

ADVISORY COMMITTEE ON BANKRUPTCY RULES  
Meeting of April 20, 2015  
Pasadena, CA

**MINUTES**

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair  
Circuit Judge Adalberto Jordan  
District Judge Jean Hamilton  
District Judge Robert James Jonker  
District Judge Amul R. Thapar  
Bankruptcy Judge Stuart M. Bernstein  
Bankruptcy Judge Dennis Dow  
Bankruptcy Judge A. Benjamin Goldgar  
Bankruptcy Judge Arthur I. Harris  
Professor Edward R. Morrison  
Diana Erbsen, Esquire  
Jeffrey Hartley, Esquire  
Richardo I. Kilpatrick, Esquire  
Jill Michaux, Esquire  
Thomas Moers Mayer, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter  
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and  
Procedure (Standing Committee)  
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee  
Officer  
Bankruptcy Judge Martin Isgur  
Bankruptcy Judge Elizabeth L. Perris  
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on the  
Administration of the Bankruptcy System  
Bankruptcy Judge Eugene R. Wedoff  
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S.  
Trustees  
Roy T. Englert, Jr., Esq., liaison from the Standing Committee  
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey  
Bridget Healy, Esq., Administrative Office  
Scott Myers, Esq., Administrative Office  
Molly Johnson, Senior Research Associate, Federal Judicial Center  
Patricia Ketchum, consultant to the Committee  
James Wannamaker, Esq., consultant to the Committee  
Michael T. Bates, Senior Company Counsel, Wells Fargo

Marcy Ford, Trott Law Firm, Farmington Hills, Michigan  
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia  
Raymond J. Obuchowski, National Association of Bankruptcy Trustees  
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida  
Daniel A. West, South Law Firm, St. Louis, Missouri

Introductory Items

1. Greetings

Judge Sandra Ikuta opened the meeting, welcoming Committee members to Southern California. The Committee members as well as guests introduced themselves. Judge Ikuta noted the absence of Troy McKenzie, the former Assistant Reporter to the Committee, who had taken a new position as deputy assistant attorney general at the Department of Justice's Office of Legal Counsel. Judge Ikuta outlined her idea of using a consent and discussion calendar approach to the meetings going forward. Items that are non-controversial and do not need discussion could be considered on the consent calendar and those that need greater discussion could be considered on the discussion calendar. Any issue could be moved from one calendar to the other.

2. Approval of minutes of the Charleston, SC meeting of September 29-30, 2014

The minutes of the meeting of September 29-30, 2014 were approved.

3. Oral Reports on Meetings of Other Committees

(A) January 2015 meeting of the Committee on Rules of Practice and Procedure

Professor Elizabeth Gibson reported on the January 2015 Committee on Rules of Practice and Procedure (Standing Committee) meeting. The Committee had one action item, the proposed amendment to Rule 1001, and the Standing Committee approved it for publication. An update was provided to the Standing Committee about the Chapter 13 plan form process and the final set of modernized forms. The draft minutes from the January 2015 Standing Committee meeting were included in the agenda materials at Tab 3A.

(B) December 2014 meeting of the Committee on the Administration of the Bankruptcy System

Judge Erithe Smith reported on the December 2014 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). The Committee on Court Administration and Case Management (CACM) took the position that bankruptcy judges do not have the discretion to waive the reopening fees in individual chapter 11 cases and the Bankruptcy Committee asked CACM to review this decision.

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No decision has been made. The Bankruptcy Committee deferred any action on the Bankruptcy Administrator (BA) program as the Administrative Office (AO) is completing an assessment of the program. There are several proposals to reduce or expand the powers of the BA program, including a proposal to transfer control of the U.S. Trustee program to the courts, but the Bankruptcy Committee recommended that these proposals be held off pending the completion of the assessment.

### (D) Spring 2015 meeting of the Advisory Committee on Civil Rules

Judge Arthur Harris reported on the spring meeting of the Advisory Committee on Civil Rules (Civil Rules Committee), noting that Judge Bates will be the new chair of the Civil Rules Committee. The amended rules regarding discovery will likely be effective in December 2015. The Civil Rules Committee also discussed amending Civil Rule 6 to eliminate the rule providing three additional days to take an act when service is made electronically as well as an amendment to Civil Rule 5 to require electronic filing. The proposed amendment to Civil Rule 5 would require electronic filing unless prohibited by local rule. In response to concerns raised by the Advisory Committee on Criminal Rules, an express exception for *pro se* filers was added.

The Civil Rules Committee meeting also discussed potential changes to Civil Rule 68. The Bankruptcy Rules have a corresponding rule – 7068 – regarding offers of judgment. The Civil Rules Committee’s Civil Rule 23 Subcommittee will have a conference in September 2015. Its Appellate Subcommittee is considering the issue of manufactured finality.

### Subcommittee Reports and Other Action Items

#### 4. Report by the Subcommittee on Consumer Issues

##### (A) Suggestion 14-BK-B from CACM to Amend Rules Regarding Redaction of Private Information in Closed Cases

Judge Harris provided a brief overview of the issue, referring to the memo at Tab 4A. The Judicial Conference adopted a policy that a case does not need to be reopened to redact a previously-filed document. The Conference approved a redaction fee of \$25 per case for instances in which redaction is the only reason for reopening a case. It is on the miscellaneous fee schedule. For this reason, an immediate amendment is not necessary and the subcommittee will continue to consider several issues related to redaction, including notice.

- (B) Report Regarding Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to Amend Rule 1006(b)

Judge Harris explained that this issue has been under consideration for several years. It relates to Suggestion 12-BK-I by Judge Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Bankruptcy Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

A report from Professor Gibson detailing the issue was included at Tab 4B of the materials.

At the fall meeting, the Committee decided not to make an amendment to Rule 1006(b) because no language change was needed to permit minimum payments with installment applications. The Committee also addressed a different issue: that some courts rejected filings where debtors did not have the upfront installment payments. That issue was referred back to the subcommittee, which recommended an amendment to Rule 1006(b) to require courts to accept a petition regardless of whether any portion of the filing fee is provided so long as the petition is accompanied by a signed application to pay the filing fee in installments. The subcommittee further recommended that the accompanying Committee Note cross-reference Rule 1017.

A motion was made to approve the recommendation and it was approved unanimously. The recommendation will be forwarded to the Standing Committee for consideration at its May 2015 meeting for approval for publication.

The subcommittee recommended that the Committee take no action on a separate suggestion from a Committee member to amend the Rule to detail the proper procedure in a case in which the debtor has unpaid fees from a prior case and requests to pay the filing fee for a subsequent case in installments.

- (C) Report Concerning Suggestion 13-BK-G to Amend Rule 1015(b)

The suggestion to change the reference in Rule 1015(b) to the word “spouse” had been approved at the spring 2014 meeting. The Committee agreed with the subcommittee’s recommendation to wait for the Supreme Court’s decision in *Obergefell v. Hodges*, No. 14-556, to be decided by June before deciding about publication of the proposed amendment.

- (D) Achieving a Better Life Experience Act of 2014 (the ABLE Act) Amendments

Judge Harris explained that the passage of the ABLE Act on December 19, 2014 necessitates several amendments to Official Forms 106A/B, 122A-2, and 122C-2 as well as a change to the Committee Note for Official Form 106A/B. The changes are all minor and add references to ABLE Act accounts to the forms. A memo detailing the required

changes is included at Tab 4D of the agenda materials. The subcommittee recommended the following edits to the materials in the agenda book: to change the term “interest” to “interests,” the term “continues” in the means tests forms to “continuing,” and “defined under” or “defined by” to “defined in” in the forms and Committee Note.

The changes will be included with the other modernized forms changes that will go to the Standing Committee for its May 2015 meeting. A motion was made to approve the amendments and it was unanimously approved.

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

(A) Discussion Regarding Proposed Chapter 13 Plan Form (Official Form 113) and Related Proposed Amendment Rules

Judge Ikuta stated that the Committee’s first decision was a policy decision regarding how to proceed with the plan form. She provided a brief overview of the history of the development of the plan form. The form was published in 2013 and again in 2014, and a hearing was held in January 2015 in Washington D.C. at which several people testified both for and against the published plan form. Both publications resulted in many comments, and the majority of the comments objected to a mandatory chapter 13 plan form. One of the comments received in 2014 was a letter opposing the plan form signed by 144 bankruptcy judges. Following the hearing, a compromise solution was proposed by a small group of bankruptcy judges and practitioners, including some of the 144 judges who had signed the letter opposing the plan form. The materials related to the chapter 13 plan form are included at Tab 5A of the agenda book and Appendix A of the appendices book.

Professor Gibson outlined the options for the chapter 13 plan form and related rules. The options include: (1) going forward with the published plan form and related rules with any necessary changes in response to comments received by presenting the package to the Standing Committee for approval at its May 2015 meeting, (2) going forward with the proposed amended rules as published but not issue an official form, using the published version of the plan form as either a Director’s Form or have not form at all, (3) not proceed with any aspect of the chapter 13 plan form or related rules, or (4) proceed with some type of compromise with regard to the plan form and related rule amendments.

The compromise would not necessarily be the same as the one proposed by the commenters, but its premise would be the same: that district could opt-out of using the national form if the district had a local plan with certain required provisions. This option would require an amendment to Rule 3015.

If the Committee decided to proceed with a compromise approach, the Committee would also have to consider timing issues. Assuming that the Official Form and related

rules remain as a package, republication of any part of that package in August 2016 means that the form and rules would be on track to go into effect on December 1, 2018. On the other hand, if republication is not deemed necessary, the chapter 13 plan form and rules could be promulgated a year earlier.

The Committee engaged in a robust discussion. Many members spoke in favor of a compromise solution, noting that it achieves some of the goals of the original chapter 13 plan form project, including greater efficiency in the chapter 13 process and also will provide the opportunity to test the plan form. A number of members expressed support for continuing with the current plan form as published. Several members noted their objection to continuing with the proposed rule amendments by themselves. Members also discussed whether republication would be necessary.

Following the discussion, a motion was made to explore a compromise approach and the motion was approved unanimously. A second motion was made to defer a decision on republication until the Fall 2015 meeting. This motion was also approved unanimously. Judge Ikuta assigned this project to the Forms Subcommittee, which may seek the help of former members of the Working Group that developed the chapter 13 national form, as well as other members of the bankruptcy community. The Forms Subcommittee will recommend revisions to the form and rules and recommend whether to republish the form and associated rules at the fall meeting.

(B) Report Regarding Potential Forms to Implement Rules 3002.1(f) and (g)

Judge Goldgar reported that the subcommittee is continuing its work on the proposed forms related to Rules 3002.1(f) and (g).

(C) Report on Comments and Recommendation Regarding Published Rule 3002.1

Judge Goldgar reported that there were several comments on the published rule, although they were closer to suggestions than comments. A motion was made to approve the amended form as published and the motion was approved unanimously.

6. Report by the Subcommittee on Forms

(A) Report and Recommendation on Effective Date for Modernized Forms

Judge Dow reported on the Forms Subcommittee's recommendations. First, the subcommittee recommended, with one dissent, that the modernized forms become effective December 1, 2015. The Committee modernized the forms to make them more usable for debtors and creditors as well as to utilize the data benefits of the Next Gen system. Going forward with the forms in 2015 achieves the first of the two objectives and permits the AO to build its database for the new forms rather than for both sets of forms. The subcommittee's research established that the majority of private software

vendors will be prepared to proceed with the modernized forms in December. Therefore, the subcommittee did not recommend delaying the effective date of the forms until the Next Gen system is ready to accept data from the modernized forms, which would be December 2016, at the earliest, or December 2017.

Second, the subcommittee recommended permitting the use of the current Official Forms after December 1, 2015 solely by the Electronic Self-Representation (ESr) program. The program permits *pro se* debtors to use an online system to complete the case opening forms for bankruptcy in three courts: the District of New Jersey, the District of New Mexico, and the Central District of California. The ESr program is not designed to work with the modernized forms.

Third, the subcommittee considered how to provide the bankruptcy community with guidance regarding the conversion to the modernized forms by courts and parties, including guidance concerning the use of superseded forms in certain circumstances in cases that were started before the effective date of the new forms. The subcommittee proposed adopting language that is used with the promulgation of amended rules, that the new forms should be used in pending cases “insofar as just and practicable.”

A motion was made to make December 1, 2015 the effective date for the modernized forms, permit the use of the current forms in the ESr courts post-December 1, 2015, and to use the suggested language regarding the use of the superseded forms. The motion was approved unanimously.

Judge Ikuta and Judge Dow thanked Judge Perris for her work on the project.

(B) Report on Comments on Published Forms

Judge Dow stated that the subcommittee reviewed the many comments filed on the published forms. A summary of all of the comments and the subcommittee’s recommendations were included in the agenda book at Tab 6(B)(1) and in Appendix B. The proposed forms are included in Appendix C. Judge Dow noted that the Forms Subcommittee recommended several revisions to the forms’ instructions, and these revisions did not need approval by the Standing Committee or the Judicial Conference.

A motion was made to approve the forms as set forth in the agenda book with the revisions that the language regarding “with net value” be deleted from Official Form 206A/B and that the term “lease” be added to questions about ownership to Official Form 206A/B to add “lease” in questions about ownership. The motion was approved.

A motion was made to approve the following of the published forms as set out in the agenda materials with the minor edits as described above: Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B,

309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B. The motion was approved.

(C) Report and Recommendation on Comments on Official Form 410A

Judge Dow stated that Official Form 410A is the proof of claim attachment form used by mortgage creditors and that the form was included as part of Appendix C. The form was published in August 2014 and the subcommittee recommended that the form be approved as published with a few minor alternations in response to comments. The Department of Justice commented that the modernized form eliminates an itemized list of fees included on the current version of the form. After discussion, the Committee determined not to include the itemized list of fees on the modernized form.

A motion was made to approve Official Form 410A as published, with the minor edits. The motion was approved.

7. Report by the Subcommittee on Business Issues

(A) Recommendation Concerning Whether to Publish Proposed Amended Official Forms 9F and 9F(Alt.) (to be Official Form 309F)

Judge Bernstein reported on Suggestion 12-BK-I regarding the language used on Official Forms 9F and 9F(Alt.) (Official Form 309F) regarding the commencement of a dischargeability action and the deadline for filing such an action. The Committee had previously approved a revisions to these forms in response to an ambiguity in section 1141(d)(6)(A) of the Bankruptcy Code at the fall 2014 meeting. The subcommittee recommended publishing the amended form after the modernized form goes into effect. A motion was made to approve this recommendation and the motion was approved.

(B) Report on Noticing Working Group

Judge Bernstein explained that because Troy McKenzie has left the Committee as Assistant Reporter, this issue will wait until the new Assistant Reporter is appointed.

(C) Report Regarding Small Business Forms

Judge Bernstein reported that these forms are ones related to small business cases (Official Forms 25A, 25B, and 25C), Official Form 26, and Exhibit A to the petition (to be re-numbered Official Form 201A). The subcommittee is continuing to work on the forms. Mr. Mayer provided an update on his research regarding Exhibit A/Official Form 201A, which included speaking with several lawyers at the Securities and Exchange Commission. He determined that the SEC does use the forms and would use the form with new Official Form 401. The SEC does not monitor bankruptcy filings by reviewing Form 8-K filings; instead, they look for Exhibit A/Official Form 201A filings in

bankruptcy cases. Although service of the form on the SEC would be helpful, it is not necessary. Mr. Mayer advised that he is working on a re-draft of Exhibit A/Official Form 201A and that he will circulate the draft to the subcommittee when complete.

Mr. Mayer will also provide a suggestion to the Business Subcommittee for a change in the rules to address a problem with companies ceasing SEC filings immediately before or after filing for bankruptcy.

(D) Recommendation Regarding Proposed Amended Rule 9006(f)

Professor Gibson reported that this amendment eliminated the rule providing three additional days to take an act when service is made electronically. A memo on the topic was included at Tab 7D of the agenda materials. The other rules committees published similar amendments. There were few comments submitted in response. The various rules committees are working together to develop consensual language in response to an objection raised by the Department of Justice (DOJ) that the elimination of the three-day rule could lead to gamesmanship in litigation.

A motion was made to delegate authority to the Reporter to communicate that while the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

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

(A) Recommendation Regarding Revising the Uniform Numbering System for Local Bankruptcy Rules

Judge Adalberto Jordan reported on the uniform local rules renumbering issue. Scott Myers explained that the uniform numbering system must be amended in order to match the revised Part VIII Rules. The uniform numbering system document is posted online for courts to use in promulgating their local rules. The Committee agreed to this change.

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

(A) Report Regarding Amendments Related to Electronic Filing

Professor Gibson reported on the current status of the Civil Rules Committee's electronic filing proposal which is discussed in the materials included in the agenda book at Tab 9A(1). The Advisory Committee on Criminal Rules proposed revised language

that would exempt *pro se* parties from electronic filing requirements and permit electronic filing by *pro se* parties where permitted by local rule. A motion was made to delegate the authority to complete the negotiations for this language to the Reporter and Chair, and the motion was approved unanimously.

Professor Gibson reported that the Civil Rules Committee has proposed permitting service via a court's CM/ECF system without the consent of the person served and via another electronic method with consent.

(B) Review and Recommendation Regarding Comments on Official Form 401 and Related Proposed Rule Amendments

Professor Gibson reported that Official Form 401 resulted from the Forms Modernization Project's decision to create separate petitions for individual and non-individual debtors and the determination that a separate chapter 15 petition would allow the deletion of otherwise unnecessary information from the other petitions. In addition, the rules that relate to chapter 15 were revised to create a separate rule governing responses to chapter 15 petitions. The form and proposed amended rules were published in August 2014. One comment suggested a small change to Rule 1012 regarding service of a response. The SEC suggested that an Exhibit A/Official Form 201A requirement be added to Official Form 401. This will be considered by the Business Subcommittee. A motion was made to approve Official Form 401 and the related proposed chapter 15 rules, and the motion passed unanimously.

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

(A) Report Concerning Suggestion 13-BK-C by the American Bankruptcy Institute's (ABI) Task Force on National Ethics Standards to Amend Rule 2014

Judge Robert Jonker discussed the subcommittee's work on this issue. The ABI suggested changes to Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals. The subcommittee will continue to work on this issue.

Information Items

11. Report on Decisions Interpreting 11 U.S.C. § 109(h)

Professor Gibson provided an update on this issue. There is one new case interpreting Bankruptcy Code § 109(h) as to whether credit counseling can be obtained on the day of the filing of the petition but after the time of the filing. There was as a direct appeal to the Seventh Circuit of a case from the Northern District of Illinois that allowed post-filing credit counseling but it was determined to be moot on appeal. She does not see a need for any changes to official forms at this time.

12. Report on Legislative Issues Related to Bankruptcy

There was nothing to report.

13. Supreme Court Update

Professor Gibson updated the group on *Sharif v. Wellness Int'l Network, Ltd.* (No. 13-935) which was heard by the Court in January. There are several other cases before the court, including a case regarding fee awards for defending a fee application and two cases involving stripping off junior mortgages where the senior lien is under-secured. During the argument on these cases, several justices questioned whether *Dewsnup v. Timm*, 502 U.S. 410 (1992) should be reconsidered.

14. *Deferred consideration*: The following items have been approved for submission to the Committee on Practice and Procedure in the future.

(A) Proposed revisions to Rule 8002(a)(5) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting.*

(B) Proposed revisions to Rule 8006(b) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting.*

(C) Proposed revisions to Rule 8023. *Approved at the spring 2014 Advisory Committee meeting.*

(D) Proposed revisions to Rule 3002.1 that notice requirements for payment changes for home equity lines of credit (HELOCs) may be modified by court order. *Approved at the fall 2014 Advisory Committee meeting.*

15. *Future consideration*: Suggestions and issues deferred for future consideration.

(A) Suggestion 12-BK-M by Judge Scott Dales to amend Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed proof of claim. *Placed on the future consideration list at the fall 2013 meeting pending receipt of comments on the Chapter 13 Plan Form and related rules amendments.*

(B) Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding the designation of the record in bankruptcy appeals.

(C) Recommendation concerning previously approved and then withdrawn amendments to Rules 7008, 7016, 9027, and 9033 (based on *Stern v. Marshall*), as well as Alan Resnick's Suggestion 12-BK-H to amend the Part VIII rules to

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allow appellate courts to treat bankruptcy courts' judgments as proposed findings of facts and conclusions of law.

16. Future meetings: Fall 2015 meeting, October 1-2 in Washington, D.C.

Judge Ikuta stated that the next meeting will be in Washington, D.C. on October 1-2, 2015. The meeting will be held at the Administrative Office.

17. New Business

Judge Ikuta noted that the new suggestions have been assigned as set forth below. No one voiced any objections to the assignments.

(A) Suggestion 14-BK-G by Gary Streeting the Rule 2002(a)(1) be amended so that only the last 4 digits of a debtor's Social Security Number are included in the 341 meeting notice sent to creditors. Assigned to the Consumer Subcommittee.

(B) Suggestion 15-BK-A by Derek S. Tarson that the bankruptcy schedules be revised to reflect ownership categories that are gender neutral so that they can be accurately completed by same sex spouses. Assigned to the Forms Subcommittee.

(C) Suggestion 15-BK-B by Judge S. Martin Teel, Jr. to revise Director's Form 263-*Bill of Costs*. Assigned to the Forms Subcommittee.

(D) Suggestion 15-BK-C by Professor Kenneth N. Klee to amend Rule 8018-*Serving and Filing Briefs; Appendices*. Assigned to the Privacy, Public Access and Appeals Subcommittee.

18. Adjournment

Judge Ikuta thanked everyone for attending the meeting. The meeting adjourned at 3:20 p.m.