended to reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit ("HELOCs"). Below is a summary of the comment:

National Consumer Law Center Inc. (BK-2021-2022) – The current Notice of Payment Change, Official Form 410S1, provides for disclosure of only one payment amount, the "New total payment." We recommend that Official Form 410S1 be modified to include a disclosure of the one-time "next payment" that includes the reconciliation amount under Rule 3002.1(b)(3)(C), and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). Alternatively, a committee note should be added that instructs claim holders to make appropriate modifications to Official Form 410S1 in order to comply with the HELOC requirements.

Treating the comment as a new suggestion, the Subcommittee considered it at its meeting on July 20 and **now recommends amending Form 410S1 as shown on the mock-up of the form that follows in the agenda book**.

Proposed HELOC rule provisions

In the version of Rule 3002.1 that was published for comment this summer, the relevant HELOC provisions state as follows:

(b) Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection

* * * * *

(2) ***Notice of a Change in a Home-Equity Line of Credit.***

(B) *Content~~s~~ of the Annual Notice.* The annual notice must:

(i) state the payment amount due for the month when the notice is filed; and

(ii) include a reconciliation amount to account for any overpayment or underpayment during the prior year.

(C) *Amount of the Next Payment.* The first payment due at least 21 days after the annual notice is filed and served must be increased or decreased by the reconciliation amount.

(D) *Effective Date.* The new payment amount stated in the annual notice (disregarding the reconciliation amount) is effective on the first payment due date after the payment under (C) has been made and remain*s* effective until a new notice becomes effective.

* * * * *

The NCLC's proposed amendment would respond to these provisions.

Recommended Amendment to Official Form 410S1

Because a change to a Committee Note cannot be made without amending the form itself, acceptance of the NCLC's proposal would require amending Official Form 410S1.

The existing form consists of three parts plus a signature box—Part 1: Escrow Account Payment Adjustment; Part 2: Mortgage Payment Adjustment; and Part 3: Other Payment Change. In order to avoid any confusion, the Subcommittee recommends that a new Part 3 be

added for the Annual HELOC Notice (with Other Payment Change becoming Part 4 and the signature box becoming Part 5). As shown on the attached form, it would solicit the information required by proposed Rule 3002.1(b)(2). The following direction would be added under "New total payment" at the top of the form: "For HELOC payment amounts, see Part 3."

The amended form would be accompanied by the following Committee Note:

Committee Note

> Official Form 410S1, *Notice of Mortgage Payment Change*, is amended to provide space for an annual HELOC notice. As required by Rule 3002.1(b)(2), new Part 3 solicits disclosure of the existing payment amount, a reconciliation amount representing underpayments or overpayments for the past year, the next payment amount (including the reconciliation amount), and the new payment amount thereafter (without the reconciliation amount). The sections of the form previously designated as Parts 3 and 4 are redesignated Parts 4 and 5, respectively.

The amendments to Rule 3002.1 are on a track leading to a December 1, 2025, effective date. Because the process for amending official forms is one year shorter than the period for amending rules, an amendment to Official Form 410S1 could be published for comment in 2024 and, if approved, go into effect at the same time as the rule amendments.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/25

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/_____

New total payment:
Principal, interest, and escrow, if any $ _____
For HELOC payment amounts, see Part 3

Part 1: Escrow Account Payment Adjustment

1. **Will there be a change in the debtor's escrow account payment?**

❑ No
❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

2. **Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?**

❑ No
❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Annual HELOC Notice

3. **Will there be a change in the debtor's home-equity line-of-credit (HELOC) payment for the year going forward?**

❑ No
❑ Yes.

Current HELOC payment: **$_____**

Reconciliation amount: **+ $_____ or**
- $_____

Amount of next payment (including reconciliation amount) **$_____**

Amount of the new payment thereafter (without reconciliation amount) **$_____**

Part 4: Other Payment Change

4. Will there be a change in the debtor's mortgage payment for a reason not listed above?

- ❑ No
- ❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 5: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- ❑ I am the creditor.
- ❑ I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Committee Note

Official Form 410S1, *Notice of Mortgage Payment Change*, is amended to provide space for an annual HELOC notice. As required by Rule 3002.1(b)(2), new Part 3 solicits disclosure of the existing payment amount, a reconciliation amount representing underpayments or overpayments for the past year, the next payment amount (including the reconciliation amount), and the new payment amount thereafter (without the reconciliation amount). The sections of the form previously designated as Parts 3 and 4 are redesignated Parts 4 and 5, respectively.

TAB 5B

MEMORANDUM

TO: ADVISORY COMMITTEE ON FEDERAL BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: 23-BK-I – FORM 1340 (APPLICTION FOR PAYMENT OF UNCLAIMED FUNDS)

DATE: AUG. 16, 2023

The Unclaimed Funds Expert Panel of the Financial Managers Working Group has submitted a proposal for amendments to Form 1340 (a Director's Form by which an applicant may seek payment of unclaimed funds) and to the instructions accompanying that form. A copy of their redlined suggestions is attached.

The concern expressed by the Expert Panel is that fraudulent applications may be filed by persons who assert that they are a successor claim holder when in fact they are not. The Expert Panel seeks to reduce such applications by requiring notice to be given to the owner of record and other prior owners of the claim when the claim has been transferred, assigned, purchased, obtained by merger or acquisition, or another means of succession.

The revisions to the form suggested by the Expert Panel are the following:

1. Dividing the current section on "Applicant Information" into two sections, one with representations from the Applicant about the Claimant, and one with representations from the Applicant about itself.

The Subcommittee endorses this change.

2. Modifying the text opposite the second box under "Claimant Information" in two ways. First, to add the word "transfer" before "assignment" as a means by which the claimant may have acquired the claim and changing the phrase "succession or by other means" to "or succession by other means". Second, by requiring a list of the name(s) of the Owner of Record and any other previous owner(s) of the claim.

Although it is not clear why the changed language to the text next to the second box is necessary, it is not objectionable, and the Subcommittee agreed to make this change. The Subcommittee also decided to add a new parenthetical reading "(Successor Claimant)" to make clear that anyone described in that text next to the second box is a Successor Claimant as described in the instructions to Form 1340.

The Subcommittee agreed to include the list of names of the Owner of Record and any previous owners of the claim in the form. (That information was previously required by the Supporting Documentation section.)

3. Modifying the "Supporting Documentation" section to state that the applicant is providing the required supporting documentation "for each claimant."

The instructions to Form 1340, under Section 2 entitled "Additional Supporting Documentation" states explicitly that "if there are joint Claimants, then supporting documentation must be provided for both Claimants." The proposed language is not necessary. The form itself is written with the assumption that there is a single Claimant, and it would be confusing to make reference to more than one Claimant just in this section. The Subcommittee rejected this suggestion.

4. Adding a new section to the form requiring any Successor Applicant to certify that "Applicant has sent a copy of the application to any previous owner(s) of the claim at their current address or enclosed a statement addressing why notice on previous owner(s) is not possible. (This requirement is applicable if the application is based on transfer, assignment, purchase, merger, acquisition or succession by other means.)"

This language is aimed at the heart of the suggestion, the requirement that all prior owners of the claim be given notice of the application to permit them to object. The Subcommittee agreed with the substance of this suggestion, but as a stylistic matter, placed this representation, and the representation with respect to the names of the prior owner(s) of the claim, as a subpart of part 2 of the form:

☐ The Claimant (successor Claimant) is entitled to the unclaimed funds by transfer, assignment, purchase, merger, acquisition, or succession by other means, and below are the name(s) of the Owner of Record and any other previous owner(s) of the claim:

_____.

☐ If the Claimant is a Successor Claimant, Applicant has sent a copy of the application to the Owner of Record and all other previous owner(s) of the claim at their current address or has enclosed a statement explaining why Applicant was not able to do so.

5. The Expert Panel suggests combining the two notarization sections on the current form (one for the applicant and one for the co-applicant) into a single provision and inserting "Required for all Applicants" after the title. This is intended to provide "more space for the notary public's seal". They also suggest adding language that specifies that "[Notarial wording to be adjusted based on state requirements]" in the Notarization section.

The Subcommittee accepted the second change. Notarial wording does vary by state, and the form should use the wording required in the state where the signatures are notarized. But eliminating the second notarization block makes the assumption that co-applicants will appear and have their signatures notarized at the same time before the same notary, an assumption that may not be true. The Subcommittee decided to retain separate notary blocks (one for each co-applicant).

In the Instructions to Form 340, the Expert Panel suggests the following:

1. Replacing AO 213 with AO 213P as a certification form for a claimant to provide a tax identification number (required as Supporting Documentation in Section II(b)(1)(A) of the Instructions). They suggest that AO 213P is more "user friendly for this purpose".

This change was made several months ago at the request of the AO's Finance and Accounting Department, so no further action is necessary.

2. Addition of a new section under Section II on Filing Requirements for Payment of Unclaimed Funds entitled "Certificate of Service" which requires the Applicant to provide the court a certificate of service showing that the application was sent to the Office of the United States Trustee for the applicable district, and to all previous owner(s) of the claim if the Applicant is a Successor Applicant. They include a suggested note to the court that this provision is to be included if a court requires certificate of service, and they add a new sample certificate of service as part of the Form 1340 package.

This provision is optional, and the Expert Panel includes a note to the court that it is included for those courts that require a certificate of service. The Subcommittee accepted this suggestion, but modified the language slightly and removed the reference in the instructions to the sample certificate of service. The sample certificate of service will be included on uscourts.gov as an ancillary document, similar to the sample orders granting and denying the application that are currently included on the website.

3. Modifying the language under "Post-Filing Process" to make the 21-day period for objecting to the application run from "service of the application" rather than "the filing of the application".

The language of this paragraph in Section II(f) states that "Any party objecting to the claimant's request in the application shall, within twenty-one (21) days after service thereof, serve upon the Applicant and other appropriate parties and file with the court an objection to the application. If no objection is filed with the court within twenty-one (21) days after the filing of the application …." Given that the first sentence refers to "after service," the second sentence should do the same. The Subcommittee adopted this change.

4. Adding a new section under Section II called "Fraudulent Activity" to read as follows: "Pursuant to 18 U.S.C. §§ 152 and 3571, any indication of fraud in the application or supplemental materials will be forwarded promptly to the United States Attorney for further analysis."

The Subcommittee believes the reference to 18 U.S.C. § 3571 is inappropriate, because it deals only with criminal fines and does not set out an offense itself. The Subcommittee decided that it would be more appropriate to expand Part 6 of the form (rather than including something in the instructions) to include a certification that "any fraud in the application or supplemental materials may result in criminal penalties, see, e.g., 18 U.S.C. § 152."

***

A proposed mark-up of the amended Form 1340 and instructions reflecting the Subcommittee's recommendations is attached, along with a sample certificate of service prepared by the Expert Panel. As this is a Director's Form, and its use is permissive under Rule 9009, the Advisory Committee's role is to review any suggestions to make recommendations for proposed changes to the Administrative Office. These changes are submitted to the Advisory Committee with the Subcommittee's recommendation that they be presented to the Administrative Office to make the appropriate changes.

Fill in this Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number:

Form 1340 (12/23)

APPLICATION FOR PAYMENT OF UNCLAIMED FUNDS

1. Claim Information

For the benefit of the Claimant(s)[1] named below, application is made for the payment of unclaimed funds on deposit with the court. I have no knowledge that any other party may be entitled to these funds, and I am not aware of any dispute regarding these funds.

Note: If there are joint Claimants, complete the fields below for both Claimant

Amount:	
Claimant's Name:	
Claimant's Current Mailing Address, Telephone Number, and Email Address:	

2. Claimant Information

Applicant[2] represents the following:

☐ The Claimant is the Owner of Record[3] entitled to the unclaimed funds appearing on the records of the court.

☐ The Claimant (Successor Claimant) is entitled to the unclaimed funds by transfer, assignment, purchase, merger, acquisition, or succession by other means, and below are the name(s) of the names of the Owner of Record and all previous owner(s) of the claim:

_____

_____.

☐ If the Claimant is a Successor Claimant, Applicant has sent a copy of the application to the Owner of Record and all other previous owner(s) of the claim at their current address or has enclosed a statement explaining why Applicant was not able to do so.

3. Applicant Information

Applicant represents the following:

☐ Applicant is the Claimant.

☐ Applicant is Claimant's representative (*e.g.,* attorney or unclaimed funds locator).

☐ Applicant is a representative of the deceased Claimant's estate.

[1] The Claimant is the party entitled to the unclaimed funds.
[2] The Applicant is the party filing the application. The Applicant and Claimant may be the same.
[3] The Owner of Record is the original payee.

4. Supporting Documentation

☐ Applicant has read the court's instructions for filing an Application for Unclaimed Funds and is providing the required supporting documentation with this application.

5. Notice to United States Attorney

☐ Applicant has sent a copy of this application and supporting documentation to the United States Attorney, pursuant to 28 U.S.C. § 2042, at the following address:

Office of the United States Attorney
_____ District of _____
[Court enters address here]

6. Applicant Declaration

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and any fraud in the application or supplemental materials may result in criminal penalties, see, e.g, 18 U.S.C. § 152.

.

Date: _____

_____
Signature of Applicant

_____
Printed Name of Applicant

Address:

Telephone: _____

Email: _____

6. Co-Applicant Declaration (if applicable)

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and any fraud in the application or supplemental materials may result in criminal penalties, see, e.g. 18 U.S.C. § 152.

Date: _____

_____
Signature of Co-Applicant (if applicable)

_____
Printed Name of Co-Applicant (if applicable)

Address:

Telephone: _____

Email: _____

7. Notarization

STATE OF _____

COUNTY OF _____

This Application for Unclaimed Funds, dated _____ was subscribed and sworn to before me this_____day of_____, 20_____by

_____
who signed above and is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument. WITNESS my hand and official seal.

[Notarial wording to be adjusted based on state requirements]

(SEAL) Notary Public _____

My commission expires:

7. Notarization

STATE OF_____

COUNTY OF_____

This Application for Unclaimed Funds, dated _____ was subscribed and sworn to before me this_____day of_____, 20_____by

_____
who signed above and is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument. WITNESS my hand and official seal.

[Notarial wording to be adjusted based on state requirements]

(SEAL) Notary Public_____

My commission expires:

Instructions for Filing Application for Payment of Unclaimed Funds

These template instructions can be modified by a bankruptcy court as needed.[1]

Unclaimed funds are held by the court for an individual or entity who is entitled to the money but who has failed to claim ownership of it. The United States Courts, as custodians of such funds, have established policies and procedures for holding, safeguarding, and accounting for the funds.

I. Searching Unclaimed Funds

To search unclaimed funds, use the Unclaimed Funds Locator at https://ucf.uscourts.gov/. Select_____ (*name of court*) from the dropdown list and enter the applicable search criteria. If you need access to a computer to perform the search, you may use the court's public computer terminal(s) located at _____. Additionally, you may contact the Clerk's office at xxx-xxx-xxxx to verify unclaimed funds balances.

Note to court: If your court is not using the Unclaimed Funds Locator, please specify how your court is making unclaimed funds data accessible to the public.

II. Filing Requirements for Payment of Unclaimed Funds

a. Application for Payment of Unclaimed Funds

Any party who seeks the payment of unclaimed funds must file an Application for Payment of Unclaimed Funds in substantial conformance with the court's standard application form and serve a copy of the application on the United States Attorney for the District of _____. For purposes of this procedure, the "Applicant" is the party filing the application, and the "Claimant" is the party entitled to the unclaimed funds. The Applicant and Claimant may be the same.

b. Supporting Documentation

1. Payee Information

Funds are payable to the Claimant. In conjunction with the Application for Payment of Unclaimed Funds, Claimant's tax identification number (TIN) must be provided to the court on a certification form signed by the Claimant to whom funds are being distributed.

A. Domestic Claimant

A Claimant who is a U.S. person[2] must use either the AO 213P or W-9 certification form (accessible by searching on the Internal Revenue Service (IRS) website at: https://www.irs.gov/).

[1] The notes to courts appearing in italics are for internal use only and are intended to be removed in a court's final version of the instructions.

[2] "U.S. person" includes: an individual who is a U.S. citizen or U.S. resident alien; a partnership, corporation, company or association created or organized in the U.S. or under the laws of the U.S.; an estate (other than a foreign estate); or a domestic trust (as defined in 26 C.F.R. 301.7701-7).

If a Claimant wants payment via Electronic Funds Transfer (EFT), then the AO 213P form must be used.

B. Foreign Claimant

A foreign Claimant must use a W-8 certification form (accessible by searching on the IRS website at: https://www.irs.gov/) accompanied by the AO-215 form.

If you have problems completing a form, please contact the Clerk's office at xxx-xxx-xxxx.

Note to court: While making funds payable to the Claimant is included as the default language, specify above how funds are payable in your court, if different (e.g., payable jointly to the owner of record and funds locator if authorized by a power of attorney).

2. Additional Supporting Documentation

Requirements for additional supporting documentation vary depending on the type of Claimant and whether the Claimant is represented. Please read the instructions below to identify what must accompany your Application for Payment of Unclaimed Funds.

Sufficient documentation must be provided to the court to establish the Claimant's identity and entitlement to the funds. Proof of identify must be provided in unredacted form with a current address. If there are joint Claimants, then supporting documentation must be provided for both Claimants.

A. Owner of Record

The Owner of Record is the original payee entitled to the funds appearing on the records of the court. If the Claimant is the Owner of Record, the following additional documentation is required:

i. Owner of Record - Individual

a. Proof of identity of the Owner of Record (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address); and
b. A notarized signature of the Owner of Record (incorporated in application).

ii. Owner of Record - Business or Government Entity

a. Application must be signed by an authorized representative for and on behalf of the business or government entity;
b. A notarized statement of the signing representative's authority; and
c. Proof of identity of the signing representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address).

If the Owner of Record's name has changed since the funds have been deposited with the

court, then proof of the name change must be provided.

B. Successor Claimant

A successor Claimant may be entitled to the unclaimed funds as a result of assignment, purchase, merger, acquisition, succession or by other means. If the Claimant is a successor to the original Owner of Record, the following documentation is required:

i. Successor Claimant - Individual

a. Proof of identity of the successor Claimant (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);
b. A notarized signature of the successor Claimant (incorporated in application); and
c. Documentation sufficient to establish chain of ownership or the transfer of claim from the original Owner of Record.

ii. Successor Claimant – Business or Government Entity

a. Application must be signed by an authorized representative for and on behalf of the successor entity;
b. A notarized statement of the signing representative's authority;
c. A notarized power of attorney signed by an authorized representative of the successor entity;
d. Proof of identity of the signing representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address); and
e. Documentation sufficient to establish chain of ownership or the transfer of claim from the original Owner of Record.

iii. Deceased Claimant's Estate

a. Proof of identity of the estate representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current address);
b. Certified copies of probate documents or other documents authorizing the representative to act on behalf of the decedent or decedent's estate in accordance with applicable state law (*e.g.,* small estate affidavit); and
c. Documentation sufficient to establish the deceased Claimant's identity and entitlement to the funds.

Note to court: Your court may choose to tailor these instructions based on the laws in your state.

C. Claimant Representative

If the Applicant is Claimant's attorney or other representative, the following documentation is required:

i. Proof of identity of the representative (*e.g.,* unredacted copy of driver's license, other state-issued identification card, or U.S. passport that includes current

address);

ii. A notarized power of attorney signed by the Claimant (or Claimant's authorized representative) on whose behalf the representative is acting; and

iii. Documentation sufficient to establish the Claimant's identity and entitlement to the funds, as set forth above.

c. Proposed Order

Applicant must provide the court a proposed order in substantial conformance with the court's standard Order Granting Application for Payment of Unclaimed Funds.

Note to court: This is an option for a court that requires a proposed order in conjunction with an application.

d. Certificate of Service

Applicant must provide the court a certificate of service stating:
1. a copy of the application and supporting documentation were sent to the Office of the United States Attorney for the _____ District of _____; and
2. if the Claimant is entitled to the unclaimed funds by transfer, assignment, purchase, merger, acquisition, or succession by other means, a copy of the application was sent to the Owner of Record and all other previous owner(s) of the claim at their current address or has enclosed a statement explaining why Applicant was not able to do so.

Note to court: this is an option for a court that requires a certificate of service.

~~d~~**e. Filing the Application**

The application, supporting documentation, certificate of service, and proposed order must be mailed to the court at the following address:

U.S. Bankruptcy Court
_____ District of _____
[Court enters address here]

Note to court: Please identify any alternative means for filing (e.g., electronic filing with documents containing personal identifiers restricted from public access).

~~e~~**f. Post-Filing Process**

Insert your court's procedure for processing an application here.

Suggested Practice: Any party objecting to the Claimant's request in the application shall, within twenty-one (21) days after service thereof, serve upon the Applicant and other appropriate parties and file with the court an objection to the application. If no objection is filed with the court within twenty-one (21) days after ~~the filing~~service of the application, the application and accompanying documents may be considered by the court without hearing. If the application is deficient, the Clerk's office may contact the Applicant for additional proof of identity or entitlement to the funds.

Note to court: *The 21-day objection period is not required by statute or rule; however, various courts have implemented this negative notice practice by local procedure.*

III. Links

AO-213P

W-9 (accessible by searching on the IRS website at: https://www.irs.gov/)

W-8 (accessible by searching on the IRS website at: https://www.irs.gov)

AO 215

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

----------X

In Re: Case No.

Chapter

Debtor(s).

----------X

CERTIFICATE OF SERVICE

I certify that a copy of the Application for Payment of Unclaimed Funds and the required supporting documentation were sent by: _____
(Specify Method of Delivery, e.g., USPS First-Class Mail postage prepaid)
to the following:

Office of the United States Attorney
_____ District of _____
[Enter current address]

I certify that a copy of the Application for Payment of Unclaimed Funds was sent by:
_____
(Specify Method of Delivery, e.g., USPS First-Class Mail postage prepaid)

to Previous Owner(s) of Claim (if applicable):

[Enter name and current address for each previous owner served, or provide statement with your application addressing why service is not possible.]

Dated:_____

_____
Signature
Print Name: _____
Address: _____
_____
Phone: _____
Email: _____

TAB 5C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: OFFICIAL FORMS 309A AND 309B (NOTICE OF CHAPTER 7 BANKRUPTCY CASE)

DATE: AUGUST 16, 2023

In 2022 Professor Bartell suggested that the forms providing notice of a bankruptcy filing by an individual debtor in a chapter 7, 11, or 13 case be amended to include a provision notifying the debtor of the obligation to file a certificate of completion of a course on personal financial management and stating the filing deadline (Suggestion 22-BK-E). The Subcommittee concluded that the proposed amendment should be made only to the chapter 7 forms—Official Form 309A and 309B—because debtors who file under chapter 7 are the most likely to fail to complete the course by the required deadline and because only in chapter 7 is the deadline known at the time the notice is sent out. At the fall 2022 meeting, the Advisory Committee approved for publication the following amendment to Part 9 (Deadlines) of the two forms:

Deadline to File Financial Management Course Certificate: Filing deadline: _____

After filing for bankruptcy, the debtor must take an approved course about personal financial management and file with the court the certificate showing completion of the course, unless the provider has done so.

Because the Consumer Subcommittee was considering whether the deadline in Rule 1007(c)(4) for filing the certificate of course completion should be eliminated, the Advisory Committee did not request at the June Standing Committee meeting that the proposed forms amendments be published for comment. The Consumer Subcommittee is now recommending the elimination of the deadline. If the Advisory Committee agrees, this Subcommittee will need to consider whether to recommend withdrawal of the amendments to Forms 309A and 309B or

recommend a revision of the proposed amendment that eliminates reference to a deadline. The Subcommittee will make a recommendation regarding the forms at the spring 2024 meeting.

TAB 6

TAB 6A

MEMORANDUM

TO: ADVISORY COMMITTEE FOR BANKRUPTCY RULES

FROM: TECHNOLOGY, PRIVACY, AND PUBLIC ACCESS SUBCOMMITTEE

SUBJECT: 22-BK-I– PROPOSAL TO REDACT ENTIRE SSN FROM COURT FILINGS AND CREDITOR DISTRIBUTIONS

DATE: AUG. 17, 2023

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.

At the last meeting of the Advisory Committee, the Advisory Committee agreed with the recommendation of the Subcommittee to defer consideration of the suggestion until the Federal Judicial Center completes its pending 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 studies have been requested by the Committee on Court Administration and Case Management of the Judicial Conference of the United States (CACM).

Since the last Advisory Committee meeting, we have been informed that the privacy study requested by CACM will be limited to an examination of whether filings are complying with existing privacy rules (which require redacting all but the last four digits of a SSN from court filings). They will not be studying the issue of whether there have been any privacy breaches based on the redacted SSN, because there is really no method of ascertaining that.

Although the FJC privacy study may still be useful in determining the extent to which disclosure of SSNs actually occurs, and whether those disclosures are made in the bankruptcy forms themselves or in documents that are attached to the forms by debtors, creditors and their attorneys, the Subcommittee also wishes to consider whether creditors actually need the last four numbers of the redacted SSN on all court filings where it is not statutorily required.[1] Some information is going to be solicited in connection with Suggestion 23-BK-D regarding the need

[1] As previously discussed with the Advisory Committee, § 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." In addition, § 110 requires disclosure of the complete social security number of a bankruptcy petition preparer (BPP) on documents such as the petition and schedules prepared by the BBP.

for full captions on Rule 2002 notices. The Subcommittee also wishes to consider whether there is a benefit to the debtor to including the truncated SSN in bankruptcy filings. For example, it was suggested that including the truncated SSN on the notice of discharge (Form 318 and others) would benefit the debtor 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 will be continuing to gather information to inform a recommendation on the suggestion at a future meeting.

TAB 6B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: TECHNOLOGY, PRIVACY, AND PUBLIC ACCESS SUBCOMMITTEE

SUBJECT: 23-BK-D and 23-BK-J– PROPOSAL TO AMEND RULE 2002(o)

DATE: AUG. 16, 2023

We have received a suggestion from the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the Eight Circuit joined, suggesting that Rule 2002(n) (which will be Rule 2002(o) after the restyled rules become effective) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting that of the Clerk of Court for the Minnesota Bankruptcy Court and her colleagues.

Rule 1005 (as restyled) reads as follows:

Rule 1005. Caption of a Petition; Title of the Case

(a) Information. A petition's caption must contain the name of the court, the title of the case, and the case number (if known).The title must include the following information about the debtor:

(1) name;

(2) employer-identification number;

(3) the last 4 digits of the social-security number or individual taxpayer-identification number;

(4) any other federal taxpayer-identification number; and

(5) all other names the debtor has used within 8 years before the petition was filed.

(b) Petition Not Filed by the Debtor. A petition not filed by the debtor must include all names that the petitioner knows have been used by the debtor.

The restyled version of Rule 2002(o) (formerly Rule 2002(n)) reads as follows:

(o)[1] Caption. The caption of a notice given under this Rule 2002 must conform to Rule 1005. The caption of a debtor's notice to a creditor must also include the information that § 342(c) requires.

[1] Because Congress enacted Bankruptcy Rule 2002(n) in P.L. 98-353, 98 Stat. 357, § 114 (1984), it was returned to that designation in the restyling process and what was formerly Rule 2002(n) became Rule 2002(o).

The clerks of court state that the caption requirements "are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice." They also note that, despite the requirements of Rule 2002(n), the "general long-standing practice for the bankruptcy courts in the Eight Circuit is to only provide the Rule 1005 caption requirements on the Notice of Bankruptcy Case [Official Forms 309A-309I]." Thereafter, the clerk's office uses a shorter caption that "generally follows Official Form 416B."

The same concern was expressed at the time Rule 2002(n) (formerly Rule 2002(m)) was amended in 1991. The following appears in the Minutes of March 15-16, 1990, meeting of Advisory Committee on Bankruptcy Rules, included in the Agenda Book for the Sept. 17-18, 1992:

> The Seventh Circuit bankruptcy clerks suggested providing at Rule 2002(n) that the caption of a notice shall comply with Rule 9004(b) instead of Rule 1005. The clerks indicated that the social security number, employer's tax ID number, and other names used by the debtor, which are included in the Rule 1005 caption, are not needed in routine notices. Creditors have been apprised of this information in the § 341 meeting of creditors notice. The Reporter opposed changing the Rule because some creditors rely on the social security number to identify the debtors. Professor King stressed the importance of the information in the full caption and opposed the proposed change. It was moved to leave the rule as it is. The motion carried without objection.

If creditors have no need of the information in the full caption after the notice of meeting of creditors, there would be some merit to the suggestion, but it is not clear that creditors match all routine notices under Rule 2002 to the initial notice of § 341 meeting. Deb Miller offered to canvas some creditor groups to try to ascertain whether they need the full caption on all Rule 2002 notices. After the Subcommittee receives the results of her information-gathering, it will consider the suggestion further.

TAB 6C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTY RULES

FROM: TECHNOLOGY AND PRIVACY SUBCOMMITTEE

SUBJECT: 23-BK-C– RULES 9014 AND 9017 AND PROPOSED RULE 7043 ON REMOTE HEARINGS

DATE: AUG. 16, 2023

The National Bankruptcy Conference (NBC) has submitted proposals to amend Bankruptcy Rules 9014 and 9017 and introduce a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

Currently, Rule 9017 makes applicable to bankruptcy cases the Federal Rules of Evidence[1] and Fed. R. Civ. P. 43 (Taking Testimony), 44 (Proving an Official Record) and 44.1 (Determining Foreign Law). Fed. R. Civ. P. 43(a) provides as follows:

> (a) IN OPEN COURT. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from the different location.

Fed. R. Bank. P. 5001(b) requires, in part, that "[a]ll trials and hearings shall be conducted in open court[2] and so far as convenient in a regular court room." The Rule was adapted from Fed. R. Civ. P. 77(b), which states, in part, that "[e]very trial on the merits must be conducted in open court, and, so far as convenient, in a regular courtroom." The proposal by the NBC would not modify the requirements of Rule 5001(b).

The NBC proposes to eliminate the incorporation of Fed. R. Civ. P. 43 by reference in Fed. R. Bankr. P. 9017, so that it would no longer be applicable "in a bankruptcy case."[3] With the deletion of the reference to Civil Rule 43, Rule 9017 would read as follows:

---

[1] Fed. R. Evid. 611(a), one of the Federal Rules of Evidence made applicable to bankruptcy cases under Bankruptcy Rule 9017, states that "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." The NBC views the broad discretion conferred by Fed. R. Evid. 611(a) as setting out a standard that is "inconsistent" with Fed. R. Civ. P. 43(a). In fact, Rule 611 does not directly address remote testimony, while Civil Rule 43(a) does so.

[2] The concept of an "open court" requires a presiding judge, a formal record, and public access. *See, e.g.*, Gould Electronics, Inc. v. Livingston County Road Comm'n, 470 F. Supp. 3d 735, 739 (E.D. Mich. 2020).

[3] This is the language in the restyled version of Bankruptcy Rule 9017.

Rule 9017. Evidence[4]

The Federal Rules of Evidence and Fed. R. Civ. P. ~~43,~~ 44, and 44.1 apply in a bankruptcy case.

Advisory Committee Note

The Rule is amended to delete the reference to Fed. R. Civ. P. 43. Under new Rule 7043, Fed. R. Civ. P. 43 is applicable to advisory proceedings but not to contested matters. Testimony in contested matters is governed by Rule 9014(d).

Instead, the NBC suggests a new Fed. R. Bankr. P. 7043 which would read as follows[5]:

Rule 7043. Taking Testimony

Fed. R. Civ. P. 43 applies in adversary proceedings.

Advisory Committee Note

Rule 7043 is new and continues to make Fed. R. Civ. P. 43 applicable to adversary proceedings —as was previously true under Rule 9017—but not to contested matters.

For contested matters, the NBC proposes to amend Fed. R. Bankr. P. 9014(d). That Rule currently reads as follows:[6]

Rule 9014. Contested Matters

***

(d) Taking Testimony on a Disputed Factual Issue. A witness's testimony on a disputed material factual issue must be taken in the same manner as testimony in an adversary proceeding.

The NBC proposes that the Rule should be amended as follows:

Rule 9014. Contested Matters

***

(d) Taking Testimony on a Disputed Factual Issue; Evidence; Interpreters. Rule 43(d) F.R.Civ. P. applies in contested matters. A witness's testimony on a disputed material factual issue must be taken ~~in the same manner~~

[4] This is the restyled version of Rule 9017.
[5] The suggested language of the NBC has been modified to be consistent with the restyled version of the Part VII rules.
[6] This is the restyled version of Rule 9014(d).

~~as testimony in an adversary proceeding.~~ in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. When a contested matter relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

The language of the proposed insertion is identical to Civil Rule 43 with the exception that the "compelling circumstances" standard is removed. To be consistent with the restyling project,[7] the amended rule should read as follows:

Rule 9014. Contested Matters

***

(d) Taking Testimony on a Disputed Factual Issue; Evidence; Interpreter.

(1) ***Taking Testimony***. A witness's testimony on a disputed material factual issue must be taken ~~in the same manner as testimony in an adversary proceeding.~~in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(2) ***Evidence on a Motion***. When a motion in a contested matter relies on facts outside the record, the court may hear the motion on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(3) ***Providing an Interpreter***. Fed. R. Civ. P. 43(d) applies in a contested matter.

* * * * *

Advisory Committee Note

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters, but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. Under new Rule 7043, all of Fed. R. Civ. P. 43—

[7] Note that the restyled Bankruptcy Rules never use the term "good cause" so the second sentence in (d)(1) uses the term "cause" despite the inconsistency with Civil Rule 43(a).

including the "compelling circumstances" standard—continues to apply to adversary proceedings.

Remote hearings have become commonplace in bankruptcy practice since the COVID-19 pandemic, and were justified during that period by "compelling circumstances." But bankruptcy courts have recognized that there are many advantages to remote hearings, including to the debtors. As the NBC suggestion notes, "[r]emote transmission of court hearings removes a barrier to access for individual debtors who are unable to travel to the federal courthouse because the travel expense, parking expense, childcare needs, lack of job leave, and no public transportation make live attendance not possible." Remote hearings also, as the NBC points out, "allow creditors who are often spread out across the country to participate in hearings when live attendance would be cost prohibitive."

Unlike adversary proceedings, which are comparable to civil actions governed by Fed. R. Civ. P. 43, contested matters are often of very short duration and do not typically turn on the credibility of witnesses. Therefore, the concerns about the inability to confront witnesses in person are much less pressing for bankruptcy contested matters. The proposed amendments and new rule would retain the general rule that testimony in a contested matter will be in person, but give the court more discretion to permit remote testimony by setting a less stringent standard for allowing exceptions to the rule.

***

The Subcommittee recommends that that Advisory Committee approve the proposed rule amendments and new Rule 7043 and submit them to the Standing Committee for publication.

TAB 7

TAB 7A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: SUGGESTION FOR AMENDMENT OF RULE 3018(c)

DATE: AUGUST 17, 2023

The National Bankruptcy Conference ("NBC") has submitted a suggestion (23-BK-F) regarding Rule 3018(c), which prescribes the method of voting on plans in chapter 9 and chapter 11 cases. The proposal would authorize courts to treat as an acceptance or rejection of a plan a statement of counsel or other representative that is part of the record in the case, including an oral statement at a confirmation hearing. The current rule, NBC contends, is "unduly formalistic in mandating a written ballot as the only possible means of evidencing creditor acceptance of a plan." Suggestion at 2.

This memo explains the NBC's reasoning for its suggestion, discusses the Subcommittee's consideration of it, and presents the Subcommittee's recommendation for an amendment to Rule 3018(c).

The Suggestion

The NBC makes its suggestion to address what it considers to be a problem under the existing rule: The IRS and certain other federal and state agencies that are repeat players in bankruptcy cases rarely submit a ballot either accepting or rejecting a proposed plan in a chapter 11 case.[1] Although there is a split of authority on the issue,[2] many courts do not accept a failure

[1] The suggestion focuses on chapter 11, but notes that similar problems occur in chapter 9 cases.

[2] *See, e.g.*, American Bankruptcy Institute Commission to Study the Reform of Chapter 11, Final Report and Recommendations, 23 AM. BANKR. INST. L. REV. 1, 268-71 (2015) (discussing split in the case

to vote as a deemed acceptance. And when the nonvoting creditor is in an impaired class by itself, its failure to vote means that the class rejects the plan. In order for the plan to be confirmed, it either has to be crammed down on that class, or the class has to be made unimpaired so as to be deemed accepting. *See* 11 U.S.C. §§ 1129(b), 1126(f).

The NBC focuses in particular on what happens in a subchapter V case if a creditor in an impaired class by itself does not submit a ballot under the current rule. The plan becomes nonconsensual, even if the nonvoting creditor supports confirmation, and confirmation will have to be under § 1191(b) with the less favorable (to the debtor) § 1192 discharge applicable.

Underlying the suggestion is the belief that there are many cases in which the IRS or other nonvoting agency supports the plan but is bound by policy or practice not to return a ballot. The NBC argues that § 3018(c)'s "rigid requirement [of a written ballot] creates unnecessary problems for chapter 11 plan proponents—and especially for subchapter V debtors—in scenarios where, as a matter of substance and reality, everyone supports the plan."

To address the problem they have identified, the NBC proposes the following amendment to Rule 3018(c):

> FORM OF ACCEPTANCE OR REJECTION. An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. The court for cause may also permit an acceptance or rejection to be set forth in a statement or representation by counsel to, or an authorized agent of, the creditor or equity security holder that is part of the record of the case, including orally at the confirmation hearing, in a stipulation, or through endorsement of a confirmation order. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be ~~filed~~ made by each creditor or equity security holder for any number of plans transmitted and if acceptances are ~~filed~~ made for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted.

law and ultimately concluding "that the better rule is to prohibit a plan from providing for 'deemed acceptance' if an impaired class of claims fails to vote on a plan").

Suggestion at 3. This amendment, says the NBC, "solves the problem created when certain creditors (largely governmental units) are unwilling or unable to return ballots and gives the bankruptcy court better and more complete information when all participating creditors support a plan." *Id.*

Issues Considered by the Subcommittee

The Subcommittee discussed several issues before arriving at its recommendation.

1. *Why don't the IRS and other agencies vote?* In order to assess the NBC's suggestion, the Subcommittee thought it would be helpful to know why the problem the NBC identifies occurs. The suggestion seems to assume that attorneys or other representatives of the nonvoting agency are unable or unwilling to vote by ballot but would be able to express approval—perhaps at a later time—in another manner, such as orally or by stipulation. The reporter consulted with the Committee's Department of Justice representatives to see if they could shed light on why the IRS and other federal agencies might not vote as secured or unsecured creditors in an impaired class.[3]

Mr. Hubbert and Ms. Elliott have been attempting to gather information on this issue that they can share with the Committee, but they were not able to do so by the time of the Subcommittee meeting.

Mr. Hubbert did offer his own thoughts about why the IRS and other agencies may refrain from returning their ballots. One reason is that there is a complex process for determining how a federal agency will vote on a reorganization plan. Section 1126(a) of the

[3] The Internal Revenue Manual instructs that the IRS does not vote with respect to administrative expense claims, gap period claims, and priority tax claims because their treatment is specified by the Bankruptcy Code and they are not put in classes in a plan. The Manual goes on to say that the "IRS should have an opportunity to vote to accept or reject a plan" with respect to secured and unsecured claims. Int. Rev. Manual 5.17.10.9.3(4), (5).

Bankruptcy Code provides that if "the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States." This provision means that an attorney representing a federal agency in a chapter 11 case has to figure out who at the Department of the Treasury to contact about the case, determine if Treasury has a position on the plan, and receive authorization to vote on behalf of the agency. Mr. Hubbert suggested that that process may take longer than the time for voting, especially if there is more than one federal agency in the case and any disagreements about how to vote must be resolved by the Treasury General Counsel's office.

In addition to having to navigate a cumbersome process, there may be reluctance on the part of a federal agency to take a position on the plan as a whole. Mr. Hubbert explained that most agencies seem to take the position that the federal government frequently does not have sufficient information to take sides in monetary disputes between private parties. He believes that the federal government is generally considering principles beyond maximizing a specific agency's short-term financial interests, and the ability to consider those principles may not be possible until all disputes have been resolved. Accordingly, even if the agency's treatment under the plan and other issues relevant to it are resolved satisfactorily, the agency may want to go no further than saying that it does not oppose confirmation. Since the agency will not know prior to the confirmation hearing whether there will be any other dissenting creditors, it will refrain from voting so as not to potentially prejudice anyone.

2. *Would the suggested amendment eliminate the problem the NBC identifies?* This issue follows from the previous discussion. If the reason for agencies not voting on a plan is just one of timing, allowing a form of voting at the confirmation hearing might address the problem. But if there are also obstacles to obtaining the necessary authority to vote after last minute

changes are made or if there is an unwillingness to take a position on the entire plan, changing the method and timing of voting as the NBC proposes will not change things. *See, e.g., In re Sabbun*, 556 B.R. 383, 391 (Bankr. C.D. Ill. 2016) ("But the Debtor's bargained-for use of the term 'affirmatively accepts' in the Stipulation is simply not enough to overcome the IRS's unequivocal statements that it intentionally did not vote and absolutely will not vote to accept the Amended Plan.").

3. *Is the proposed amendment consistent with the court's fixing of a date to accept or reject the plan?* Because the proposed amendment would allow actions that occur as late as the confirmation hearing or confirmation order to be treated as an acceptance or rejection, the date fixed by the court for voting could be disregarded. Under the proposal, however, the court would have to find cause to treat the action as an acceptance or rejection.

The Subcommittee's Conclusion and Recommendation

Members of the Subcommittee were especially concerned about the impact of not voting on a subchapter V case. If the IRS or any other creditor is in an impaired class by itself and declines to vote, in many courts the plan will have to be confirmed under § 1191(b), rather than (a), since not all impaired classes will have accepted the plan. That means that, instead of getting an immediate discharge under § 1141(d), the debtor's discharge will be governed by § 1192 and will not be granted until all payments under the plan have been made for the first 3 years of the plan or longer period set by the court. The Subcommittee viewed that result as being unfortunate when the nonvoting creditor actually supports the plan. If the nonvoting creditor ends up stating on the record or stipulating its acceptance of the plan, even though it did not submit a ballot by the deadline for voting, the Subcommittee agreed with the NBC that Rule 3018(c) should accept that action as a valid acceptance.

Because of the underlying concern that gives rise to the proposed amendment, the Subcommittee thought that the new provision should only apply to acceptances. It also revised the NBC's suggested provision to apply to changes of votes to acceptances and withdrawals of rejections, as well as initial acceptances.

The Subcommittee was not sure whether the revised rule would affect the actions of the IRS and other government agencies and result in their actions being treated as acceptances. But it is possible that it will have that effect, at least in some cases, and it will apply more broadly to creditors whose negotiations lead to their support of plans they previously rejected or failed to accept.

Therefore, the Subcommittee recommends that the Advisory Committee approve for publication the amendments to Rule 3018(c) shown on the following page.

Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan.[4]

(a) In General.

* * * * *

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. The court may also do so as provided in (c)(1)(B).

* * * * *

(c) ~~Form~~ Means for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.

(1) ***~~Form~~ Alternative Means.***

(A) *In Writing.* Except as provided in (B), ~~An~~ an acceptance or rejection must:

(~~A~~i) be in writing;

(~~B~~ii) identify the plan or plans;

(~~C~~iii) be signed by the creditor or equity security holder—or an authorized agent; and

(~~D~~iv) conform to Form 314.

(B) *As a Statement on the Record.* The court may also permit an acceptance—or the change or withdrawal of a rejection—that is:

(i) in a statement that is part of the record, including an oral statement at the confirmation hearing or a stipulation; and

[4] The changes indicated are to the restyled version of Rule 3018, not yet in effect.

(ii) made by an attorney for—or an authorized agent of—the creditor or equity security holder.

(2) ***When More Than One Plan Is Distributed.*** If more than one plan is sent under Rule 3017, a creditor or equity security holder may accept or reject one or more and may indicate preferences among those accepted.

* * * * *

Committee Note

Subdivision (c) is amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance or rejection by written ballot, the rule now authorizes a court to permit a creditor or equity security holder to accept a plan by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. This change reflects the fact that disputes about a plan's provisions are often resolved after the voting deadline and, as a result, an entity that previously rejected the plan or failed to vote accepts it by the conclusion of the confirmation hearing. In such circumstances, the court is permitted to treat that change in position as a plan acceptance when the requirements of subdivision (c)(1)(B) are satisfied.

Subdivision (a) is amended to take note of the additional means in (c)(1)(B) of changing or withdrawing a rejection.

TAB 8

TAB 8A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: LAURA B. BARTELL, ASSOCIATE REPORTER

SUBJECT: 23-BK-E – CONTEMPT PROCEEDINGS

DATE: AUG. 16, 2023

We received a "proposal for reforming judicial rules governing contempt proceedings" from Joshua T. Carback, an attorney in Baltimore, Maryland. He attached a law review article he authored that was published in the Mitchell Hamline Law Journal of Public Policy and Practice in 2023, called "Contempt Power and the United States Courts." In the article he makes three proposals:

(1) "to improve the statutory regime for contempt procedures by eliminating redundancy between criminal contempt statutes and passing legislation that explicitly gives bankruptcy courts contempt power."

(2) adopting "new rules and rule amendments to streamline contempt procedures for the United States Supreme Court, United States Courts of Appeals, United States District Courts, specialty courts, territorial courts, and administrative courts."

(3) "nationalize local contempt rules derived from specific courts with local contempt provisions that deserve to be replicated."

He then provided proposed language for statutory and rule changes.

Focusing on bankruptcy, he proposes an amendment to Section 105(a) of the Code to insert the words "including orders for civil and criminal contempt" at the end of the existing first sentence (which reads "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"). He then proposes that "[i]f and when bankruptcy courts are statutorily given contempt power, Bankruptcy Rule 9020 should be amended to simply state that New Civil Rule 42[1] and revised Criminal Rule 42[2] govern contempt matters in proceedings before bankruptcy courts. Bankruptcy Rule 9020's current internal cross-reference to Bankruptcy Rule 9014 should be eliminated."

The Advisory Committee is not the appropriate venue for proposals to amend the Bankruptcy Code. Because the proposed amendments to Bankruptcy Rule 9020 are dependent on Congressional action on his proposed amendment to the Bankruptcy Code (as well as

[1] He proposes a new Civil Rule 42 governing civil contempt that would be similar to Criminal Rule 42.
[2] He proposes that Criminal Rule 42 be amended "to eliminate unnecessary criminal contempt statutes and trim unnecessary contempt provisions in other criminal rules."

adoption of new or amended Civil Rules and Criminal Rules), I recommend that the Advisory Committee take no action in response to the suggestion.

TAB 9

TAB 9A

MEMORANDUM

DATE: August 24, 2023

TO: Judge John D. Bates
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: H. Thomas Byron III

FROM: Judge Jay S. Bybee
Catherine T. Struve

RE: E-Filing Deadlines Joint Subcommittee

We write on behalf of the E-Filing Deadlines Joint Subcommittee to summarize the Subcommittee's recommendations concerning Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U. Those docket numbers refer to a 2019 proposal by now-Chief Judge Michael Chagares that the national time-counting rules[1] be amended to set a presumptive electronic-filing deadline earlier than midnight.[2]

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1 Civil Rule 6(a)(4) is representative of the operative portions of the national time-counting rules. It provides in relevant part:

> (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time….
>
> > (4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:
> >
> > > (A) for electronic filing, at midnight in the court's time zone; and
> > >
> > > (B) for filing by other means, when the clerk's office is scheduled to close.

Bankruptcy Rule 9006(a)(4) and Criminal Rule 45(a)(4) are materially similar. Appellate Rule 26(a)(4) is slightly more complicated (in part because it addresses electronic filings in both the district court and the court of appeals) but, like the other three rules, it sets a presumptive deadline of midnight for electronic filings.

2 Chief Judge Chagares summarized his proposal thus:

The subcommittee requested information from the Federal Judicial Center ("FJC") about actual filing patterns by time of day. The FJC released two studies in 2022 – one concerning e-filing in federal court,[3] and another concerning e-filing in state courts.[4] The study of federal-court filings included a survey component, but that survey was truncated due to challenges arising from the pandemic.[5] The study also included a quantitative analysis of more than 47 million docket entries made in 2018 in the federal bankruptcy courts, district courts, and courts of appeals. That analysis enabled the researchers to reach this estimate: "About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00."[6]

This year, the Third Circuit adopted (effective July 1, 2023) a new local rule that moves the presumptive deadline for most electronic filings in that court of appeals from midnight to 5:00 p.m.[7] The Standing Committee asked the subcommittee to update its consideration of the

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> I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

The full proposal is enclosed.

3 See Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingDeadlineStudy.pdf .

4 See Marie Leary & Jana Laks, Electronic Filing Deadlines in State Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingStateCourts.pdf .

5 See Reagan et al., supra note 3, at 1 ("We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic.").

6 See id. at 4.

7 Third Circuit Local Appellate Rule 26.1 provides:

> 26.1 Deadline for Filing
>
> (a) Unless a different time is set by a statute, local rule, or court order:
>
> (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
>
> (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and

2019 proposal in the light of that development.

The subcommittee met by Zoom on August 21, 2023. All members participated, as did the Rules Committee Secretary and reporters from all four of the relevant advisory committees. Subcommittee members gave consideration to the Third Circuit's stated reasons for its new local rule, and also to reported comments concerning that local rule. It was noted that the local rule proposal had evoked strong negative reactions from the bar. An internal DOJ survey of attorneys concerning the idea of moving the presumptive e-filing deadline earlier than midnight had also elicited negative comments about that idea. A subcommittee member reported a similar reaction from members of a law firm.

After careful discussion, the subcommittee voted unanimously to recommend that no action be taken on Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U, and that the subcommittee be disbanded.[8]

Encls.

> (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.
>
> (b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.
>
> (c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
>
> > (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
> >
> > (2) a party is providing paper copies of previously filed electronic briefs and appendices.
>
> (d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

The Third Circuit's Public Notice dated May 2, 2023 is enclosed.

8 It was noted that the Appellate Rules Committee currently has before it a suggestion from Howard Bashman, Esq., proposing various possible responses by the Appellate Rules Committee to the Third Circuit's local rule. See Suggestion 23-AP-F. The Appellate Rules Committee, however, has not yet discussed that proposal, which remains for future consideration by that advisory committee.

19-AP-E
19-BK-H
19-CR-C
19-CV-U

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

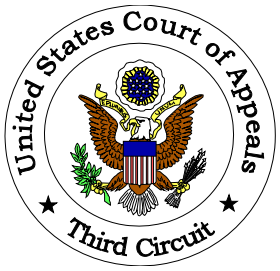
approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.



Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk's Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk's Office closes. The hours of the Clerk's Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. "The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review," stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court's adoption of the amendments include, in no particular order:

- permitting the Court's Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk's Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party's motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.

- insofar as over half of the Court's litigants are pro se, many of whom cannot or will not use the Court's CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.

- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court's filings are currently received after business hours.

- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, "the virtual courthouse remains open twenty-four hours a day for electronic filing."

The Clerk's Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:
  (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
  (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
  (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:

(1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or

(2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as "midnight in the time zone of the circuit clerk's principal office" for electronic filing and "when the Clerk's office is scheduled to close" for other means of transmission of documents to the clerk's office. This rule applies "[u]nless a different time is set by statute, local rule, or court order." L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

….

(c) Except as stated in L.A.R. 26.1, ~~F~~filing must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

….

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

TAB 10

Item 10 will be an oral report.