ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 6-7, 2007
Jackson Hole, Wyoming

Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge Irene M. Keeley
District Judge William H. Pauley, III
District Judge Richard A. Schell
District Judge Laura Taylor Swain
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge Kenneth J. Meyers
Bankruptcy Judge Eugene R. Wedoff
Dean Lawrence Ponoroff
J. Michael Lamberth, Esquire
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Jacqueline P. Cox, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
District Judge David H. Coar, member elect
Bankruptcy Judge Elizabeth L. Perris, member elect
District Judge Lee H. Rosenthal, chair of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Donald F. Walton, Acting Principal 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
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen “Scott” Myers, Bankruptcy Judges Division, Administrative Office

Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following summary of matters discussed at the meeting should be read in conjunction with the memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

INTRODUCTORY MATTERS

The Chair welcomed the members, members elect, advisers, staff, and guests to the meeting. He introduced Judges Coar and Perris and said that they would begin their terms as members in October. He said that, due to the short notice, the third new member, Judge Jeffery P. Hopkins, was unable to attend. The Chair said that the three new members would replace him, Judge Klein and Judge McFeeley. The Chair also announced that Judge Swain would succeed him as chair starting in October.

1. Approval of minutes of Marco Island meeting of March 29-30, 2007.

The Chair asked for a motion to approve the minutes of the Marco Island meeting held March 29-30, 2007. **A motion to approve the minutes passed without opposition.**

2. Oral reports on meetings of other Rules Committees.

(A) June 2007 meeting of the Committee on Rules of Practice and Procedure.

The Chair said that the Standing Committee approved the rules amendments published in August 2006 as revised by the Advisory Committee at its March meeting. He noted that, after the March meeting, AO staff discovered several minor errors that were changed before the recommended rules and forms changes were presented to the Standing Committee as follows: (i) the introductory sentence in Form 22A was revised to conform to a change in Rule 1007 to read: "In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Joint debtors may complete one statement only"; (ii) line 29 on Form 22A was changed to read "total average monthly amount" to be consistent with same statement on line 34 of Form 22C; (iii) the title of new Rule 7058 was changed to "Entering Judgment in an Adversary Proceeding" to distinguish it from Rule 9021; and (iv) on recommendation of the Chief of the Rules Committee Support Office at the AO, the recommended changes to Exhibit D (which are tied to new proposed Rule 1017.1) were deferred until next fall, so that the rule and form could be considered by the Standing Committee at the same time. The Chair said that he approved the above changes as technical amendments after consulting with the Chief of the Rules Committee Support office at the AO.

(B) April 2007 meeting of the Advisory Committee on Appellate Rules.

The Chair said that the Appellate Rules Committee was recommending a new Appellate Rule 12.1 (Indicative Rulings) for publication that might have bankruptcy implications. He explained that the proposed rule would formalize a procedure currently in place in some courts to deal with motions filed in the originating court while an appeal is pending. After an appeal has been docketed and while it remains pending, the originating court cannot grant relief under a motion such as Civil Rule 60(b) without a remand. The court can, however, entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantive issue. The new rule provides a procedure for notifying the appellate court of the originating court's action, and for remanding in appropriate circumstances.

(C) June 2007 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Cox said that the Bankruptcy Administration Committee was continuing its review of the EOUST's request for mandatory use of smart forms. She said the Committee was concerned about the level of detail involved in the EOUST request, and explained that it encompassed over 400 discrete data elements from each filing. She further reported that B.A. Committee members would soon attend an EOUST demonstration of how smart forms would work.

(D) April 2007 meeting of the Advisory Committee on Civil Rules.

Judge Wedoff said that the Civil Rules Committee thoroughly discussed rewriting Rule 56 at its last meeting. The purpose of the proposed changes would be to establish a deadline for filing a motion for summary judgment, and to require the movant to identify all material uncontested facts. He said that there was also an extensive discussion regarding sanctions under the proposed rule. Judge Wedoff said he was concerned that the proposed changes would not work well in bankruptcy, and that this Committee might have to consider an approach other than simply adopting the rule by reference, as is done now. Judge Rosenthal, however, said that since the meeting, the Civil Rules Committee had decided to defer consideration of the proposal for a year, and that there would be a mini-conference on the changes before the next civil rules meeting. She anticipated that further changes would be made to the rule prior to proposing it for publication.

(E) April 2007 meeting of the Advisory Committee on Evidence.

Judge Klein reported on the April 2007 meeting of the Advisory Committee on Evidence and referred the Committee to proposed Rule 502 (published in the fall of 2006). He said the rule is designed to provide a uniform set of standards under which parties can determine the consequences of disclosing information covered by attorney-client privilege or work product protection. He also said that the rule would have to be enacted legislatively.

(F) Bankruptcy CM/ECF Working Group.

Judge McFeeley said that the CM/ECF Working Group met several times since the Committee's last meeting and reported their request that the Committee give them a "heads up" of upcoming changes to forms because the changes affect CM/ECF workflow considerably. He also reminded the Committee that he was ending his term at this meeting, and recommended that his successor liaison also be a member of the Forms Subcommittee.

(G) New items.

The Chair said there would be three oral reports that were not on the agenda: (1), a proposal to honor Judge Duplantier; (2), an announcement about the new reporter; and (3), a report concerning changes to the IRS Internal Revenue Manual and Forms 22A-C.

(1). The Chair asked the Committee to review the proposed memorial resolution honoring Judge Duplantier. He said that the AO would mount the resolution on a plaque and would give it to Judge Duplantier's wife, Sally. A number of members reflected on the many contributions made by Judge Duplantier over the years. A motion was made and passed unanimously to approve the resolution.

(2). The Chair said that Jeff Morris will have served nearly 10 years as Reporter by October 2008 and that he would like to step down soon. He expressed optimism that the Chief Justice would soon select Professor Elizabeth Gibson of the University of North Carolina as the Reporter's eventual replacement. He anticipated that Professor Gibson will act as assistant reporter for the next year and will then replace Professor Morris as Reporter.

Members of the Committee thanked the Reporter for the great job he has done over his tenure, especially in light of the many changes to the Bankruptcy Code due to BAPCPA. The Reporter said that the job has been great, and he thanked the members for how much time that they had committed over the years.

(3). The Chair announced that within the past few days he had learned that the IRS intended to make changes to the Financial Analysis Handbook (§ 5.15.1) portion of the Internal Revenue Manual, (the IRS Manual) that would greatly affect the means test forms. He asked Judge Wedoff to expound.

Judge Wedoff said that one aspect of the IRS proposal would be to create a new category of expenses called "health care," separate from the National Standards category. He explained that this could be a problem in bankruptcy because § 707(b) refers only to National and Local standards and does not recognize a "health care" standard in any calculations. (At present, the debtor's actual "health care" costs are included as "other necessary expenses.") In addition, the IRS proposal would end the current practice of correlating national expense standards to both income and family size, and would instead correlate such standard expenses to family size only.

Judge Wedoff said that although he was concerned that the IRS did not consider the bankruptcy implications of its proposal, the real problem was that the proposed changes were scheduled to go into effect in just a few weeks, on October 1, 2007. He said that it would not be possible to make changes to the means-test forms in such a short time frame, and that the forms would be inconsistent with the changes unless the effective date was delayed.

Judge Wedoff said that he had not seen specific changes to the IRS Manual yet, but only an outline of the proposals. But he thought that one possible solution would be if the IRS issued different standards for use in bankruptcy cases.

Christopher Kohn said that he had participated in a conference call with the IRS that morning in which he and Mark Redmiles tried to explain the bankruptcy implications of the proposed changes. He said that the call participants were not initially aware of the impact of the changes on bankruptcy law, but that they now appreciated the problem and were looking for solutions that would lessen the impact. He said one proposal discussed was to delay the effective date of the changes for bankruptcy purposes. And he anticipated being asked in a follow-up call tomorrow morning, how much of a delay would be needed to implement any changes for bankruptcy.

Don Walton said that he had listened in on the telephone conference with Christopher Kohn. He thought the tenor of the conversation was a good and he thought that the IRS seems to recognize the problem of treating "health care" as a category separate from the National Standards.

After the telephone conference the following morning, Christopher Kohn reported that the IRS had agreed to defer making the changes effective for bankruptcy purposes for three months, until January 1, 2008. He added that the new "health care" standard would be modified to be incorporated as a National Standard. Judge Wedoff said that the solution would enable the Committee to come up with revised versions of Form 22 by the end of the year.

The Committee discussed possible procedural mechanisms for approving the IRS-related forms changes. **After discussing several alternatives, the Committee approved a motion recommending withdrawal from the Judicial Conference consent calendar the changes to Forms 22A-C scheduled to go into effect December 1, 2007. It also approved a motion to give the Chair and the Chair's successor the authority to work with the Judicial Conference to develop a mechanism to approve IRS-related changes to Forms 22A-C with a tentative effective date of January 1, 2008.**

Finally, the Chair asked that the minutes reflect the Committee's appreciation of the work done by Judge Wedoff, Don Walton, Mark Redmiles, and Chris Kohn in negotiating with the IRS in this matter.

Action Items

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

Judge Schell said the Subcommittee met by teleconference to discuss Comment 06-BK-011 submitted by Bankruptcy Judge Marvin Isgur. In his comment, Judge Isgur suggested amending Rule 2007.2 to require a health care business debtor in a voluntary case to file a motion at the start of the case to seek a determination of whether a patient care ombudsman needs to be appointed.

Judge Schell said that the Subcommittee discussed the proposal and recommends that no action be taken. He noted that the petition already contains a checkbox that the debtor uses to describe itself as a healthcare business. He said that before making its decision, the subcommittee's members had canvassed bankruptcy judges they knew and asked those judges whether they thought a change is needed. Most of the bankruptcy judges did not think it was a problem. In addition, Don Walton told the subcommittee members that the United States trustee was already making motions in appropriate cases. **A motion was made and carried to approve the Subcommittee's recommendation that no action be taken.**

4. Report by the Subcommittee on Consumer Issues.

(A) Proposed amendments to Rules 4004(a) and 7001 with respect to objections to discharge under §§ 727(a)(8) and (9) and 1328(f) based on insufficient lapse of time between a debtor's bankruptcy cases.

The Reporter said the proposed amendments, described at pages 1-3 of the July 25, 2007, memo at Agenda Item 4, are in response to an informal comment from Bankruptcy Judge Neil Olack. He said that the premise behind the proposed changes was the thought that an objection to the debtor's discharge based on information supplied by the debtor in the bankruptcy petition (i.e. the date of a prior bankruptcy case) did not require all the procedural protections of a full-blown adversary proceeding.

Judge Wedoff said that some change to the rules, such as that proposed by the Subcommittee, would be necessary to create uniformity of practice around the country. In some courts, he said, the clerk's office will withhold the discharge based on the dates of previous cases reported by the debtor in the petition even if no motion or adversary proceeding is filed at all. Other courts require that a motion be filed, and still others require a full-blown adversary proceeding.

The Reporter reviewed the proposed changes as set out at pages 3-5 of the memo. Members made a number of suggestions. One member suggested that there should be no deadline for filing a motion objecting to discharge, as opposed to the 60-day deadline

proposed in the amendment to Rule 4004. Another member suggested that a deadline might not be appropriate in chapter 13 cases because § 1328(f) provides that "the court *shall not* grant a discharge … if the debtor has received a discharge [in a specified time preceding the current case]." Thus, the Court should not grant a discharge, no matter when it learns of a discharge in a prior case. However, other members pointed out that the rules already set deadlines notwithstanding similar language in § 727. After additional discussion, **the Committee approved Rule 7001 and Rule 4004(a) and (c)(1), as set out in the materials at pages 3-5, with the following changes:**

In the committee note to Rule 7001, delete "as is the case for other objections to discharge" at the end of the second sentence, and change "904(c)" at the end of the note to "9014(c);" and in

Rule 4004(a), line 3, add a comma after "complaint" and add ", under Rule 7001(b)" after "or motion;" and in

Rule 4004(c)(1), line 17, add ", or motion under Rule 7001(b)" after "complaint" and at line 21 add a comma after "complaint" and "under Rule 7001(b)" after "or motion."

(B) Proposed amendments to Rules 1007, 4004 and 5009 to provide additional notice to the debtor that the case may be closed without the entry of a discharge if the debtor fails to file the statement of completion of a personal financial management course. The proposal is in response to comments submitted by the National Bankruptcy Conference (Comment 06-BK-018) and the National Association of Consumer Bankruptcy Attorneys (Comment 06-BK-020).

The Reporter said that the Subcommittee recommended changes to Rules 1007, 4004 and 5009 designed to give the debtor additional notice that failing to complete a post-petition educational course and file the required form would result in the case being closed without entry of the discharge. **The Committee approved the proposed changes to the three rules as set forth in the July 25 memo at Agenda Item 4, pages 7 - 11, with the following edits:**

Rule 4004(c)(4), line 51 (page 7), delete the rest of the sentence after "Rule 1007(b)(7)" through line 52;

Rule 5009(b), line 11 (page 10), delete "the" and "a" and add the following after "discharge": "unless the statement is filed within the applicable time limit under Rule 1007(c)."

(C) Proposed amendment to Rule 1019 to allow objections to exemptions for a short time period after conversion of a case to chapter 7. The proposal is in response to comments filed by Bankruptcy Judges Dennis Montali (Comment 06-BK-054) and Paul Mannes to resolve a split in the case law.

The Reporter said that Judges Montali and Mannes suggested rules amendments to address what they see as an unfair opportunity for debtors to obtain the benefit of excessive exemptions. They believe that some debtors played a game of "gotcha" by claiming a large exemption while also proposing a substantial repayment to creditors in a chapter 11, 12, or 13 case. After the time to object to exemptions has passed, the debtor

will convert to chapter 7. The judges believe this opportunity for abuse can be foreclosed by creating a new exemptions-objection deadline when a case is converted to another chapter.

The Subcommittee discussed four alternative fixes: alternative 1 -- a new time to object to exemptions is established if the debtor converts a case to chapter 7 within one year of the confirmation of an initial plan; alternative 2 -- a new time period is established to object to exemptions when the debtor converts a case to chapter 7; alternative 3 -- no new time period; and alternative 4 -- parties in interest can object to exemptions in the converted case only upon a showing of cause to allow the objection. Although there were advocates for each approach, the Subcommittee recommended the first alternative as the best balance between preventing possible abuse on the one hand, and providing finality of the objection period on the other hand. The Reporter distributed a handout showing revisions to Rule 1019, which included a new subpart "b" that he said was meant to accomplish alternative 1.

One committee member agreed that there should be a new exemption objection period if a case is converted shortly after filing, but argued that a new period should arise only if conversion occurred within six months of the initial filing, rather than one year. Another member thought there should always be a new time objection period after a conversion, regardless of how long it had been since the initial filing. A third member argued that no new time period was necessary because creditors already have an opportunity to object when the case is initially filed. Finally, Judge Perris suggested if the change to Rule 1019 is adopted, that the proposed language at lines19 and 20 of the handout could be improved to more clearly indicate when the time period would start.

After further discussion, **the Committee recommended (with one vote against) the changes to Rule 1019 in the handout distributed at the meeting with the following change: delete "confirmation of" at line 20, and replace with "entry of an initial order."**

(D) Possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code. This suggestion was prompted by Comment 06-BK-011, submitted by Bankruptcy Judge Marvin Isgur, and Comment 06-BK-020, submitted by the National Association of Consumer Bankruptcy Attorneys.

The Reporter recapped the issue. Section 521(i) of the Bankruptcy Code requires "automatic dismissal" of the case the 46th day after the petition date if an individual debtor fails to file certain information. Among other things, the debtor must file "copies of all payment advices or other evidence of payment received within 60 days before the date of filing of the petition, by the debtor from any employer." 11 U.S.C. § 521(a)(1). The Reporter said that the courts have issued a number of decisions addressing the automatic dismissal cases in which the debtor either did not file any payment advices or filed fewer than all of the payment advices for the 60-day period prior to the filing of the petition. The cases are not uniform.

One group of opinions holds that the language of the statute is unambiguous and must be strictly applied. Under this line of decisions, if the debtor fails to file any of the required materials within the 45-day period, the case is automatically dismissed. Some courts have observed, however, that overly strict interpretation could frustrate the intent of Congress. For example, a debtor could use the 45-day automatic dismissal period offensively to get a case dismissed in order to prevent the case trustee from selling some of the estate's assets. In re Parker, 351 B.R. 790 (Bankr. N.D. Ga. 2006). Other courts have concluded that, if the debtor files the most recent payment advice, and that payment advice sets out the year-to-date figures for the debtor's income, dismissal is not appropriate, even if the debtor has not "technically" complied with the statute.

Because the case law appears to be in flux regarding interpretation of 11 U.S.C. §521(i), the Subcommittee recommends no change to the rules at this time. **After discussion, the Committee approved the Subcommittee's recommendation that no change to the rules be made at this time with respect to automatic dismissals under 11 U.S.C. § 521(i). The Subcommittee and the Reporter will continue to monitor case law developments in this area.**

5. Report by the Subcommittee on Business Issues.

(A) Proposed amendment to Rule 1007(a)(2) to set an earlier deadline for filing the list of creditors in involuntary cases to facilitate timely noticing of the § 341 meeting of creditors in such cases. The proposal is in response to Comment 06-BK-057 submitted by Chief Deputy Clerk Margaret Grammar Gay of the Bankruptcy Court for the District of New Mexico.

The Reporter said that Ms. Gay suggested amending Rule 2003 to set a different deadline for holding the § 341 meetings in an involuntary case. As currently written, Rule 2003(a) requires that the § 341 meeting be held no fewer than 20 and no more than 40 days after the order for relief. Rule 2002 requires the clerk give at least 20 days notice of the § 341 meeting. Ms. Gay asserts that the delay in receiving the list of creditors in involuntary case makes it difficult to provide timely notice the § 341 meeting.

The Reporter said that the Subcommittee considered the suggestion and decided that a better solution would be to amend Rule 1007(a)(2) to shorten from 15 to seven days the time that the involuntary debtor has to file the required list of creditors.

One member thought that the suggested time period was too short because an involuntary debtor's books and records are usually in severe disarray. Other members, however, commented that the same problem exists under the current time period. **After additional discussion, the Committee approved the Subcommittee's recommendation to amend Rule 1007(a)(2) as set forth at Agenda Item 5 with the following change: insert a comma after "final" in line 6 and change "7" to "seven."**

(B) Report on further consideration of possible amendment to Rule 3015(f) to permit post-confirmation objections by taxing authorities to chapter 13 plans. The report reflects consideration of Comment 06-BK-015 submitted by the IRS and the Sense of Congress provision set out in § 716(e)(1) of BAPCPA.

The Reporter explained that, at the Marco Island meeting, the Committee tasked the Subcommittee with determining whether there is a way in which the rules could be amended to further protect the interests of governmental units with respect to post-confirmation tax return issues. He said the Subcommittee discussed the issue extensively, but recommends no change to Rule 3015 because current law and administrative practice provide sufficient protection for governmental units before and after plan confirmation, and because allowing objections to confirmation of a plan that was previously confirmed would introduce substantial uncertainty into the process. **A motion to approve the Subcommittee's recommendation to make no change to Rule 3015 carried without opposition.**

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

(A) Proposed amendments to Rules 5009 and 9001 and new Rules 1004.2 and 5012, which were approved at the Seattle meeting and then were withdrawn with a direction to the Subcommittee to consider whether a more extensive set of rules should be adopted for chapter 15 cases.

The Reporter said that the Subcommittee met by teleconference on June 13, 2007. He said it continued its recommendation that there be no comprehensive set of chapter 15 rules at this time. Instead, the Subcommittee was resubmitting the above rules with a few minor changes. He said that Rule 9001 had not been changed since approved in Seattle. With respect to Rules 5009 and 5012, he said that the Subcommittee recommended deleting the "special notice" reference. Finally, he said the Subcommittee recommended a slight change to the version of Rule 1004.2 that was approved in Seattle, and directed the Committee's attention to the version described as "Option one" at the bottom of page 3 of the memo at Agenda Item 6. Instead of asking the filer whether the pending foreign preceding is a "foreign main preceding" or a "foreign non-main preceding" the rule would instead require the filer to simply name the country in which the debtor has the center of its main interests and to list each country in which a foreign proceeding is pending.

After discussion, the Committee voted to approve Rules 5009 and 9001 and new Rules 1004.2 and 5012 as recommended by the Subcommittee with the following changes: in the committee note to Rule 5009 on page 8 of the memo, substitute "court" for "case" in the 6th line. However, the Committee voted to hold the changes in the "bullpen" until the Subcommittee reconsidered proposed changes, described below, to Rule 1018.

(B) Possible amendments to Rule 1018 or Rule 7001(7) regarding whether any action brought seeking injunctive relief under §§ 1519(e) and 1521(e) is governed by

Rule 7065. The proposal is in response to Comment 05-BR-037 submitted by the Insolvency Law Committee of the Business Law Section of the State Bar of California.

The Reporter said that the Subcommittee recommended revising Rule 1018 as set forth on pages 13 and 14 of the memo at Agenda Item 6. The purpose of the proposed changes was to make Rule 7065 applicable to actions for injunctive relief brought under §§1519(e) and 1521(e). **After discussing the matter, the Committee sent the proposed Rule 1018 revisions back to the Subcommittee to revise the committee note, and to clarify terminology problems outside the Chapter 15 context.**

7. Report of Subcommittee on Privacy, Public Access, and Appeals.

(A) Possible amendment to either Rule 8003 or Rule 8005 to better coordinate the process governing appeals of interlocutory orders when the appellant also wishes to obtain a stay of the order pending resolution of the appeal. The proposal was submitted by Bankruptcy Judge Colleen Brown as Comment 06-BK-016.

Judge Pauley described Judge Brown's comment. He said that, when a party seeks leave to appeal an interlocutory order and also seeks a stay of the order pending the resolution of the appeal, the motions are presented to different courts. The bankruptcy court will address the stay issue, and the district court or the BAP will consider the motion for leave to appeal. Judge Brown suggested that amending the rules to consolidate such motions would facilitate the process. If consolidated, both motions could be considered in the first instance by the bankruptcy court, which is more familiar with the case. Judge Brown did not think this change in procedure would diminish the BAP or district court's authority because, even if the bankruptcy court denied the consolidated motion, an appeal of that decision would be available. The Subcommittee recommended against such consolidation because, under 28 U.S.C. § 158(a), the motion for leave to appeal an interlocutory order can only granted by the appellate court. **After discussion, the Committee agreed with the Subcommittee and recommended no change to the rules.**

(B) Proposed amendment to either Rule 9023 or Rule 8002 to respond to a pending amendment to Civil Rule 59 that would extend the time to file motions to amend judgment beyond the appeal deadline in bankruptcy cases.

Judge Pauley explained that in light of a proposed change to Civil Rule 59 that would extend the deadline to file a motion to amend judgment to 30 days, there would be a need to amend either Bankruptcy Rule 9023 (which incorporates Civil Rule 59), or Bankruptcy Rule 8002 (the appeal deadline), so the deadline in the two bankruptcy rules would work together. Currently, both rules have 10-day deadlines (scheduled to go to 14 days as a result of the time amendments). Judge Pauley said that in light of the Committee's decision last meeting in considering the time amendments to keep the appeal deadline in bankruptcy cases short (14 days), that the Subcommittee recommended applying the same 14-day deadline to motions to alter or amend. He said

that Subcommittee's recommendation for amending Rule 9023 was set forth as Option 1 on pages 4 and 5 of the memo at Agenda Item 7.

Some committee members argued in favor of the alternative option of expanding the deadlines for both types of motions to 30 days so that they would be consistent with the Civil Rules, and would thereby remove a trap for attorneys that practice in both courts. These members also argued that a short deadline for appeals in bankruptcy cases doesn't really move the appeal along faster, but just gets the appeal *filed* more quickly. And Judge Rosenthal explained that part of the Civil Rules Committee's reasoning in changing Rule 59 to 30 days was that the current 10-day deadline cannot be expanded under the civil rules.

Other committee members said that the shorter period for appeals in bankruptcy cases was appropriate because it moves discrete issues along in the process and, at least with respect to issues that are not appealed, promotes finality.

The Reporter reminded members that the Committee's decision at the last meeting in favor of keeping the shorter appeal period in bankruptcy cases was due in part to historical reasons. Like criminal cases, the appeal period in bankruptcy has always been short, and he thought that there would be considerable resistance from the bar to an expansion of the appeal period to 30 days. He suggested that, at a minimum, the issue should wait until the Committee had the benefit of comments to the time amendments, currently out for comment, which changed both periods from 10 to 14 days.

Several members agreed that waiting until the time amendment comments came in made sense, but suggested that because the changes to Rules 9023 and 8002 in those amendments were buried among changes to all the rules with time periods, that they might not be noticed. Judge Swain suggested that comments would be more likely if the Committee flagged the issue in a letter sent to major bankruptcy groups, and said that she would undertake such an effort as incoming Chair. **After further discussion, a motion to table the matter until the next meeting carried 12-1, so that any comments to the time amendments or a special solicitation could be considered.**

(C) Possible amendment to Official Form 10 or Rule 3001 to restrict disclosure of highly personal information contained in the debtor's medical records by advising creditors holding health care claims to submit only the minimally necessary information. The proposal was in response to part of Comment 06-BK-016 submitted by Judge Colleen Brown.

Judge Pauley said that the Subcommittee also considered Judge Brown's suggestion to amend the rules to admonish creditors not to include information of a "highly personal nature" in the attachments submitted in support their claims. He said that the Subcommittee ultimately rejected Judge Brown's suggestion because it was unable to craft language in a rule with enough specificity that the creditor would know what not to do. Also, the Subcommittee thought that at least with respect to medical records, HIPAA regulations might sufficiently cover the matter. The Subcommittee did

recommend, however, that the matter be referred to the Forms Subcommittee to consider the possibility of amending either Form 10, or the instructions to that form, to remind creditors of the existence of HIPAA regulations. **After discussion, the Committee referred the matter to the Forms Subcommittee.**

8. Report of Subcommittee on Forms.

(A) Revision of proposed Form 27 prior to publication.

The Chair reported that after the Marco Island meeting, the Forms Subcommittee met by teleconference to discuss whether newly proposed Form 27, which was scheduled to be published for comment in August 2007, could be modified before publication to accommodate the requirement of Rule 4008 that the *debtor* explain the difference between total income and expenses on schedules I and J, and the income and expenses reported at the time of reaffirmation. He said that the Subcommittee concluded that by adding a signature line for the debtor on the proposed form, the debtor could comply with the rule without filing an additional, and duplicative, statement. After discussing the matter with the head of the Rules Committee Support Office, the Chair said he had approved publishing Form 27 for comment with the amendments shown at Agenda Item 8 so that the bench, bar, and public would have the benefit of all contemplated changes during the comment period.

(B) Possible refinement of the definition of "creditor" on the back of Official Form 10, the Proof of Claim.

The Chair said that the Subcommittee recommended revising the definition of "creditor" on the back of Form 10 to more closely match the statutory definition found at 11 U.S.C. § 506(a). He said that the proposed revision was shown at in the agenda materials. **The Committee approved revision of the definition of "creditor" as follows:** "The creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. § 101(10)." **Upon the recommendation of a member, the Chair referred the proposal back to the Subcommittee and asked the Subcommittee to suggest a similar revision to the definition of "claim" on the same form.**

(C) Proposed revision of Form 16A (Caption Full) to require the filer to provide the debtor's "Employer Identification Number" (if one exists) rather than the "Employer's Identification Number."

The Chair reported that the Subcommittee also recommended correcting a typographical error on Form 16A so that rather than requiring the debtor to report its "Employer's Identification Number," that it instead report its own "Employer Identification Number" (if one exists). The Chair said that after discussing the matter with the head of the Rules Committee Support Office and determining that the change was merely technical and did not require publication, he had approved transmitting the

revised form to the Judicial Conference with a recommended effective date of December 1, 2007.

(D) Oral report on the status of the long-range review of the Bankruptcy Forms, including Judge Isgur's proposal (Comment 06-BK-011) to renumber the forms filed at the beginning of consumer cases.

The Chair referred the Committee to the "Forms Modernization Report" in the materials and explained that the Forms Subcommittee met by teleconference on June 18, 2007, and endorsed the idea first presented by Judge Walker that there should be a formal undertaking to review and modernize the bankruptcy forms. During the teleconference, the Subcommittee determined that the project would be long-term, and, because of policy considerations, would likely require input from the AO and other Judicial Conference committees. Accordingly, the Subcommittee recommended that the Committee explore the possibility of setting up a working group that would report back to the Committee.

Peter McCabe endorsed the working group concept because of the policy implications inherent in the project. He said that on one level, the project simply required a review of existing forms with an eye toward simplification, improving clarity, and removing redundant information. And that part of the project clearly came within the purview of this Committee.

Mr. McCabe anticipated, however, that no matter how the forms are reorganized, that much of the information filled in by debtors could, and in the future likely would, be submitted electronically. As a result, he envisioned that the courts would soon become the repository of vast amounts of personal, highly-searchable, detailed information about bankruptcy filers. He said that a policy addressing what the AO and the courts would do with such information, and for distributing such information outside the court family, was currently under consideration by other Judicial Conference committees in connection with the EOUST's request that Judicial Conference require the mandatory use of so-called "smart" or "data-enabled" forms (i.e., PDF forms with tagged field data). **After additional discussion, the Committee voted to authorize the Chair to take the necessary steps to form the working group with this Committee acting as the lead committee in the project.**

9. Possible technical amendment to Rule 2016(c) to conform the rule to the amendments to section 110(h) of the Code by BAPCPA.

The Reporter explained that there was a need for a technical amendment to Bankruptcy Rule 2016(c). He said that as a result of the 2005 amendments to § 110 of the Bankruptcy Code, a bankruptcy petition preparer must now file a declaration of compensation together with the petition, rather than within 10 days after filing the petition. He said that the changes made the 10-day filing deadline for the declaration in Rule 2016, and the rule's cross-referenced to § 110(h)(1), incorrect. And he moved that the Committee approve the changes proposed at Agenda item 9 to be forwarded without publication at the appropriate time to the Standing Committee for approval and

submission to the Judicial Conference and the Supreme Court. **The Committee approved the recommendation.**

(After the meeting, the Style Subcommittee expressed concern Rule 2016 may require an additional amendment. As a result, the Chair deferred the transmission of the proposed amendment and referred it to the Consumer Subcommittee for further consideration.)

Discussion Items

10. Possible amendment to Rule 1017(e) to address issues identified in Bankruptcy Judge Wesley Steen's opinion in In re Cadwallder, 2007 WL 1864154 (Bankr. S.D. Tex. 2007).

The Reporter said the Cadwallder case pointed out a statutory ambiguity with §704(b), which gives the United States Trustee "not later than10 days after the date of the first meeting of creditors" to file the presumption of abuse statement, and 30 more days to file a motion to dismiss in the case. The Report said that the statute was ambiguous because it does not provide any guidance as to whether the initial 10 days begins to run on the first day the § 314 meeting is held, or when the meeting is concluded.

In Cadwallder, Judge Steen ultimately concluded that § 704(b) does not set a deadline for the U.S. Trustee at all, but merely sets forth a duty. He suggested to the Committee, however, that as currently drafted, Rule 1017(e) could be read to assume that there is a § 704(b) deadline and that such deadline is always earlier than the 60-day deadline established by Rule 1017(e). He thought that clarity could better be achieved by removing any reference to § 704(b) from the rule.

The Reporter said that he did not think a change to the rule was appropriate at this time. He said that the reason Rule 1017(e) explicitly sets deadlines "except as otherwise provided in § 704(b)(2)," is to avoid the appearance of a conflict between the rule and the statute. Further, although the Cadwallder court concluded § 704(b) did not establish a deadline for the U.S. Trustee, other courts have found the opposite. Accordingly, the Reporter recommended that the rule remain unchanged unless a consensus develops in the case law in support of the Cadwallder holding. **After discussion, the Committee approved the Reporter's recommendation to make no change to Rule 1017(e) at this time.**

Information Items

The Committee was reminded that the next meeting was scheduled for March 27-28, 2008, at The Inn at Perry Cabin in St. Michaels, MD.

Before closing the meeting, the Chair made several comments. He thanked the Committee on behalf of himself and Judges Klein and McFeeley, all who were rotating off. He said it has been a fascinating and rewarding eight years. He asked that the minutes reflect his

gratitude to the Administrative Office staff, including, among others, Jim Wannamaker, Scott Myers, James Ishida, and John Rabiej.

The Chair also reminded the members that, in spite of the rash of rules and forms changes in response to BAPCPA, the rules-making process is normally a deliberative process and that the Committee should take its time to consider changes. He added that rules and forms should be changed only infrequently and that, even when improvements might seem warranted, there should be a bias toward giving existing formulations precedential value.

Finally, Judge Rosenthal, as Chair of the Standing Committee, asked that the minutes reflect the appreciation of the Standing Committee for all of the work performed by this Committee in response to the enactment of BAPCPA, and of Judge Zilly's leadership in particular.

Respectfully submitted,

Stephen "Scott" Myers