

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 17, 2018
Washington, D.C.

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Amul R. Thapar
District Judge Marica S. Krieger
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar (by phone)
Bankruptcy Judge Melvin S. Hoffman
Jeffrey J. Hartley, Esq. (by phone)
David A. Hubbert, Esq.
Thomas Moers Mayer, Esq.
Jill Michaux, Esq.
Debra Miller, Esq., Chapter 13 trustee
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
(the Standing Committee)
Professor Daniel Coquillette, reporter to the Standing Committee (by phone)
Professor Catherine Struve, associate reporter to the Standing Committee (by phone)
Circuit Judge Susan Graber, liaison to the Standing Committee (by phone)
Bankruptcy Judge Mary Gorman
Professor Cathie Struve, associate reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Vivian Jones, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Ahmad Al Dajani, Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Walle, National Association of Chapter 13 Trustees
Gary Seitz, representative of the National Association of Bankruptcy Trustees
Elizabeth Jones, Supreme Court fellow
Abigail Willie, Supreme Court fellow

Discussion Agenda

1. Greetings and introductions

Judge Sandra Ikuta welcomed the group and advised that this is her last meeting at chair of the Committee. Judge Dennis Dow will take over on October 1, 2018. She introduced Judge David Campbell, Professor Daniel Coquillette, and Professor Catherine Struve, the chair and reporters for the Standing Committee.

2. Approval of minutes of San Diego April 3, 2018 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) June 12, 2018 Standing Committee meeting

Professor Elizabeth Gibson provided the report. All proposed bankruptcy items were approved, including several items for final approval and publication. She reviewed the rule and form amendments that were approved by the Standing Committee, noting that those given final approval were just approved by the Judicial Conference. She advised that minor stylistic changes were made to the draft proposed Rule 8012 to conform with changes made to proposed Appellate Rule 26.1.

(B) April 10, 2018 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report. The Civil Rules Committee discussed many issues related to multi-district litigation, including interlocutory appeals, settlement, and third-party funding of litigation. There was a discussion of a recent Supreme Court decision *Hall v. Hall*, 138 S.Ct. 1118 (2018), in which the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2), they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. The Court noted that changes in the meaning of final judgment should come from rulemaking rather than judicial decisions. The Civil Rules Committee determined to go forward with a study of the issue.

(C) April 6, 2018 Meeting of the Advisory Committee on Appellate Rules

No report.

(D) June 14-15, 2018 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report. She said the issue most relevant to this Committee was the discussion regarding unclaimed funds held by courts. The Bankruptcy Committee is considering submitting a suggestion for amendments to Rules 3011 and 9006 to

add a statute of limitations for unclaimed funds. Another possible solution is to reach out to larger claimants regarding the collection of unclaimed funds; however, there are practical issues with claiming the funds.

The Committee discussed the potential proposed rule changes, and whether a statute of limitations amendment is the proper solution to the issue of unclaimed funds.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Business Issues

- (A) Status report concerning proposed amendments to Rules 2002(g) and Official Form 410A (held back at spring 2018 meeting) and related suggestion 18-BK-D from the Committee on Court Administration and Case Management to require certain high-volume notice recipients to transition from paper to electronic notices

Professor Gibson provided the report, advising that that no rule changes are being proposed at this time and that the subcommittee seeks guidance from the Committee as to how to proceed. She reminded the Committee that proposed amendments to Rules 2002(g) and 9036, along with Official Form 410, were published in August 2017. The amendments were intended to expand the use of electronic noticing and service. Following several comments raising concerns regarding the technological implementation of the proposed changes, including the potential for conflicting priorities of email addresses for notice, the Committee determined to hold back the amendments to Rule 2002(g) and Official Form 410. The Committee went forward with the proposed amendments to Rule 9036, which would permit clerks and parties to provide notices or serve using a court's electronic filing system (CM/ECF) on registered users of CM/ECF. The proposed amendments to Rule 9036 were approved by the Standing Committee and Judicial Conference.

After the spring meeting, the Committee on Court Administration and Case Management (CACM) filed suggestion 18-BK-D to further amend Rule 9036 to impose a requirement for mandatory electronic notice for certain high-volume notice recipients. The suggestion related to a previous suggestion from the Bankruptcy Judges Advisory Group (BJAG) which was discussed by the Committee but not adopted because of potential conflicts with Bankruptcy Code § 342.

The subcommittee discussed CACM's suggestion, which was modified from BJAG's suggestion to account for any potential conflicts with Bankruptcy Code § 342. The subcommittee contacted Administrative Office (AO) technology staff to determine any possible technological issues. The current proposal is to amend Rule 9036 to add a carve-out for section 342(e) and (f) and to distinguish between types of filers, i.e., registered users, non-registered users, and high-volume notice recipients (as defined by the Director of the Administrative Office). A further issue that arose in the discussions with the AO technology staff is the monitoring of bounce back emails if the email address provided is not valid or no longer valid. Ken Gardner completed an informal survey of clerks' office and found that most courts responding (about fifty percent) do some type of monitoring of bounce back emails.

Professor Gibson advised that the subcommittee is seeking feedback about whether the Committee should propose rule amendments adopting a program that impacts high-volume notice recipients. The Committee agreed that the subcommittee should continue to work on a proposed draft amendment for Rule 9036, in consultation with AO technology staff.

Judge Campbell asked about the current proposed amendments to Rule 9036 that were given final approval by the Standing Committee and Judicial Conference this year and will be forwarded to the Supreme Court for approval. If the current proposed amendments to Rule 9036 go forward, they will be effective December 1, 2019. He raised whether the current proposed amendments should be removed from consideration by the Supreme Court, and the entire set of proposed changes to Rule 9036 presented together in the future. Professor Gibson and Judge Ikuta responded that it could be several years until other amendments are proposed, and that technology could change prior to any further amendment. For these reasons, the current proposed amendments to Rule 9036 should go forward. Judge Campbell agreed with this conclusion.

- (B) Recommendation to amend Rule 3007(a)(2)(ii) to eliminate the inclusion of credit unions from the heightened service requirements of Rule 7004(h).

Professor Gibson provided the report. The current version of Rule 3007 includes special requirements for serving insured depository institutions based on the congressionally enacted language in Rule 7004(h). At the spring meeting, the Committee determined not to expand Rule 7004(h) to include credit unions because of the limited definition of “insured depository institution” in that rule. However, Bankruptcy Code § 101 contains a definition of insured depository institution that is broader than the definition provided in Rule 7004, and that definition applies to Rule 3007. The Committee voted to propose for publication an amendment to Rule 3007(a)(2)(ii) to eliminate credit unions from the special service requirements of that rule.

5. Report by the Forms Subcommittee

- (A) Recommendation for amendment to Official Form 113 based on Suggestion 18-BK-A

Professor Gibson provided the report, explaining that the suggestion was to change to Official Form 113 to avoid a possible ambiguity. On the current version of the form, the debtor is required to check a box identifying whether certain provisions are included in the proposed plan, and the form states the consequences of checking that a provision is not included or checking both boxes for a particular provision. The form is silent, however, about the consequence of failing to check either box, resulting in ambiguity. A second part of the suggestion was based, in part, on an issue with a local form in one jurisdiction, and the subcommittee’s research shows that the local form at issue was amended to correct the mistake. The subcommittee agreed that the second part of the suggestion no longer required action, but it recommended accepting the first suggestion to amend the Official Form to include language to

address situations in which no box is checked. The Committee, by motion and vote, approved the amended language, and the approved amendment will be held pending other potential amendments to Form 113.

- (B) Recommendation in support of Suggestion 18-BK-B to amend Director's Form 3180W

Professor Bartell explained the suggestion regarding Director's Form 3180W is to change the language about non-dischargeable fines and penalties. A revised version of the form was included in the materials, and no additional approval is required to implement the amendment. The revised form was approved by motion and vote.

- (C) Recommendation of no action in response to Suggestion 18-BK-E to amend Official Forms 101A and 101B

Professor Bartell explained that the suggestion related to Official Forms 101A and 101B, which were both adopted as part of the Forms Modernization Project in December 2015. She explained that Bankruptcy Code § 362(b)(22) is the basis for the forms, but that Bankruptcy Code § 525(a) is the section at issue in the suggestion as it may preclude a debtor from being evicted from governmental housing. Professor Bartell noted that the law is not settled on the issue, so the subcommittee recommended that no action be taken on the suggestion at this time.

6. Report by the Restyling Subcommittee

- (A) Recommendation regarding restyling the Federal Rules of Bankruptcy Procedure

Judge Dow introduced the topic of restyling the Bankruptcy Rules. He advised the subcommittee recommends that the Committee proceed with the restyling project and that it would be similar to the restyling of the other federal rules.

He provided detail of the work completed by the subcommittee. Following the spring meeting, the subcommittee completed a survey of the bankruptcy community regarding interest in restyling of the Bankruptcy Rules. The survey was drafted by Dr. Molly Johnson of the Federal Judicial Center and Professor Bartell, and included a sample restyled version of Rule 4001(a). The subcommittee sent the survey to bankruptcy judges, clerks, and bankruptcy organizations, and posted it on uscourts.gov. More than 300 people responded to the survey, including forty percent of bankruptcy judges and about fifty percent of bankruptcy clerks. The survey respondents overwhelmingly supported the restyling effort, but there were significant concerns raised regarding the protection of certain terms of art used in bankruptcy and the danger of unintended consequences of restyling. In addition, the survey showed that respondents supported restyling all the rules rather than a subset.

Judge Dow stated that following the survey results, the subcommittee determined that the project to restyle the Bankruptcy Rules should go forward. A caveat to the subcommittee's recommendation is that any final decisions on whether to recommend any change to the Bankruptcy Rules rest with the Committee. Judge Dow noted that if the Committee approves the

recommendation, there are still open questions with regard to how to proceed with the restyling project, and that the subcommittee will continue to work on these issues.

Judge Campbell stated that it is a big task, and it will take several years, advising that it is likely unavoidable that problems will be introduced through restyling, as seen with the restyling of other federal rules. He expressed his view that the recommendation regarding the restyled rules comes from the Committee, and the Committee has the final say regarding whether something is of substance rather than stylistic, including terms of art and terms used in the Bankruptcy Code. The Standing Committee will defer to the Committee regarding whether something is substantive and not stylistic, as well as language approved by the Committee because bankruptcy is a specialty area. Several Committee members and Professor Dan Coquillette noted their approval of Judge Campbell's comments.

Professor David Skeel added that the Committee should be wary of unintended consequences of rules restyling, stating that mistakes can be introduced easily even with careful attention to detail. Professor Catherine Struve echoed his comments, although both offered their support for the project. The recommendation to approve the restyling project subject to the caveat was approved by motion and vote.

Information Items

7. Business Subcommittee Consideration of possible changes to Rule 5005.

Professor Bartell explained that she is working with Ramona Elliott to determine if changes are needed to Rule 5005 as a result of the proposed amendment to Rule 9036. A further update will be provided at the spring meeting.

8. Coordination Items.

Scott Myers provided a brief report on the coordination of pending rule amendments.

9. Future meetings:

The spring 2019 meeting will be in San Antonio, Texas, on April 4, 2019, and the fall 2019 meeting will be in Washington D.C.

10. Adjournment

The meeting was adjourned at 12:00 p.m.

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. Subcommittee on Appellate Issues.
 - (A) Recommendation for conforming technical changes to Rules 8012, 8013, and 8015.
 - (B) Recommendation of no action in response to Suggestion 18-BK-C to amend Rule 9033.

2. Subcommittee on Business Issues.
 - (A) Recommendations to refer Suggestion 14-BK-E (from the National Bankruptcy Conference) to the Consumer Subcommittee, and to take no action with respect to informal suggestions from committee member Jill Michaux, and former committee member David Lander.