ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 15, 2022
Washington, D.C. and on Microsoft Teams

The following members attended the meeting in person:

Circuit Judge Thomas L. Ambro
Bankruptcy Judge Rebecca Buehler Connelly
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge Dennis R. Dow
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
Bankruptcy Judge Catherine Peek McEwen
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq.
Tara Twomey, Esq.
District Judge George H. Wu

District Judge Marcia Krieger attended remotely.

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)
Professor Catherine T. Struve, reporter to 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
Circuit Judge William J. Kayatta, liaison from the Standing Committee
Bankruptcy Judge Laurel M. Isicoff, Liaison to the Committee on the Administration of the Bankruptcy System
Nancy Whaley, National Association of Chapter 13 Trustees
H. Thomas Byron III, Administrative Office
Brittany Bunting-Eminoglu, Administrative Office
Bridget M. Healy, Esq., Administrative Office
S. Scott Myers, Esq., Administrative Office
Allison A. Bruff, Esq., Administrative Office
Shelly Cox, Administrative Office
Carly E. Giffin, Federal Judicial Center
Christopher Pryby, Rules Law Clerk
Dana Yankowitz Elliott, Administrative Office
Daniel J. Isaacs-Smith, Administrative Office

The following persons attended the meeting remotely:

Shari Barak, LOGSLegal Group LLP
Pam Bassel, Chapter 13 trustee
Edward J. Boll, Dinsmore & Shohl LLP
Hilary Bonial, Bonial & Associates, P.C
Lisa Caplan, Rubin Lublin
Andrea L. Cobery, U.S. Bank
Jeff Collier, Attorney for Locke D. Barkley, Trustee
Professor Daniel R. Coquillette, consultant to the Standing Committee
James Davis, Chapter 13 trustee
Kathy Day, no affiliation
Ana V. De Villiers, Office of Laurie K. Weatherford, Chapter 13 trustee
Marcy J. Ford, Trott Law, P.C.
Jeff S. Fraser, Albertelli Law
Lisa Gadomski, Schiller, Knapp, Lefkowitz & Hertzel, LLP
Rebecca R. Garcia, Chapter 12 and 13 trustee
John Hawkinson, freelance journalist
Susan Jenson, Administrative Office
Teri E. Johnson, Law Office of Teri E. Johnson, PLLC
Sarah M. McDaniel, Mackie Wolf Zientz & Mann, P.C.
Lisa K. Mullen, Chapter 13 trustee
Lance E. Olsen, McCarthy Holthus, LLP
Madeline Polskin, Shell Point Management
Tim Reagan, Federal Judicial Center
Andrew Spivack, Brock & Scott PLLC
Linda St. Pierre, McCalla Raymer Leibert Pierce, LLC
M. Regina Thomas, bankruptcy court clerk in N.D. Ga.
Vicki Vidal, Black Knight
Julia Waco, Gregory Funding Bankruptcy Department
Alice Whitten, Wells Fargo Legal
Crystal Williams, no affiliation

Discussion Agenda

1. Greetings and Introductions

Judge Dennis Dow, chair of the Advisory Committee, first introduced Senior Inspector Tirrell Richardson of the Judicial Security Division who provided a brief security announcement. Judge Dow then welcomed the group and thanked everyone for joining this meeting, including those attending virtually, Judge Krieger and Professor Coquillette. He welcomed new Rules Committee Chief Counsel H. Thomas Byron III. He noted that this will be his last meeting as chair of the Advisory Committee, and that also leaving the Committee are Judge Thomas Ambro and Professor David Skeel. He thanked them for their service. He noted that Judge Rebecca

Connelly will be succeeding him as chair. He stated that this has been one of the highlights of his professional career and thanked everyone for their work on this Committee.

Scott Myers made a special presentation to Judge Dow of a commemorative book with the following inscription:

In special recognition of the Honorable Dennis R. Dow for his exemplary contributions to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States

Member:	2014-2022
Forms Subcommittee Chair:	2014-2018
Chair, Advisory Committee:	2018-2022

In his eight years on the Advisory Committee Judge Dow was witness to and participated in a number of significant changes to the Bankruptcy Rules and Forms, including a complete revision and restyling of the Official Bankruptcy Forms shortly after he became a member, the promulgation of rule amendments requiring the adoption of a plan form for chapter 13 cases, and a multi-year effort to restyle the Bankruptcy Rules, currently on track to go into effect December 1, 2024.

Judge Dow contributed greatly to the Advisory Committee's many projects, but his leadership was particularly evident in the adoption of rule and form amendments necessary to address the passage of the Small Business Reorganization Act of 2019 (the SBRA), the most significant addition to the Bankruptcy Code in 14 years. The SBRA was signed into law with an effective date 180 days after enactment, requiring the Advisory Committee, the Standing Rules Committee and Judicial Conference to 'shorten' the normal three-year amendment process required under the Rules Enabling Act (the REA) to roughly four months. In those four months, the Advisory Committee not only proposed Official Form amendments and Interim Rules that courts could adopt as local rules to implement the SBRA while the REA amendment process ran its course, but it even built in a one-month public comment period to ensure that the best version possible of the needed amendments would be implemented. And just a few months after SBRA took effect, Judge Dow led efforts to respond to temporary changes to the SBRA provisions that Congress enacted during the COVID-19 pandemic

This commemorative volume contains the full set of SBRA Rule amendments sent by the Supreme Court to Congress in May 2022 -- on track to go into effect December 1, 2022. These Rules are a small sample of the work done under Judge Dow's leadership.

Judge Dow then reviewed the anticipated timing of the meeting and when he anticipated lunch. In-person participants were asked to state their name before speaking for the benefit of those not present, and 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.

2. **Approval of Minutes of Remote Meeting Held on March 31, 2022**

Two corrections of the minutes have been requested.

First, Dana Yankowitz Elliott requested a change in the final paragraph of (3)(D) (the report on the meeting of the Bankruptcy Committee). She requested that the language "The Bankruptcy Committee also supports the proposed amendment to Rule 7001(1)" be changed to "The Bankruptcy Committee continues to receive informational updates on the status of the proposed amendment to Rule 7001(1)" and that the language "and remains available should the Advisory Committee wish to refer any matters related to *Fulton* for the Bankruptcy Committee's feedback or input" be added at the end of the paragraph. The minutes as so amended were approved by motion and vote.

Second, in the report by Judge Catherine McEwen on the meeting of the Advisory Committee on Civil Rules in (3)(C), the second paragraph should be deleted. The proposed change is being made to Criminal Rule 16, not Civil Rule 16, and is not relevant to the bankruptcy rules. All remaining paragraphs in her report should be renumbered.

With those changes, the minutes were approved.

3. **Oral Reports on Meetings of Other Committees**

(A) ***June 7, 2022 Standing Committee Meeting***

Judge Dow gave the report.

(1) **Joint Committee Business**

(a) ***Emergency Rules***. The Standing Committee gave final approval to the proposed new and amended rules addressing future emergencies, including new Bankruptcy Rule 9038.

(b) ***Juneteenth National Independence Day***. The Standing Committee also gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform, adding Juneteenth National Independence Day to the lists of specified legal holidays.

(c) ***Pro Se Electronic Filing Project***. Professor Catherine Struve provided the Standing Committee a status report on the working group meetings on the suggestions related to electronic filing by self-represented litigants. She stated that the working group would be meeting again during the summer and would hope to present

topics for discussion at the fall meetings of the advisory committees.

(2) **Bankruptcy Rules Committee Business**

The Standing Committee provided final approval on seven items and approved four others for publication for public comment.

Final Approval

(a) ***Restyling***. Judge Dow presented for final approval Parts III through VI of the restyled Rules. He noted that the Advisory Committee received extensive comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. The Standing Committee approved the proposed restyled Rules in Parts III through VI.

(b) ***Rule 3011***. The Standing Committee gave final approval to the proposed amendment to Rule 3011. The amendment adds a subsection to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code.

(c) ***Rule 8003***. The Standing Committee approved the proposed amendment to conform the rule to the recent amendments to Fed. R. App. P. 3.

(d) ***Official Form 101***. The Standing Committee gave final approval to amendments to the individual debtor petition form, concerning other names used by the debtor over the past 8 years.

(e) ***Official Forms 309E1 and 309E2***. The Standing Committee gave final approval to the amendments to the forms used to give notice to creditors after a bankruptcy filing. The amendments improve the formatting and applicable deadlines.

(f) ***Official Form 417A***. The Standing Committee approved amendments to the form to conform to the amendments to Rule 8003.

Publication for Public Comment

(a) ***Restyled Rules for Parts VII – IX***. The Standing Committee approved for publication for public comment the proposed restyled rules in Parts VII – IX.

(b) ***Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006***. The Standing Committee approved for publication for public comment an amendment to the rule that would require filing the certificate of completion of a course on personal financial management rather than a statement. Conforming amendments in rules 4004, 5009 and 9006 were also approved for publication.

(c) ***Rule 8023.1***. The Standing Committee approved for publication for public comment a new Rule 8023.1 concerning substitution of parties.

(d) ***Official Form 410A***. The Standing Committee approved for publication for public comment amendments to the attachment to the proof-of-claim form that a creditor with a mortgage claim must file.

Information Item

Judge Dow also reported on changes that would be required to forms upon anticipated enactment of the Bankruptcy Threshold Adjustment and Technical Correction Act.

(B) ***Oct. 13, 2022, Meeting of the Advisory Committee on Appellate Rules***

The next meeting of the Appellate Rules Advisory Committee will be on Oct. 13, 2022, in Washington, D.C. and the report will be made at the spring meeting.

(C) ***Oct. 12, 2022, Meeting of the Advisory Committee on Civil Rules***

The next meeting of the Civil Advisory Committee will be on Oct. 12, 2022, in Washington, D.C. and the report will be made at the spring meeting.

(D) ***June 7, 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 June in Denver. It will meet again on December 8-9, 2022, in Washington, D.C.

Legislative Proposal Regarding Emergency Authority and Proposed Rule 9038

The Bankruptcy Committee has been updated by Judge Connelly on the status of proposed Rule 9038, which the Standing Committee has recommended to the Judicial Conference for final approval. The Bankruptcy Committee appreciates the Rules Committee's work on this important effort.

Just as the Rules Committee was considering rules amendments under the CARES Act to deal with future emergencies, in spring 2020, the Bankruptcy Committee developed a legislative proposal to extend statutory deadlines during the pandemic, which the Judicial Conference adopted. Unfortunately, Congress did not take any action on the legislative proposal, and on recommendation from the Bankruptcy Committee, the Conference rescinded the legislative proposal in March 2021.

The Bankruptcy Committee may still consider a broader legislative proposal after the COVID-19 emergency subsides and courts resume normal operations. The broader proposal would likely provide a permanent grant of authority during an ongoing emergency and could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. Just like the narrower proposal that was tied to the COVID-19 emergency, the permanent grant of authority would not extend to the Bankruptcy Rules. The Bankruptcy Committee does not have any legislative proposal currently under consideration, but if and when it does consider a proposal related to emergency authority, it will coordinate closely with the Rules Committee to ensure that there is no conflict or overlap with Proposed Rule 9038 (if adopted) or otherwise.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

At its December 2021 and June 2022 meetings, the Bankruptcy Committee considered certain structural concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys. It also solicited feedback on these concerns from the AO's Bankruptcy Judges and Bankruptcy Clerks Advisory Groups.

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. Rulings on whether and to what extent these arrangements are allowed are inconsistent around the country.

To address these issues, the Bankruptcy Committee considered a number of potential statutory and non-statutory fixes originally proposed in the Final Report of the American Bankruptcy Institute's Commission on Consumer Bankruptcy, and ultimately recommended that the Judicial Conference seek legislation to amend the Bankruptcy Code to (1) except from discharge chapter 7 debtors' attorney fees due under any agreement for payment of such fees; (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.

If the Conference adopts the legislative position and Congress enacts amendments to the Code based on this position, conforming changes to the Bankruptcy Rules would be required.

City of Chicago v. Fulton

The Bankruptcy Committee continues to receive informational updates on the status of the proposed amendment to Rule 7001(a) that responds to issues raised by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton* and remains available should the Rules Committee wish to refer any matters related to *Fulton* for the Bankruptcy Committee's feedback or input.

With respect to the attorneys' fee proposal, Judge Dow asked whether a bankruptcy judge would have to approve fees in every case. Judge Isicoff said the details would have to be worked out, but she contemplated that the courts would adopt something like the practice in chapter 13 cases, a no-look rule if the fees were within certain guidelines. Judge Dow noted that Judge Isicoff is a leader in this area, having authored a leading opinion on the topic.

Subcommittee Reports and Other Action Items

4. **Report by the Consumer Subcommittee**

(A) ***Consider changes to proposed amendments to Bankruptcy Rule 3002.1 in light of public comments***

Professor Gibson provided the report.

After presenting the Subcommittee's preliminary reactions to the comments to the Advisory Committee at its last meeting, the Subcommittee has met several times and now recommends a revised amended Rule 3002.1 to the Advisory Committee, which the Subcommittee believes is responsive to the comments.

The key changes to the published draft are as follows:

In subdivision (b) the Subcommittee recommended changing the order of former (b)(2) and (b)(3) and making optional the provisions for annual notices of HELOC-payment changes. This is also responsive to comments suggesting that the rule was not authorized by the Rules Enabling Act. Other changes include a clarification of the amounts of the next two payments following an annual notice and the addition of an explicit exception for HELOCs in (b)(1). Professor Gibson noted that the except clause in (b)(1) should be modified to limit it to the time period for notice, not the service requirement. Judge Connelly suggested reversing the sentences so the time period exception comes after the service requirement in (b)(1) so the first sentence would provide "The notice must be served on: [list]". Professor Struve suggested a slight modification to the structure of the second sentence to provide "Except as provided in (b)(2), it must be filed and served at least 21 days before the new payment is due."

The Subcommittee recommended several changes to (b)(4) in response to comments. A service requirement is added, and the effective date of a payment change when there is no objection is clarified. The references to § 1322(b)(5) is deleted.

Changes to (b)(1), (c), (d) and (e) are primarily stylistic.

The Subcommittee recommended significant changes to (f), which was the subject of most of the critical comments upon publication. The Subcommittee recommends that (1) the midcase review be made optional rather than mandatory, (2) it be initiated by either the trustee or the debtor, (3) it could be sought at any time during the case rather than just between 18 and 24 months after the petition was filed, but the committee note suggests that it should be used only when necessary and appropriate for carrying out the plan, and (4) it would be initiated by motion,

rather than notice. The claim holder would have an obligation to respond only if the claim holder disagreed with the facts set forth in the motion. A sentence was added to authorize the court to enter an order favorable to the moving party if the claim holder does not respond.

Judge Kahn suggests that the language in (f)(3) should contemplate that the court should be able to enter an order even if a claim holder filed a response agreeing with the facts set forth in the motion. The sense of the Advisory Committee was favorable to amending the language to say, "If the claim holder does not respond to the motion or files a response agreeing with the facts set forth in it, the court may enter an order favorable to the moving party based on those facts."

Judge Isicoff asked whether the motions must be served under Rule 7004. Judge Dow said that the amended rule does not so require, and Professor Gibson said that this question is not addressed by the current rule. Judge McEwen suggested that courts may want to impose a Rule 7004 service rule because of the way the mortgage servicing industry works. Judge Connelly said that this was not addressed and should be left to the courts. Judge McEwen suggested adding something to the committee note inviting courts to address the issue. Deb Miller said requiring Rule 7004 service for these motions would be a considerable expense to the trustee. No change was suggested by the Advisory Committee in response to this discussion.

The revised proposal consolidates all end-of-case determination provisions in a single subdivision (g). The Subcommittee recommended that the current procedure of (f)-(h) be retained, with some changes to make it more effective. The procedure would be initiated by a notice rather than a motion and would have to be filed within 45 days after the debtor completed all payments due to the trustee under the plan. The claim holder would be required to file a response to the notice. The time limits for both the notice and response would be longer than under the current rule, and Official Forms would be created for both filings.

If either the trustee or the debtor wanted a court determination of whether the debtor had cured any default and paid all required postpetition amounts, either could file a motion for a court determination. The Subcommittee recommends that the rule not specify what should be in the court's order, but a Director's Form could be created for this purpose.

Deb Miller stated that the midcase motion to determine status will address the concern that there was no vehicle to allow the debtor's attorney or trustee to determine whether payments were current before the end of the case.

In (h), the Subcommittee recommends two changes in response to comments. One is to insert the word "as" in the first sentence, as in the existing rule. The second is to provide authorization for noncompensatory sanctions in appropriate circumstances.

Changes were made to the committee note to reflect these changes.

Judge Dow stated that he was pleased with the process and comfortable with the modified rule. Judge Kayatta suggested changing "the effective date of the new payment" to "the effective

date of the new payment amount" in the first paragraph in (b)(3). The Committee agreed. He also questioned whether using a cross-reference to (b)(1) for the parties to be served was appropriate if the debtor was doing the service, but the conclusion was that the cross-reference worked in that case.

The Subcommittee recommended that this revised amended version of the rule be recommended to the Standing Committee for republication. Although all changes are responsive to comments and republication may not be necessary, the Subcommittee concluded that republication would be helpful and some new provisions, like the explicit authorization of noncompensatory sanctions, might attract significant comment. Because the Forms Subcommittee must review the implementing forms in light of the comments and proposed changes to the rule, the Subcommittee recommended that the revised rule not go to the Standing Committee until June 2023. Judge Bates agreed that republication is appropriate.

Judge Bates asked what changes are being made pursuant to the comments today. Judge Dow said he was comfortable with Professor Gibson making changes in response to the comments, and asked her to identify and repeat the substance of the changes before the Advisory Committee voted on the rule.

The Advisory Committee recommended that the revised rule be sent to the Standing Committee for republication at the June 2023 meeting of the Standing Committee.

(B) ***Consider amendment to Rule 5009(b) (Suggestion 22-BK-D)***

Professor Gibson provided the report.

Professor Laura Bartell submitted Suggestion 22-BK-D, which arises out of research she has conducted concerning individual debtors emerging from bankruptcy without a discharge because of their failure to timely file a statement of completion of a course on personal financial management. In order to reduce the number of these cases, she suggested that the timing of the notice under Rule 5009(b), which reminds the debtor of the need to file documentation of course completion, be moved up to just after the conclusion of the meeting of creditors. This suggestion was considered by the Subcommittee during its August 12 meeting.

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 over 6400 cases—primarily in 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 sent just after the conclusion of the § 341 meeting, rather than 45 days after the first date set for that meeting, and that, to the extent possible, a specific filing deadline be stated.

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.

The issue for the Subcommittee then was whether sending the Rule 5009(b) notice earlier in the case will increase its effectiveness and thereby decrease even further the number of noncompliant debtors in chapter 7 and 13 cases. Professor Bartell suggested that it will do so because at the conclusion of the meeting of creditors debtors will be focused on their bankruptcy case and likely to still be in contact with their attorneys and reachable by the court.

Additionally, the Subcommittee discussed what should be the timing of an earlier notice. Members concluded that the date should not be expressed as a number of days after the conclusion of the meeting of creditors for two reasons. First, the meeting may be continued and not concluded until after the deadline for filing the certificate of course completion. Second, the clerk's office is generally not aware of when the meeting of creditors concludes. The Subcommittee therefore discussed moving up the time of the Rule 5009(b) notice to a number of days after the filing of the petition or after the first date set for the meeting of creditors. It did not settle on a date, however.

To inform the Subcommittee's decision, Ken Gardner offered to gather information from his staff about when filings in his district occur under the current rule in relation to when the Rule 5009(b) notice is sent. His office sends the notice 90 days after the case is filed. About 85% of debtors comply with the initial notice. Sixteen percent of debtors fail to file within the 45 days. Most filed within 20 days after the reminder. Ninety-five percent of debtors actually file before the case was closed.

The Subcommittee discussed other possibilities like sending two notices, and whether chapter 13 cases should be included. The Subcommittee invited comments from the Advisory Committee.

Judge Isicoff thought chapter 13 should be included. Judge Kahn said that the deadline for filing the certificate should perhaps be moved up, not just the timing for the notice. Professor Gibson noted that the Advisory Committee had previously extended the deadline for filing, thinking it would be advantageous to debtors. Judge McEwen suggested that the course should be taken as early as possible to give debtors the advantages of its content. Judge Connelly said that when the deadline was earlier, more debtors failed to comply. Judge Kahn said perhaps the deadlines should be different for chapter 7 and chapter 13, because chapter 7 is so much shorter. Ken Gardner said that anything we can do to help debtors get their discharge is desirable. A reminder notice is definitely effective. Perhaps a reminder notice should be sent after a plan confirmation in a chapter 13, and after the § 341 meeting for a chapter 7.

The Subcommittee will continue to consider these issues.

6. **Report by the Forms Subcommittee**

(A) ***Consider Suggestion 22-BK-E to amend Forms 309A and 309B to include the deadline for the debtor to file the certificate of completion evidencing completion of the required financial management course.***

Professor Gibson provided the report. 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.

The Subcommittee concluded that the proposed amendment should be made only to the chapter 7 forms – Official Form 309A and 309B – both because the 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.

Ramona Elliott noted that the vast majority of credit counseling agencies file the certificate, and the language might be interpreted to impose an additional duty on the debtor when the course provider is filing the certificate. Judge Donald asked why the approval process for course providers cannot require them to file the certificate. Ms. Elliott said that changing the approval rules would require a formal rule change. Judge Connelly suggested the language say the debtor must file the certificate "unless the provider has done so." Tara Twomey agreed that this language would be more understandable to the debtors.

The Advisory Committee recommended the amended form and committee note with that change to the Standing Committee for publication.

(B) ***Consider Suggestion 22-BK-C for amendment to OF 410 concerning the Uniform Claim Identifier field.***

Professor Bartell provided the report. The Advisory Committee received a suggestion from Dana C. McWay, Chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel, that part 1, Box 3 of Official Form 410 be modified to change the line referring to the uniform claim identifier so that it is no longer limited to use in chapter 13. The Subcommittee concluded that the suggestion should be adopted, but expanded even further to permit use of the uniform claim identifier not only in cases filed under all chapters of the Code, but also for payments made other than electronically. Use of the uniform claim identifier remains completely voluntary.

The Advisory Committee recommended the amended Form 410 and the committee note to the Standing Committee for publication.

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

(A) *Consider Recommendation to Publish an Amendment to Rule 8006(g)*

Judge Ambro described some of the background on the proposal for direct appeals. Professor Bartell provided the report. At the last meeting of the Advisory Committee, the Subcommittee recommended amendments to Rule 8006(g) suggested by Bankruptcy Judge A. Benjamin Goldgar to make explicit what the Subcommittee believed was the existing meaning of the rule – that any party to an appeal may submit a request to the court of appeals to accept a direct appeal under 28 U.S.C. § 158(d)(2).

At the spring Advisory Committee meeting Professor Struve expressed concern about the interplay between Rule 8006(g) and Fed. R. App. P. 6(c). She suggested that the amendment to Rule 8006(g) be recommitted to the Subcommittee with the recommendation that the Subcommittee work with the Advisory Committee on Appellate Rules to ensure that the two rules work in tandem. The Advisory Committee followed that recommendation.

The reporters for the Bankruptcy Rules Committee and the Appellate Rules Committee conferred and developed coordinated proposals. Although the Appellate Rules Committee will not meet until after the Advisory Committee meeting, Professor Edward A. Harnett intends to present the draft amendments to Rule 6(c) to the Appellate Rules Committee at its next meeting.

The Advisory Committee recommended the proposed amendments to Rule 8006(g) and committee note to the Standing Committee for publication, conditional on the Appellate Rules Committee approving modifications to the appellate rules consistent with the prior discussions among the reporters.

7. Report of the Restyling Subcommittee

Judge Krieger congratulated Judge Dow on his leadership of the Advisory Committee. She noted that we are nearing the end of the process, and wanted to praise the efforts of the Subcommittee members, the reporters, and the Administrative Office personnel who worked on this project.

Professor Bartell then gave the report. Parts III-VI were given final approval by the Standing Committee at its meeting in June. Parts VII-IX were published for comments August 15, and comments will be considered at the next meeting of the Advisory Committee.

Since the restyling process has begun, some of the rules that were restyled have been amended substantively in a way that has already become effective or will become effective before the restyled rules are finalized. The Subcommittee has 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.

The style consultants are working on a "top-to-bottom" review of the restyled rules (both amended and not) for consistency and any final style changes. All those comments will be reviewed by the Subcommittee and presented to the Advisory Committee in connection with final approval of the restyled rules.

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

Scott Myers asked whether the Advisory Committee is comfortable that republication of the amended restyled rules is not necessary. The Advisory Committee was comfortable with the recommendation of the Subcommittee that republication is not necessary.

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

Professor Struve gave the report. Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule. In late 2021, in response to a number of proposals submitted to the advisory committees, a cross-committee working group was formed to study whether developments since 2018 provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Staff Office and researchers from the Federal Judicial Center (FJC). By March 2022, Tim Reagan, Carly Giffin, and Roy Germano of the FJC had conducted a study of current practices in various courts with respect to electronic filing and shared it with the working group.

Since 2018 the national rules on filing have set a default principle that pro se litigants can use electronic filing (CM/ECF) only if permitted by court rule or order. Sai has suggested flipping the presumption. John Hawkinson has suggested that in the absence of such a change the rules committees should consider setting reasonable standards for when permission should be granted.

The working group has been meeting on these suggestions and discussing both electronic filing and electronic service.

Electronic Filing

On the topic of electronic filing, there are questions both about access to the CM/ECF system and about other electronic methods for submitting filings to the court. There are also questions about whether the best way forward is through rule amendments or whether other measures could increase self-represented litigants' electronic access. Quantitatively, the FJC study found that, among the courts of appeals, five circuits presumptively permit CM/ECF access for non-incarcerated self-represented litigants, seven circuits allow it with permission in an individual case, and one circuit has a rule against such access (but has made exceptions in some instances). The researchers report that, based on the local rules, at least 9.6% of districts

"permit nonprisoner pro se litigants to register as CM/ECF users without advance permission" (in existing cases, though typically not to file complaints); 55% of districts "state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission"; 15% state "that pro se litigants may not use CM/ECF"; and 19% fail to "specify one way or the other whether pro se litigants can use CM/ECF." Further along the spectrum, the study found that it is "very unusual for pro se debtors to receive CM/ECF" access in the bankruptcy courts. In courts that have explored alternative electronic routes for self-represented litigants' access, options include both electronic means for submitting filings to the court and electronic noticing programs.

<u>Service on Registered CM/ECF Users</u>

Because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users. It would be useful for the advisory committees to consider whether this difference in treatment is desirable. Requiring self-represented litigants to make separate service on registered CM/ECF users may impose an unnecessary task. Should service rules be amended to eliminate this redundant service requirement?

The Working Group invites comments from the various advisory committees. The rules might proceed at different paces for different sets of rules.

Professor Gibson emphasized that most of these electronic access rules do not apply to case-initiation filings. Self-represented debtors should not be able to file a petition through CM/ECF and get the automatic stay. Tara Twomey expressed the view that self-represented debtors should be given access to CM/ECF. Judge Dow said he could not understand why there should be a bar on electronic filing in his bankruptcy court when the district court allows it. Judge Kahn finds the arguments against electronic access unconvincing. Whether it is a physical filing or an electronic filing, the burden is the same on the court. Judge Dow sees this as the next big issue for the Advisory Committee. He also thinks paper service should not be required for those being served through CM/ECF. Ken Gardner said it is more work for the clerk's office if filings are made by paper rather than electronically, and requiring paper filing is discriminatory. Judge McEwen said that when filings are tangible the debtors may claim they are stolen or treated improperly. But she is also concerned about how to deal with self-represented litigants who file improper papers. Judge Bates asked why that is different with paper filings and electronic filings, and said that the system has methods to deal with improper filings. Judge McEwen said that in her district the clerk's office does not accept improper paper filings and requires the debtors to come pick them up. Judge Kahn says that all litigants file things they should not, and we have tools to deal with that. Tara Twomey noted that the U.S. postal service is not operating efficiently right now, and the service issue is critical. Ken Gardner said that the rules require the clerk to accept everything presented for filing. Judge Connelly said access to a courthouse is a barrier if you are in a rural area. Allowing electronic access is important. And if there are multiple courthouses in a district, pro se litigants don't know what address to use. Judge

Krieger said there has been a lot of development of CM/ECF over time, and security has improved dramatically. But there are circumstances where the pro se litigant includes information that should not be publicly disclosed that could harm them or third parties. She asked, who decides what information gets into the public record?

Professor Struve said that this discussion is exactly what she hoped to gain from this meeting. Judge Dow said that the Advisory Committee is on board with the project of advancing the goal of increased electronic filing and service by self-represented litigants and looks forward to participating in the process of rules amendments over time to deal with the issue. Professor Gibson was pleased to hear the enthusiasm for electronic filing from the Advisory Committee.

9. **Future meetings**

The spring 2023 meeting has been scheduled for March 30 (and tentatively, March 31), 2023 in West Palm Beach, FL.

10. **New Business**

There was no new business.

11. **Adjournment**

The meeting was adjourned at 12:35 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. Forms Subcommittee

    (A) Recommendation of no action regarding suggestion 22-BK-B to amend certain versions of Form 309 to provide the deadline for filing an objection under Rule 1020(b).

2. Business Subcommittee

    (A) Recommendation of no action regarding suggestion 22-BK-F from Giuseppe Ippolito to amend Rule 7012(b).