ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 7 - 8, 2011
San Francisco, California

MINUTES

The following members attended the meeting:

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

The following persons also attended the meeting:

District Judge Laura Taylor Swain, past chair
Professor S. Elizabeth Gibson, reporter
Professor Troy McKenzie, assistant reporter
District Judge Lee H. Rosenthal, chair of the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge James A. Teilborg, liaison from the Standing Committee
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Bankruptcy Judge Dennis Montali
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
James Ishida, Administrative Office of the U.S. Courts (Administrative Office)
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Molly Johnson, Federal Judicial Center (FJC)
Philip S. Corwin, Virtualaw LLC
David Melcer, Bass & Associates

The following members were unable to attend the meeting:

Michael St. Patrick Baxter, Esquire
Professor Edward R. Morrison

For the first morning of the meeting, the Committee met jointly with the Appellate Rules Committee. Attendance of the joint meeting is noted at Agenda Item 10-1.

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda materials were published, is available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings; Introduction of new members and new assistant reporter.

The meeting began as a joint committee discussion with the Advisory Committee on Appellate Rules to consider this Committee's progress in revising the Bankruptcy Appellate Rules. The members of both Committees and the other attendees introduced themselves, and the Chair took the opportunity to welcome the Committee's newest members, District Judge Adalberto Jordan (S.D. FL) and Judge Robert James Jonker (W.D. MI), and its new assistant reporter, Professor Troy McKenzie (New York University School of Law).

The report of the joint committee discussion is at Agenda Item 10.

2. Approval of minutes of Santa Fe meeting of September 30 - October 1, 2010.

The Santa Fe minutes were approved with minor changes noted by Judge Harris and Mr. Kohn.

3. Oral reports on meetings of other committees:

A. January 2011 meeting of the Standing Committee.

The Chair said the Committee had no action items before the Standing Committee last

January but that there was constructive feedback regarding the Bankruptcy Appellate Rules revision project. He said the Reporter provided the Standing Committee with two revisions of FRBP 8003 to illustrate the alternative structural approaches for the revision project. One was a self-contained version of rule that repeated relevant provisions from the appellate rule, while the other simply made reference to the relevant appellate rule provisions. He said a clear preference emerged in favor of the self-contained version of the rule. Standing Committee members also said that the Part VIII rules should parallel the FRAP as much as possible and that when relevant changes are made to the FRAP, they should be reflected in the Part VIII rules as soon thereafter as possible.

B. January 2011 meeting of the Bankruptcy Committee.

Judge Lefkow said the Bankruptcy Committee's primary focus at its January meeting was its recommendation for additional bankruptcy judgeships and for the conversion of 28 existing temporary bankruptcy judgeships to permanent judgeships. She said that although the need for additional judges has been documented in court surveys preformed by the AO, it is unlikely that Congress will act on the recommendation because it would require additional funds to the judiciary. There also appears to be reluctance in Congress to convert temporary judgeships to permanent judgeships, so the currently proposed legislation would simply extend the temporary judgeships for five years.

Judge Lefkow said courtroom sharing was another big issue before the Bankruptcy Committee and that it was working with the Space and Facilities Committee and the Committee on Court Administration and Case Management to develop a policy, to be considered by the Judicial Conference this fall, that would require some level of courtroom sharing by bankruptcy judges with respect to future court construction.

C. November 2010 and April 2011 meetings of the Advisory Committee on Civil Rules.

Judge Harris said that the focus of the November Civil Rules meeting continued to be issues pertaining to electronic discovery. Two issues of particular concern are national standards for both preservation of evidence and imposition of sanctions. He said the Civil Rules Committee's Discovery Subcommittee was reviewing both issues, and it reported difficulty in drafting a rule on preservation because it concluded that there are an infinite variety of situations arising before litigation that could trigger preservation obligations. The Discovery Subcommittee was more optimistic that it could agree on the language of a rule addressing sanctions and expected to discuss a proposed sanctions rule at its April meeting.

Judge Harris said the Civil Rules Committee also proposed changes to Rule 45 that it recommended be published for comment this summer. Because Bankruptcy Rule 9016 makes Rule 45 applicable in bankruptcy, he recommended that a subcommittee consider the proposed

changes. **The Business Subcommittee was asked to consider the impact of the proposed Rule 45 transfer provision on bankruptcy cases.**

D. October 2010 and April 2011 meetings of the Advisory Committee on Evidence.

Judge Wizmur said the Supreme Court has approved the proposed restyled evidence rules.

E. April 2011 meeting of the Advisory Committee on Appellate Rules.

The Reporter said that the Appellate Rules Committee recommended publishing proposed amendments to FRAP 13, 14 and 24 and was considering amendments to FRAP 28 and 29. She said she had also been working with the reporter of the Appellate Rule Committee, Professor Catherine Struve, in preparing the version of the Bankruptcy Appellate Rules that both committees reviewed in the joint session at the beginning of this meeting.

F. Bankruptcy CM/ECF Working Group, the CM/ECF NextGen Project, and the *Pro Se* Pathfinder Project.

Judge Perris said that the courts are currently on version 4.1 of CM/ECF and that version 5.0 was in the works. She said that the requirements phase of bankruptcy NextGen is mostly complete, and that the requirements groups across bankruptcy and district courts are now synchronizing with each other and should complete their work in early 2012. The next step will be to prioritize requirements, with the idea that NextGen will be rolled out in a series of steps. Judge Perris explained that there are also a number "pathfinder" projects underway.

Mr. Waldron gave the Committee an overview of a pathfinder project for *pro se* filers. He said the idea was to encourage *pro se* filers to file electronically by answering a set of questions that would complete the official forms, which could then be sent to the court over the internet. He said this pathfinder workgroup was considering practical issues, such as how to make clear that the filing does not actually occur until the debtor drops off a wet signature page and the filing fee at the courthouse. The working group is also trying to create a system that would allow for some parts, such as chapter 13 filings, to be turned off.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

A. Recommendation concerning comments submitted on the proposed amendment to Rule 3001(c), dealing with the information required to support a proof of claim when the claim is based on an open-end or revolving consumer credit agreement.

Judge Harris said the proposed amendment was in its second year of publication. As revised, the rule would require holders of open-end consumer credit claims to provide certain information at the time the claim is filed, subject to a possible sanction of not being able to use that information in response to a claim objection. (As previously published, rather than merely reporting required information, the rule would have required that the last account statement be attached.) The proposed rule amendment would also require the claim holder to provide the writing underlying an open-end consumer credit claim if a party in interest made a written request for that documentation. Four witnesses testified on the proposed amendment to Rule 3001(c), and there were a number of comments.

Comments and testimony from consumer advocates and the debtor's bar generally supported the proposed rule as amended. Some debtor advocates, however, said the republished version was too lenient and urged that holders of open-end consumer credit claims be required to attach writings that support the claim, as is required by the current version of the rule and as would be required if the claimant were suing on the debt in state court. The creditor's bar, on the other hand, maintained that since most claims are uncontested, the rule goes too far in providing for discovery-type sanctions simply for the failure to provide information at the time of filing. Creditors also said the rule as published was unclear on whether it applied to home equity loans.

Judge Harris said the Subcommittee had carefully considered the comments and testimony and concluded that the amendment should go forward with three changes from the published version: (1) a 30-day time limit would be made applicable for responses to any request for documentation; (2) the new provision would be subject to an exception for home equity loans; and (3) the Committee Note would clarify that entitlement to prima facie validity under Rule 3001(f) would not depend on whether or not a request for the underlying writing was made or satisfied. There was some discussion about the wording of the exception for home equity loans, to the effect that it should not be limited to the debtor's principal residence. **A motion to approve the proposed amendment to Rule 3001(c) as set forth in the materials carried without objection, with the wording at lines 15 and 16 changed to read "a security interest is claimed in the debtor's real property." A corresponding change to the committee note was also approved.**

B. Recommendation concerning Suggestion (09-BK-H) by Judge Margaret Dee McGarity and Suggestion (09-BK-N) by Judge Michael E. Romero on behalf of the Bankruptcy Judges Advisory Group to amend Rule 3007(a) to provide for disposition of objections to claims by negative notice and to clarify the proper method of serving objections to claims.

Judge Harris said that at the fall 2010 meeting, the Subcommittee presented a recommendation to the Committee to revise Rule 3007(a) to authorize negative notice of claims objections and to clarify the method of service—allowing generally that service is adequate if sent to the name and address on the proof of claim. As a result of the Committee's discussion of

the recommendation, the Subcommittee was asked whether an exception to the proposed procedures should be made for depository institutions, and whether the proposed 21-day notice period should be changed back current notice period of 30 days.

Judge Harris said that after reviewing the relevant statutory provisions, the Subcommittee concluded that Congress has mandated Rule 7004(h) service on depository institutions in all contested matters, and that they should therefore be excepted from the proposed 3007(a) negative notice procedure for claims objections. He said that no one member felt strongly about shortening the notice period to 21 days, and that the Subcommittee therefore recommended it stay at 30 days. **The Committee approved the Subcommittee's recommendation without objection, and voted to publish for comment proposed 3007(a) in August 2011.**

C. Recommendation concerning proposed technical amendment to Rule 3001(c)(1) to conform the rule to Instruction 7 on Official Form 10, the Proof of Claim, which directs claimants not to send original documents.

A motion to amend Bankruptcy Rule 3001(c)(1) to require the filer to attach only copies (not originals) of writings supporting the claim passed without objection. Because the amendment would merely conform the rule to current practice and to instruction 7 on the proof of claim, the Committee concluded that publication for comment is not necessary.

D. Recommendation concerning proposed amendment to Rule 5009(b) to conform the rule to the proposed amendment to Rule 1007(b)(7) to allow personal financial management course providers to file a statement of completion.

Judge Harris said that the Committee previously approved for publication in August 2011 proposed amendments to Rule 1007(b)(7) and Form 23 that would allow personal financial management course providers to directly notify courts that the debtor completed the course. He said that a conforming amendment should be made to Rule 5009 to relieve the clerk of the requirement to send a notice to the debtor regarding the need to file Form 23 if the course provider has already notified the court that the course has been completed. **A motion to publish for comment proposed changes to Rule 5009 as set forth in the materials was approved without objection.**

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

Recommendation concerning amendment to Schedule C (Official Form 6C) as a result of the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), in which the Court dealt with the extent of a claimed exemption.

At the fall 2010 meeting, the Committee discussed the impact of the Supreme Court's decision in *Schwab v. Reilly* on Official Form 6C and decided that the form should be amended

to provide an express option for the debtor to state an intent to exempt the full fair market value of an asset, regardless of the dollar amount of that value. The Committee asked the Consumer and Forms Subcommittees to develop a recommendation for amending the form.

Judge Harris said that after considering several options, the Subcommittees recommended either of the two proposed versions set out at page six of the memo in the materials. The first was a revised version of the five-column option favored by many committee members at the fall meeting, and the second was a revised version of a four-column option considered but rejected at the fall meeting.

In discussing the Subcommittees' recommendation, **the Committee first voted to recommend that one of the two options be published for comment in the August 2011.** One member argued in favor of the five-column version because it would make it easier for a trustee to scan to see if the full market value box was checked and then determine if an objection to the exemption was necessary. Several other members argued in favor of the four-column version as being less ambiguous and more consistent with *Schwalb*. **In a second vote, the Committee recommended the four-column version for publication.**

6. Report of the Subcommittee on Forms.

A. Recommendations concerning comments and testimony on proposed new mortgage claim forms: Official Form 10 (Attachment A), Official Form 10 (Supplement 1), and Official Form 10 (Supplement 2).

Judge Perris recounted the comments and testimony about the mortgage claim forms.

Attachment A: Judge Perris said that Attachment A was to be included with all mortgage proofs of claim at the time of filing. She said that when the form was drafted, Committee members debated whether to require full account histories or an account summary. Ultimately, members decided that a detailed loan history was probably not needed in many cases and that the summary form that was published provided the debtor with sufficient information to determine whether there was a dispute about the amounts due. Two bankruptcy judges testified, however, that a detailed loan history was necessary to determine whether the lender had applied funds as required under the loan documents and applicable law.

Judge Perris said several subcommittee members were persuaded by the bankruptcy judges' testimony and similar written comments that reconsideration should be given to requiring a detailed loan history. The Subcommittee concluded, however, that any such revision of proposed Attachment A would have to be republished. Because the mortgage-related rule changes that anticipate the mortgage forms have already been approved by the Supreme Court and are scheduled to go into effect December 1, 2011, the Subcommittee recommended that Attachment A go into effect this year as published, and that the Committee reconsider whether a

detailed loan history attachment should be developed after courts have had experience with the summary attachment. After a short discussion, **Attachment A was approved without objection, and the Subcommittee was directed to report back at the fall 2011 meeting about how feedback on experience with the new form should be obtained.**

Supplement 1 and Supplement 2: Judge Perris said that Subcommittee recommended some minor, mostly stylistic, changes to Supplement 1 (Notice of Mortgage Payment Change) and Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges), as set out in the materials. **A motion to approve Supplements 1 and 2 as set out in the materials was approved with the following change:** the word "claim" in the declaration in each form was changed to "notice."

B. Recommendations concerning comments on proposed amendments to Official Form 10, Proof of Claim.

After considering the comments, the Subcommittee recommended approving Form 10 as published with the following changes as described in the materials: delete the debtor/trustee checkbox on page 1 because that information has been added to the revised signature block on the form; add a statement to the committee note that the new request for email addresses does not affect notice or service requirements. **The Committee approved Form 10 changes described above, with a December 1, 2011 effective date.**

As described at page 8 of the memo in the agenda book, the Subcommittee also recommended adding language to box 7 of Form 10 that addressed the need to attach the new mortgage attachment form under proposed Rule 3001(c) and the statement concerning open-end or revolving consumer credit agreements in proposed Rule 3001(c)(3)(A). However, because the change to Rule 3001(c)(3)(A) cannot take effect until December 2012, the Subcommittee recommended that the proposed changes to box 7 be put in the bullpen until the spring 2011 meeting. **The Committee approved the proposed changes to box 7 and put the proposal in the bullpen until the spring 2012 meeting to be sent to the Standing Committee at that meeting.**

C. Recommendation concerning comments on proposed amendment to Form 25A.

The Reporter said there were no comments on the proposed amendment to Form 25A, and **a motion to approve the form as published passed without objection.**

D. Recommendation concerning amending Official Forms 22A and 22C as a result of the Supreme Court's decision in *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716 (2011).

When Official From 22A-C were adopted following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Committee chose to avoid resolving ambiguous statutory language regarding the means test. Instead, the forms were drafted to allow debtors to apply the means test in the manner they believed was appropriate under the Code, even if other readings were possible. With respect to local standards for transportation ownership/lease expenses, Forms 22A and 22C direct the debtor to "[c]heck the number of vehicles for which you **claim** an ownership/lease expense" (emphasis added). The Committee Note states that the "forms take no position on the question of whether the debtor must actually be making payments on a vehicle in order to claim the ownership/lease allowance."

In *Ransom*, the Supreme Court held that "a person cannot claim an allowance for vehicle-ownership costs unless he has some expense falling within that category." After *Ransom* was decided, Mr. Redmiles urged an amendment to Official Forms 22A and 22C to make clear that the debtor is not entitled to claim an allowance for a vehicle based simply on ownership. The Subcommittee considered the suggestion and agreed to recommend that line 23 on Form 22A and line 28 on Form 22C be amended to substitute "you are obligated to make a loan or lease payment" for "you claim an ownership/lease expense."

Mr. Redmiles said he generally supported the Subcommittee's suggested change, but argued that merely being "obligated" to make payments was not enough, and that the debtor should not be allowed to claim the expense unless payments were actually being made. Some members suggested possible revisions to the Subcommittee's proposal, and others argued that because the current version of the form merely asks the debtor to report the number of vehicles for which he or she "claims" an ownership expense, it is already consistent with *Ransom*. **A motion to make no changes to Official Forms 22A and 22C in response to *Ransom* carried seven votes to four.**

E. Recommendation concerning Suggestion 10-BK-G by Judge Margaret Mahoney and Comment 10-BK-M by States' Association of Bankruptcy Attorneys (SABA) to adopt a form chapter 13 plan.

Judge Perris said there was a large demand for uniformity in chapter 13 plans around the country, and that after considering suggestions from Judge Mahoney and the States' Association of Bankruptcy Attorneys, the Subcommittee recommended appointing a working group to study the idea. **A motion to create a working group was approved without objection.** The Chair, Judge Perris, Judge Harris and Professor McKenzie agreed to confer regarding establishing the members of the working group.

F. Recommendation concerning Suggestion 10-BK-I by Aaron Cahn to revise the definition of "Insider" on page 1 of Official Form 7, Statement of Financial Affairs, to conform to the statutory definition in 11 U.S.C. § 101(31).

As set forth in the materials, the Subcommittee recommended that the phrase "any owner of 5 percent or more of the voting or equity securities" be deleted and that in its place "persons in control" be inserted in the definition of "insider" in Official Form 7. It further recommended that the citation at the end of the definition be made more precise by substituting "11 U.S.C. § 101(2), (31)" for "11 U.S.C. § 101." **A motion to recommend publishing for comment the Subcommittee's suggested change to the definition of "insider" carried without objection.**

G. Oral report on amendment to Director's Form 240A/B(Alt.), Reaffirmation Agreement, to conform to the Bankruptcy Technical Corrections Act of 2010.

Mr. Wannamaker explained that certain statutory language quoted in Director's Forms 240 A/B had been changed by Bankruptcy Technical Corrections Act of 2010, and that the AO has updated the form as shown in the materials. He explained that the changes are minor and not substantive and that the AO therefore plans to make the form effective December 1, 2012, when this year's official forms go into effect. **The Committee voted to endorse the change.**

H. Recommendation concerning Suggestion 10-BK-E by Scooter LeMay of the Middle District of Alabama for the addition of a bar code indicating the form number for each official form.

A motion to refer the suggestion to the Forms Modernization Project and bring it to the attention of the CM/ECF NextGen Project was approved.

7. Oral report on status of the Bankruptcy Forms Modernization Project (FMP).

Judge Perris provided background on the project to new members, explaining that the goals of the FMP are to clarify and streamline the forms, and to reduce errors. She said the FMP has divided the revised forms into individual and business forms and reported that most of the individual forms are done and are being tested.

Ms. Johnson continued the status report by stating that the Federal Judicial Center has begun testing the individual forms. The initial testing group consisted of 15 law clerks who completed the forms using data from five actual cases, and the FMP working groups have revised the draft forms in response to comments from the clerks. Ms. Johnson said that the draft forms are also being reviewed by college students and commercial forms vendors. Judge Perris said that the FMP hopes to evaluate and incorporate comments from the testing groups over the next several months, and present the individual forms to the Committee this fall and next spring with a recommendation that they be published for comment in August 2012. She said the business forms will be next.

Judge Perris said that it was initially anticipated that the FMP would finish its work and the modernized forms would be ready to go into effect about the same time CM/ECF NextGen becomes effective. It now appears, however, that the FMP forms may be finished before NextGen is complete. Timing is important because the FMP forms are expanded by substantial amounts of instructional material intended to educate the debtor, but not needed by attorneys, judges, and many other end users. Because most of the benefit of the new forms to end users (custom reports and finding information easily through computer search functions) will be realized only if the court's case management system is able to accept and store individual data elements, it might be preferable to delay some or all FMP forms until NextGen is implemented. This question will be discussed at the next FMP meeting.

8. Reporter's recommendations on comments on proposed amendments to Rule 7054 and Rule 7056.

The Reporter said that there were no comments on proposed Rule 7056 and only one comment on proposed Rule 7054. For the reasons discussed in the materials, the Reporter recommended that both rules go into effect as published. **The Committee agreed and voted to recommend that both rules be approved as published, with an anticipated effective date of December 1, 2012.**

9. Report of the Subcommittee on Business Issues.

A. Oral report on status of Suggestion 09-BK-J by Judge William F. Stone, Jr., for rules and an official form to govern applications for the payment of administrative expenses.

Judge Wizmur said that Judge Stone's suggestions raised the question of whether the Committee should establish a national procedure for administrative expense requests, and that at this point the Subcommittee was simply researching the issue. To help inform the Committee, Judge Wizmur said the Federal Judicial Center surveyed bankruptcy clerks and attorneys from the ABI and from the ABA business law section about existing court procedures and whether there is a need for a national procedure.

Ms. Johnson conducted the survey and said it revealed that about half of the courts have some sort of procedure in place. Procedures vary. Some courts have a motion process, and others have a process like the one used for proofs of claim. About two-thirds of responding attorneys said that their practice would benefit from a national procedure, but Ms. Johnson said it is difficult to know if the response is representative because only 90 out of over a thousand attorneys responded. Also, only a few respondents had "great difficulties" with current procedures.

Generally, only attorneys that practiced in multiple districts saw a benefit in a national rule. Some of the problems the survey identified with today's fragmented approach are the need to learn local procedures, the requirement in many courts for debtor's counsel to file a motion to set an administrative bar date, the need to hire local counsel to assert the claim, and the lack of an administrative claims register.

The Committee agreed that the Subcommittee's work warranted further development, and the Chair asked the Subcommittee to offer potential responses at the fall meeting.

B. Recommendation concerning Suggestion 10-BK-H by the Institute for Legal Reform (ILR) for a rule and form to promote greater transparency in the operation of trusts established under 11 U.S.C. § 524(g).

Judge Wizmur explained that the Subcommittee gave careful consideration to the ILR's suggestion for a draft rule that would require quarterly reporting of trust finances, including payments made and requests submitted, itemized by individual claimant. She said the Subcommittee noted the serious nature of the request and the concerns that motivated it. At the same time, the Subcommittee was concerned that the proposed rule might exceed the scope of federal rule-making authority. One of the issues raised in this regard was that asbestos trusts are established pursuant to confirmed plans in Chapter 11 cases, and the jurisdiction of the courts after a plan is confirmed is limited. Accordingly, the Subcommittee recommended that the Committee consider the scope of its rule-making authority before addressing the merits of the Institute's suggestion.

The Chair noted that shortly before the meeting that Representative Lamar S. Smith, Chairman of the House of Representatives Judiciary Committee, sent a letter urging the Committee's full consideration of the ILR's proposed rule. According to the letter, Representative Smith has also asked the Government Accountability Office to study the transparency of § 524(g) trusts and he expects that the study will be complete in time for the Committee's further consideration.

Several members also questioned whether there was a bankruptcy need for quarterly reporting of trust distributions broken down by individual. One response was that it would be helpful for the Committee to obtain the views of interested parties—including those of the ILR and the National Bankruptcy Conference—on the authority for a procedural rule governing asbestos trusts after confirmation. **At the end of the discussion, the Committee decided to give the suggestion further consideration at its fall meeting, after hearing responses from interested parties**.

C. Recommendation concerning Suggestion 10-BK-F by Douglas M. Neistat concerning a rule requiring publication of notice of the sale of estate assets

pursuant to 11 U.S.C. § 363(f) on a national registry similar to one maintained by the Central District of California.

Judge Wizmur said that the Subcommittee considered the suggestion and agreed that the practice in the Central District of California of requiring notice on its website appears to be a good way to publicize sales of estate assets and thereby attract potential buyers (as long as people become aware of the practice). It is not the only effective method of providing notice, however, and Judge Wizmur said that a brief sampling of the local rules of 20 other districts revealed no other court with a similar requirement. The Subcommittee, therefore, voted not to recommend that the practice be mandated by rule for all bankruptcy courts at this time.

Rather, the Subcommittee recommended referral to the Bankruptcy Judges Advisory Group (BJAG). If the BJAG views the Central District of California's Local Rule 6004-1(f) favorably, it could encourage the AO to call this practice to the attention of all bankruptcy courts, urge the AO to create a national registry for courts that want to publish their notices of sales of estate property, or refer the matter back to the Advisory Committee if it believes the practice should be mandated by national rule. **The Committee approved the Subcommittee's recommendation, and asked staff to refer the suggestion to the BJAG.**

10-1. Joint Discussion with the Advisory Committee on Appellate Rules.

The Chair and Judge Jeffery S. Sutton, Chair of the Advisory Committee on Appellate Rules, called the joint meeting to order. Attending from the Appellate Rules Committee were Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. James F. Bennett, Ms. Maureen E. Mahoney, Mr. Richard G. Taranto, and Professor Catherine T. Struve, Reporter of the Appellate Rules Committee. Also attending were Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice; Mr. Jeffrey N. Barr from the AO; Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the FJC.

The Chair thanked the Appellate Rules Committee for agreeing to the joint meeting and explained that one goal of the Committee's Part VIII revision project was to achieve consistency with the Appellate Rules. Judge Sutton said he expected the meeting would be interesting and helpful to the Appellate Rules Committee, especially concerning the Committee's insights on electronic filing.

Judge Pauley and the Reporter provided background on the revision project. Judge Pauley said that the revision project arose in the Subcommittee on Privacy, Public Access, and Appeals, from the efforts of former Committee member Eric Brunstad, who produced an initial draft of the proposed revision. He added that the Subcommittee has held two mini-conferences on the subject and there have been a number of iterations of the draft.

The Reporter said that a recurring background issue has been whether the revised Part VIII rules should simply incorporate the Appellate Rules by reference, similar to how the Part VII rules incorporate many Civil Rules by reference, or if they should repeat language from the appellate rule when appropriate. When presenting his initial draft revision to the Committee, Mr. Brunstad said he tried incorporation by reference, but found it to be unworkable. The Reporter said that when she presented two alternate drafts of one of the revised rules at the Standing Committee meeting last January, the approach of verbatim incorporation was clearly favored.

The Reporter proposed that the joint meeting focus on issues of common interest to the two Committees. Those include issues relating to electronic filing and transmission, as well as issues concerning the intersection of the Bankruptcy and Appellate Rules (especially with respect to appeals directly from the bankruptcy court to the court of appeals).

The Reporter said with respect to electronic filing, the Committee hoped for feedback on the possibility of incorporating into the rules a default standard of electronic filing and transmission. She asked, for example, how such a change would affect the rules concerning the submission and form of briefs, and how the record is assembled. She said it would be particularly useful to learn about the experience in the Sixth Circuit and other appellate tribunals, such as the Ninth Circuit Bankruptcy Appellate Panel (BAP), that have also moved toward electronic filing.

An Appellate Rules Committee member said that the rules would likely need to accommodate paper filings because many appeals are made by inmates who do not have access to computers. The Reporter noted that a similar accommodation is made by bankruptcy courts for paper filings from *pro se* filers, but that those paper documents are scanned by the clerk's office to maintain an electronic record. The Chair added that a requirement that attorneys file electronically has worked well.

Mr. Green said that within the Sixth Circuit, some 40 to 45 percent of the filings are paper filings by inmates and that the court converts those filings to PDF format. He said that the Sixth Circuit generally will not accept paper filings from attorneys and does not accept the appendix or record excerpts in paper form. Instead, the judges access the electronic record themselves. The Chair asked whether the Sixth Circuit's system has worked well, and Judge Sutton responded that although he thinks it is the right approach, it took years for judges' chambers to adjust, and that in the view of many judges the system simply transfers the burden of printing to chambers.

The Reporter asked how the record is handled in the Sixth Circuit. Mr. Green responded that the electronic case filing architecture differs in the court of appeals, so that the Clerk's Office must transfer the electronic record from the court below into the court of appeals' system. The Clerk's Office is able to use that method to provide the judges of the court of appeals with electronic links to the record, and appellate counsel identify for the court the relevant portions of the record. Judge Sutton noted that before the Sixth Circuit changed to electronic case filing

there was a need to include time in the case schedule to assemble the appendix; now, he said, this step is no longer necessary.

The bankruptcy judges present reported that electronic filing works well for them, explaining the key benefits as allowing the judge to access the docket and filings from anywhere. Further, because of off-site backups, filings are less likely to be lost or destroyed.

The Reporter explained how proposed Rule 8006 handles certification of direct appeals, and Professor Struve reviewed how proposed new Appellate Rule 6(c) would address the procedure for permissive direct appeals under section 158(d)(2) of the Bankruptcy Code. Both reporters posed questions and invited comments on the proposed procedures.

The Reporter asked for feedback on briefing requirements, and specifically on the situation of a district court allowing a smaller page limit for briefs than the one that applies in the court of appeals, making it potentially difficult for a party to preserve all the points that it wishes to argue on appeal. Several participants, including a district judge member of the Appellate Rules Committee, favored specific brief requirements, including length limits that were consistent at both levels of appeal.

In closing, the Reporter said that Committee is on track to discuss a portion of the revision project at its fall 2011 meeting and another portion at the spring 2012 meeting, with a goal to publish the revised rules in August 2012. In the meantime, she said a working group will further refine the proposal and she invited participation by interested appellate rules committee members in the working group. She and the Chair both expressed the Committee's desire to continue coordinating efforts with the Appellate Rules Committee and thanked them for their participation.

Judge Sutton offered to appoint personnel from the Appellate Rules Committee to the working group, and expressed commitment to coordinating the two Committees' work going forward. He thanked Chair and the Committee for inviting the Appellate Rules Committee to join them.

Judge Sutton also noted that this was Judge Rosenthal's last meeting with the both Committees, and he thanked her for tireless work as Chair of the Standing Committee. Judge Rosenthal returned the praise, and thanked the Advisory Committees for their thorough, thoughtful, and innovative work.

10-2. Oral report by the Subcommittee on Privacy, Public Access, and Appeals on the revision of the Part VIII rules.

The Reporter asked for reflections on the discussion with the Appellate Rules Committee, and members said that it was very helpful and that coordination should continue. The Reporter

then asked for feedback on specific issues in the current working draft.

With respect to Rule 8005—Election to Have Appeal Heard by District Court Instead of BAP—the Reporter asked for further consideration of the procedure for determining validity of an election to have appeal heard by the district court rather than BAP, including the possible use of an Official Form for both notice of appeal and statement of election (to reduce errors due to failure to satisfy the current requirement of a separate election statement). Members generally favored the proposed "Notice of Appeal and Statement of Election" form at page 280 of the materials. Judge Perris, who participated in drafting the form, noted a Part VIII revision working group would also need to draft an election form for the appellee. The Chair said the working group should also make a recommendation about who decides a dispute (district court or BAP) if the election is not clear.

The Reporter said that Rule 8006—Certification of Direct Appeal to Court of Appeals—contains a new provision that the case remain pending in bankruptcy court (for purposes of the rule only) for 30 days after the filing of the first notice of appeal. She said the purpose was to give the bankruptcy court a longer opportunity to rule on a request for certification. Judge Montali asked how the propose rule works if there is premature notice of appeal, e.g., if the judge orally announces the ruling, but the judgment isn't entered for two weeks. The Reporter suggested changing the trigger to run from the 'effective date' of the judgment.

Rule 8007—Stay Pending Appeal; Bonds; Suspension of Proceedings. The Reporter said that the draft no longer specifies the appellate scope of review of denial of stay by the bankruptcy court because there is a division of authority under FRAP 8, and she asked if the scope of review should go back in. Judge Montali suggested keeping the de novo standard of review because he thought the effective result of an abuse of discretion standard would be no appellate review at all. Judge Ikuta suggested abuse of discretion for review of factual determinations, and Judge Jordon said even de novo doesn't mean de novo of the facts; that would still be clear error. The Chair said this was another issue the working group should carefully consider.

Rules 8013, 8014, 8015, 8016—Form and Format of Briefs and Other Documents. The Reporter said the issue for the working group to consider in these rules is the level of detail about briefing that should be specified in rule. She said her sense from the joint meeting was that there is value to having clear rules about briefing with at least some level of detail, as similar to FRAP as possible.

Rule 8017—Brief of an Amicus Curiae. The Reporter asked whether there was support for the provision in the current draft that allows the appellate court to request an amicus-curiae brief on its own motion. She pointed out that the procedure would differ from FRAP 29, which does not give the appellate court discretion to request an amicus-curiae brief.

Rule 8018—Serving and Filing Briefs; Appendices. The Reporter said the draft lengthens some time periods for filing briefs over current Rule 8009, while still retaining some periods that are shorter than some in FRAP 31. She said the working group should consider whether the proposed time periods should be adjusted, as well as whether the rule should dispense with appendices if the electronic record is used.

Rule 8028—Suspension of Rules in Part VIII. The Reporter said the working group will need to consider whether the draft rule has too many exceptions to its authority, noting that current Rule 8019 has only three exceptions.

The Reporter suggested the following procedure for preparing a draft for consideration by the Committee. After the meeting, the Chair will create a working group composed of members from the Appeals and Style Subcommittees, the Chair, the Reporters and personnel of the Appeals Committee appointed by Judge Sutton. Judge Caldwell volunteered to be a member.

The Reporter proposed that over the summer the working group would engage in a careful review, revision, and editing of current draft. Members discussed in-person drafting sessions verses conference calls, and favored in-person sessions if possible.

The Reporter suggested asking Joe Kimble to perform a style review after the working group completes its work, with a goal to present half of the draft to the Committee in at the fall 2011 meeting and half at the spring 2012 meeting, with a recommendation to publish the Part VIII package in August 2012. **The proposed procedure was approved.**

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

No report.

12. Oral Report of the Subcommittee on Attorney Conduct and Health Care.

No report.

13. Oral report on technical amendment to Rule 2015(a)(3) to correct reference to 11 U.S.C. § 704(a)(8).

Motion to revise Rule 2015(a)(3) to include the correct the statutory reference -- from § 704(8) to § 704(a)(8) -- approved without objection.

Discussion Items

14. Suggestion 10-BK-J by Judge Linda Riegle to amend Rule 1014.

Referred to Business Subcommittee.

15. Suggestion 10-BK-M by James Jacobsen on behalf of the States' Association of Bankruptcy Attorneys for a national rule on admission to practice before the bankruptcy courts and local counsel requirements for governmental entities, and for a national uniform chapter 13 plan.

The attorney practice suggestion was referred to Attorney Conduct Subcommittee; the chapter 13 plan suggestion was treated Agenda Item 6E.

16. Suggestion by Judge Thomas W. Waldrep, Jr., for new rules to provide more transparency in the selection process for creditors' committees and to discourage unethical behavior by counsel.

Referred to Attorney Conduct Subcommittee.

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

Referred to Consumer Subcommittee.

18. Suggestion by David Andersen to eliminate unneeded and wasted regular mailings in bankruptcy cases.

The Reporter explained that Mr. Andersen's suggestion was to require most postpetition notices be sent only to those parties who affirmatively request such notices. **After a brief discussion, the Committee decided to refer the suggestion to the CM/ECF NextGen working group and the BJAG.**

19. *Charlie Y, Inc., v. Carey*, B.A.P. 9th Cir. (Mar. 4, 2011), in which the Bankruptcy Appellate Panel found that there is a gap in Rule 7054 as to the procedure for requesting allowance of attorney's fees in adversary proceedings.

The Chair said the *Carey* case raises the issue of whether Rule 7054 should incorporate Civil Rule 54(d). **Referred to the Consumer and Business Subcommittees.**

20. Oral report on impact of the sunset of the National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, on Interim Rule 1007-I and Official Form 22A.

The Chair explained that the statute, codified at 11 U.S.C. § 707(b)(2)(D)(ii), applies to cases commenced in the three years after December 19, 2008, and that if Congress declines to

extend its applicability, the Committee will need to remove certain language from Official Form 22A, for cases filed on or after December 19, 2011, and will need to decide when to sunset Interim Rule 1007-I. **The Committee decided to consider the issue at its next meeting.**

Information Items

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

Mr. Wannamaker updated the Committee on pending bankruptcy-related legislation.

22. Oral update on opinions interpreting 11 U.S.C. § 521(i).

The Reporter said that there were no new developments. Courts are still divided on whether automatic dismissal under § 521(i) is self-effectuating, which makes it difficult to develop a rule governing automatic dismissal. The Reporter said she will continue to monitor the case law.

23. Bullpen:

As a result of decisions at this and prior meetings, except where indicated, the bullpen items listed below will be forwarded to the Standing Committee for consideration at its June 2011 meeting.

A. Amendment to Rule 1007(b)(7) to authorize providers of postpetition personal financial courses to notify the court directly of a debtor's completion of the course, approved at September 2010 meeting

B. Technical amendment to Rule 1007(c) to conform to the December 1, 2010, amendment to Rule 1007(a)(2) changing the deadline for the debtor in an involuntary case to file a list of creditors, approved at September 2010 meeting.

C. New Rule 8007.1 and the amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting, **will remain in the bullpen, to be incorporated into the revised Part VIII rules**.

D. Amendments to Rule 9006, Rule 9013, and Rule 9014, to address the timing of the service of any written response to a motion, rather than only opposing affidavits, approved at September 2010 meeting.

E. Amendment to Official Form 1 to implement new Rule 1004.2 by providing space for a chapter 15 debtor to indicate the country of its center of main interests and each country in which a foreign proceeding is pending, approved at September

2010 meeting.

F. Technical and conforming amendments to Official Forms 9A - 9I, notices of the meeting of creditors, including amendments to implement the proposed amendment to Rule 2003(e), approved at September 2010 meeting.

G. Amendment to Official Form 22C to implement the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), by directing an above-median-family-income debtor to state any change from the income or expenses reported elsewhere on the form that has occurred or is virtually certain to occur during the 12-month period following the date of the filing of the petition, approved at September 2010 meeting.

H. Amendment to Official Forms 22A and 22C to permit deduction of expenses for business cell phone service necessary for the production of income, if not reimbursed by the debtor's employer, approved at September 2010 meeting.

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

J. As a result of the decision at Agenda Item 6B, the proposed amendments to Box 7 of Official Form 10 were moved to the bullpen until the spring 2012 meeting.

24. Rules Docket.

The Chair thanked Mr. Wannamaker for maintaining the Rules Docket.

25. Future meetings:

Fall 2011 meeting, September 26 - 27, 2011, at the Sofitel Water Tower Hotel in Chicago, Illinois.

The Chair announced the location of the fall 2011 meeting, and asked for location suggestions for the spring 2012 meeting.

26 New business.

No new business.

27. Adjourn.

In adjourning the meeting, the Chair thanked all in attendance for their participation and gave special thanks to Judge Swain for her past leadership and guidance of the Committee. Judge Rosenthal added her personal thanks to Judge Swain and asked that the minutes reflect the profound gratitude of the Standing Committee for the work performed by Judge Swain during her tenure as chair.

Respectfully submitted,

Scott Myers