2012 Update on Bankruptcy Rules and Forms

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Introduction

Federal rules of procedure are adopted by the Supreme Court, subject to contrary Congressional legislation. The authorization for the Court to adopt bankruptcy rules is set out in 28 U.S.C. § 2075 ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11."). In exercising its rule-making authority, the Supreme Court acts through the Judicial Conference of the United States, as authorized by 28 U.S.C. § 331 ("Such changes in and additions to [the federal rules] as the Conference may deem desirable . . . shall be recommended by the Conference from time to time to the Supreme Court . . . ."). In turn, the Judicial Conference delegates the responsibility for rules proposals to its Committee on Rules of Procedure, otherwise known as the Standing Committee; and the Standing Committee is advised by five advisory committees, each dealing with a particular set of the federal rules: civil, criminal, evidence, appeals, and bankruptcy.

Bankruptcy rules, and the forms that implement them, begin in the Advisory Committee on Bankruptcy Rules. Rule amendments generally require at least three years from their initial drafting to become effective, and forms require at least two years, as follows:

> *Year 1*: Proposals for new or amended rules and forms go from the Bankruptcy Rules Committee to Standing Committee for publication and comment within a period from mid-August to mid-February.
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> *Year 2*: The Bankruptcy Rules Committee reviews comments and sends surviving proposals to the Standing Committee for its approval and forwarding to the Judicial Conference. If the Conference approves them, new and amended forms generally go into effect on the following December 1. With Conference approval, new and amended rules are forwarded to the Supreme Court for adoption.
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> *Year 3*: If the Supreme Court adopts the proposals by May 1, it notifies Congress, which has until December 1 to enact contrary legislation before the proposals become effective as rules.

So in October of any given year, bankruptcy practitioners have three ways that they can interact with the rules process:

(1) Get ready for new rules and forms that will be effective on December 1 of the present year unless Congress acts to the contrary, and on December 1 of the following year if the Supreme Court approves and Congress does not act to the contrary.

(2) Comment on any rule and form changes published in August.

(3) Make suggestions to the Bankruptcy Rules Committee for future rule and form changes.

This outline describes the rules and forms that will go into effect on December 1 of this year, the rules that are likely to go into effect on December 1, 2013, the rules and forms currently published for comment, and a few of the matters that the Bankruptcy Rules Committee expects to be recommending for publication and comment in 2013-14.

A. New rules and forms effective December 1, 2012

The text of the rules discussed here can be found at

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct0412/BK_AdvComm_Excerpt_2012.pdf

The forms discussed here can be found at pages 261-320 of

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda Books/Standing/ST2012-06_Revised.pdf - pagemode=bookmarks

1. Rule 1007

This amendment is a technical and conforming amendment to remove an inconsistency created by an amendment to Rule 1007(a) that went into effect on December 1, 2010. The proposed amendment eliminates the current inclusion in Rule 1007(c) of a time limit for filing the list of creditors in an involuntary bankruptcy case. That time limit in the current Rule 1007(c) is inconsistent with the limit in Rule 1007(a)(2), which was amended on December 1, 2010, to reduce the period to file the list of creditors from fourteen to seven days. The amendment to Rule 1007(c) eliminates the redundant reference to Rule 1007(a)(2) and its creation of a conflicting time limit.

2. Rule 2015

The amendment to Rule 2015(a) corrects a reference to § 704 of the Bankruptcy Code. A 2005 amendment to the Code broke up § 704 into subsections. The amendment changes the reference to the pre-2005 § 704(8) in Rule 2015(a) to become § 704(a)(8).

3. Rule 3001

The amendment addresses the documents required for proofs of claim based on an open-end or revolving consumer credit account, such as credit card debt. Subdivision (c)(1) currently requires a creditor to attach to a proof of claim either the original or duplicate of the writing, if any, on which a claim or an interest in property is based. That provision will be amended to create an exception for claims

governed by a new paragraph (3) of the subdivision. For claims based on an open-end or revolving consumer credit agreement, new paragraph (3) will require that a statement be filed with the proof of claim providing the following information, to the extent applicable:

- the name of the entity from whom the creditor purchased the account;
- the name of the entity to whom the debt was owed at the time of the account

  holder's last transaction;
- the date of the account holder's last transaction;
- the date of the last payment on the account; and
- the charge-off date.

There are a number of reasons for the clarified disclosure obligations. Because claims of this type — primarily for credit card debts — are frequently sold, the claim filer may be an entity unknown to the debtor. The debtor often needs the information paragraph (3) would require to associate the claim with a known account and to know whether the claim is timely.

The amendment was changed from an earlier proposal to allow creditors to provide relevant information in a more convenient fashion and to relieve claimants from the general requirement of filing the original or duplicate of the writing on which the claim is based. However, a party in interest may obtain a copy of the writing on which an open-end or revolving consumer credit claim is based by requesting it in writing from the claim holder. The amendment imposes a 30-day deadline for responding to a written request under proposed Rule 3001(c)(3)(B), starting from when the written request is sent and subject to enlargement or reduction by the court under Rule 9006 if cause is shown.

The committee note accompanying the amendment states that a proof of claim based on an open-end or revolving credit card agreement that is filed and executed in accordance with Rule 3001(a), (b), (c)(1), (c)(2), (c)(3)(A), and (e) is entitled to the benefit of subdivision (f), which provides that a proof of claim executed and filed in accordance with the rules constitutes prima facie evidence of the validity and amount of the claim. A claimant's failure to comply with proposed Rule 3001(c)(3)(B), which requires producing a copy of the writing on which the claim is based if an interested party requests it, will not affect the applicability of subdivision (f), but could subject the claimant to sanctions.

The amendment contains a provision excepting home equity lines of credit from the Rule 3001(c)(3)(A) requirement that certain information be submitted with the proof of claim.

Finally, Rule 3001(c)(1) is being amended to delete the option of filing with a proof of claim the original of a writing on which a claim is based. This conforms with the instructions in Form 10, which warn against filing original documents.

4. Rule 7054

Rule 7054 incorporates Civil Rule 54(a)–(c) for adversary proceedings. Subsection (b) on cost awards is being amended to extend the time — from one day to fourteen days — for a party to respond to the prevailing party's bill of costs, and extend the time — from five to seven days — to seek court review of the costs taxed by the clerk. The first change is proposed to provide a more reasonable period for a response. The second period was changed to conform to the 2009 time-computation amendments, which changed five-day periods in the rules to seven-day periods. The changes make these time periods consistent with Civil Rule 54.

5. Rule 7056

Rule 7056 makes Civil Rule 56 applicable in adversary proceedings. Civil Rule 56 was amended in December 2010 to impose a new default deadline for filing a summary judgment motion, tying the deadline to the close of discovery. Because hearings in bankruptcy cases sometimes occur shortly after the close of discovery, the amendment to Rule 7056 bases the default deadline on the scheduled hearing date, rather than the close of discovery, requiring a summary judgment motion to be filed 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a local rule or court order sets a different deadline.

6. Official Form 7

Official Form 7, the debtor's Statement of Financial Affairs, requires debtors to disclose certain payments made to or for the benefit of insiders. The current version of the form contains a definition of "insider" that differs from the Bankruptcy Code's definition of the term. As used in the form, the term includes "any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives." The Code's definition of "insider" lists other qualifying relationships, including a "person in control" of a corporate debtor, but makes no reference to a five-percent shareholder. 11 U.S.C. § 101(31). The Advisory Committee found no basis for concluding that § 101(31) provides authority for the current definition used in the form. The Code does not contain a bright-line test that invariably makes a five-percent shareholder an insider. That language was added to the form in 2000, but no explanation for the addition appears in the Committee Note, the Advisory Committee's report to the Standing Committee, or the Advisory Committee minutes.

As amended, the definition of insider in Form 7 will adhere more closely to the Code. The language regarding a five-percent shareholder of a corporate debtor will be deleted. In its place, the definition will include "any persons in control of a corporate debtor." The statutory reference following the definition will also be updated to give a pinpoint citation to the definition of insider in the Code.

7. Official Forms 9A-9I and 21

These forms are being amended to reduce the risk that a debtor's Social Security number will be inadvertently disclosed publicly in a bankruptcy case.

Official Form 9 is directed at creditors. A particular version of the form (denoted Form 9A through Form 9I) applies depending on the nature of the bankruptcy case, but all serve the same function. The form gives notice to potential creditors of the debtor's bankruptcy case and provides important information, such as the date of the meeting of creditors and the deadline to object to an individual debtor's discharge. The form includes identifying information to allow a recipient to determine whether it is a creditor of the debtor. For individual debtors, that identifying information includes the debtor's Social Security information. A redacted version of Form 9 is included in the court files.

Official Form 21 is directed at the debtor. The form requires debtors to disclose, under penalty of perjury, their Social Security numbers. Neither the unredacted version of Form 9 sent to creditors nor Form 21 is intended to be placed on the public docket of a bankruptcy case.

The Judicial Conference's Committee on Court Administration and Case Management raised the concern that bankruptcy forms may be mistakenly filed in ways that publicly reveal debtors' private identifying information. To respond to that concern, Form 9 is being amended to make clear that a creditor should not attach a copy of the form when filing a proof of claim. Stylistic changes have also been made to the form. Similarly, Form 21 is being amended to include a prominent warning about proper submission of the form, so as to avoid its inadvertent inclusion on the court's public docket.

8. Official Form 10

Official Form 10, the proof of claim form, is being amended (1) to eliminate a reference to filing a power of attorney with a proof of claim, conforming to Rule 9010(c), and (2) to include statements about the attachment of required documentation for certain types of claims.

Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. This requirement, however, does not apply when an agent files a proof of claim. The amendment to Form 10 will remove from its signature the instruction that an authorized agent "attach copy of power of attorney, if any."

Line 7 of Form 10 is being amended to require a statement that certain documentation is attached. For claims secured by the debtor's principal residence, the form will state that the Mortgage Proof of Claim Attachment—required as of December 1, 2011—is being filed with the claim. For claims based on an open-end or revolving consumer credit agreement, the form would state that the information required by Rule 3001(c)(3)(A)—scheduled to take effect on December 1, 2012—is attached.

B. New rules likely effective December 1, 2013

The text of the rules discussed here can be found at pages 249 to 258 of

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda Books/Standing/ST2012-06_Revised.pdf - pagemode=bookmarks

1. Rules 1007, 4004 and 5009

These rules involve the obligation of individual debtors in chapters 7, 11, and 13 to complete a personal financial management course as a condition of receiving a discharge in bankruptcy. Rule 1007(b)(7) currently requires the debtor to file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." That form is Official Form 23, which requires the debtor to certify completion of an instructional course in personal financial management. Accordingly, Rule 5009(b) now requires the clerk to send notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. Debtors who do not file the necessary statement of completion from their course provider are not given a discharge before their cases are closed. Many of these cases are reopened later, necessitating the payment of an additional fee.

The amendments will streamline the process of filing statements of the completion of financial management courses. They remove the obligation of the debtor to file Official Form 23 if the financial management course provider has notified the court of the debtor's successful completion of the course. Rule 1007(b)(7) will be amended to authorize providers to file course completion statements directly with the court. Rule 5009(b) will be amended to direct the clerk to send notice to the debtor only if the debtor is required to file the statement and the provider has not already done so.

4004(c)(1)(H) is being amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

Two other changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge, rather than simply allowing the court not to do so. The other states specifically that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

2. Rules 9006, 9013, and 9014

These rules will be amended to highlight the default deadlines for the service of motions and written responses. Rule 9006, based on Civil Rule 6, contains a subsection regarding the time for service of motions. Rule 9006(d) regulates timing for any motions not addressed elsewhere in the Bankruptcy Rules or by order of the

court. Unlike the civil rule, however, Rule 9006 does not presently indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule.

The amendments will highlight the existence of Rule 9006(d). The title of Rule 9006 will be amended to add a reference to the "time for motion papers." This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice. Coverage of subdivision (d) would be expanded to address the timing of the service of any written response to a will (rather than only opposing affidavits as the rule current states). This change would make the provision as inclusive as possible in order to capture differences in local motion practice. Rule 9013, which addresses the form and service of motions, will be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment is also intended to call greater attention to the default deadlines for motion practice. In addition, stylistic changes will be made to Rule 9013 to add greater clarity. Rule 9014, which addresses contested matters in bankruptcy, will similarly be amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses.

C. Rules and forms published for comment until February 2013

The text of the rules and forms discussed here can be found at pages 323-506 of

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda Books/Standing/ST2012-06_Revised.pdf - pagemode=bookmarks

1. Rule 1014(b)

Rule 1014(b) is proposed to be amended to clarify the proper course of action when bankruptcy petitions involving the same or related debtors are filed in different districts. The current rule provides that, upon a motion, the court in which the first-filed petition is pending may determine—in the interest of justice or for the convenience of the parties—the district or districts in which the cases will proceed. Courts in the other districts must stay proceedings in later-filed cases until the first court makes its determination, unless that court orders otherwise. By default, the later cases are therefore stayed while the venue question is pending before the first court.

The amendment to Rule 1014(b) would alter this default requirement. The amendment provides that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending. This change is intended to prevent disruption of the other cases unless there is a judicial determination that a stay of a related case is needed while the first court makes its venue determination. The amendment would also clarify who should receive notice of the hearing on the venue motion by incorporating by reference the entities

entitled to notice under Rule 2002(a). In addition, stylistic changes have been made to the rule.

2. Rule 7004

A proposed amendment to Rule 7004(e) would change the time in which a summons remains valid after it is issued. The amendment reduces that period from fourteen days to seven days. This change is intended to ensure that a defendant has sufficient time to respond to a complaint in bankruptcy litigation. The Civil Rules and Bankruptcy Rules use different methods to calculate a defendant's time to respond to a complaint. Under the Civil Rules, the defendant's time to respond begins when the summons and complaint are served. The Bankruptcy Rules, however, calculate the defendant's response time from the date the summons is issued.

Although Rule 7012(a) of the Bankruptcy Rules gives a defendant (other than a United States officer or agency) thirty days to answer a complaint, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond in a bankruptcy proceeding. The amendment is intended to encourage prompt service after issuance of a summons.

3. Rules 7008, 7012, 7016, 9027, and 9033

These rules are proposed to be amended in reponse to the Supreme Court's recent decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). In *Stern*, the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's common law counterclaim brought against a creditor of the bankruptcy estate. Although the Judicial Code, 28 U.S.C. § 157(b), deemed the counterclaim a "core" proceeding that a bankruptcy judge could hear and determine, the Court found Congress's assignment of final adjudicatory authority to the bankruptcy judge in the proceeding to be unconstitutional.

The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern* has introduced the possibility, however, that a proceeding defined as core under the Judicial Code may nevertheless lie beyond the constitutional power of a bankruptcy judge to adjudicate finally. Accordingly, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The proposed amendments address this concern. They would alter the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

These amendments are not intended to take a position on the question whether party consent is sufficient to permit a bankruptcy judge to enter final judgment in a proceeding that would otherwise lie beyond the judge's adjudicatory authority. Instead, the proposed changes to the Bankruptcy Rules are designed to frame the question of adjudicatory authority and allow the bankruptcy judge to determine the appropriate course of action. The court must decide whether to hear and finally adjudicate the proceeding, whether to hear it and issue proposed findings and conclusions, or whether to take some other action.

4. Rules 8001-8028 (Part VIII of the Bankruptcy Rules)

These amendments propose a complete revision of the bankruptcy appellate rules. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. At the outset of the project, the Committee

hosted two mini-conferences on the subject of the bankruptcy appellate rules. Judges, lawyers, court personnel, and academics who had substantial experience with bankruptcy appeals attended. Subsequent drafting, review, and refinement of the proposed rules received the benefit of input from the Appellate Rules Committee.

The revision of Part VIII is comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled.

Each of the proposed rules is briefly discussed below.

Rule 8001 (Scope of the Part VIII Rules; Definition of "BAP"; Method of Transmission). This rule is new; it does not have a counterpart in the existing Part VIII rules, but it is similar to Appellate Rule 1. The rule explains the scope of Part VIII. It clarifies that these rules apply to appeals from a bankruptcy court to the district court or bankruptcy appellate panel and that some of the rules (specified in the Committee Note) apply to appeals from bankruptcy courts to courts of appeals.

Due to the repeated references to "district court or BAP," the acronym for bankruptcy appellate panel, well known by bankruptcy judges and lawyers, has been used throughout Part VIII, and its definition is set out in this rule.

The title of this rule highlights the fact that it addresses the method of transmission. The rule sets out presumption in favor of electronic transmission with an exception for pro se individuals.

Although the Committee is not embarking on a general restyling of the Bankruptcy Rules, in revising Part VIII it has adopted many of the style conventions of the Appellate Rules, including the use of "must" rather than "shall." The Committee believes that this part of the Bankruptcy Rules is sufficiently discrete that its use of restyled language and form will not cause confusion in the meaning of rules in the other parts.

Rule 8002 (Time for Filing Notice of Appeal). This rule is largely a restyled version of current Rule 8002. Because 28 U.S.C. § 158(c)(2) refers to this rule by number, the provisions regarding the time for filing a notice of appeal must be retained in Rule 8002, rather than being placed after the rule governing the procedure for taking an appeal as of right, as the Appellate Rules are organized. The revised rule retains the fourteen-day period for filing a notice of appeal in bankruptcy cases.

Subdivision (c) regarding an appeal by an inmate confined in an institution is a new provision. It mirrors the provision in Appellate Rule 4(c)(1) and (2).

Rule 8003 (Appeal as of Right – How Taken; Docketing of Appeal). This rule is based on Appellate Rule 3. It includes provisions of current Rule 8001(a) governing

the taking of an appeal by right and Rule 8004 governing service of notice of the filing of a notice of appeal. The proposed rule includes new provisions, modeled on Appellate Rule 3(b), allowing joint and consolidated appeals.

In a significant change from current Rule 8007(b), an appeal would be docketed in the appellate court when the clerk of that court receives the notice of appeal, rather than, as under current practice, when the complete record is transmitted to the appellate court. This change reflects the view expressed by some participants in the mini-conferences that docketing in the appellate court should occur earlier in order to eliminate most instances of a motion being filed in the appellate court with regard to a case not yet on its docket.

Rule 8004 (Appeal by Leave – How Taken; Docketing of Appeal). This rule contains provisions that are currently set forth in Rules 8001(b) and 8003. It follows the format and style of Appellate Rule 5, but it retains the current bankruptcy practice of requiring the filing of a notice of appeal in addition to a motion for leave to appeal.

Consistent with proposed Rule 8003, this rule provides that docketing in the appellate court should occur promptly after the clerk of that court receives the notice of appeal and motion for leave to appeal. As a result of this change in the time of docketing, responses in opposition to motions for leave to appeal would be filed in the appellate court rather than in the bankruptcy court, a change from existing Rule 8003(a).

Rule 8005 (Election to Have Appeal Heard by District Court Instead of BAP). This rule is a revision of current Rule 8001(e). Under 28 U.S.C. § 158(c)(1), if a bankruptcy appellate panel has been established to hear appeals from a bankruptcy court, an appellant may elect to have an appeal heard instead by a district court by making an election at the time of filing a notice of appeal, and an appellee may make such an election within 30 days after service of the notice of appeal. The proposed rule provides for the promulgation of an Official Form for making an election. The Committee believes that use of this form would make the election process more straightforward and less likely to give rise to challenges. Should a dispute about the validity of an election arise, the rule provides a procedure for resolution of the dispute. The court in which the appeal is pending when a determination of the validity of an election is sought would have authority to determine whether an election has been properly made according to the rule and statute.

Rule 8006 (Certification of Direct Appeal to Court of Appeals). This rule, like current Rule 8001(f), implements 28 U.S.C. § 158(d)(2), which authorizes certification of bankruptcy appeals for direct review by a court of appeals under three circumstances: (1) if the court in which the case is pending, acting on its own motion or on the request of a party, makes the certification specified in § 158(d)(2)(A)(i), (ii), and (iii); (2) if all parties to the appeal make the certification; or (3) if a majority of appellants and a majority of appellees request the court to make the certification, in which case the court is required to do so. Because of the

earlier time of docketing an appeal in the appellate court under the proposed rules, this rule provides that, for purposes of certification only, a case remains pending in the bankruptcy court for 30 days after the effective date of a notice of appeal. Once a certification is made, a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk within 30 days after the certification. Appellate Rule 6 would be amended to provide in new subdivision (c) the procedures for requesting permission of the court of appeals and for any subsequent proceedings in that court.

Rule 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings). This rule is derived from current Rule 8005 and Appellate Rule 8. In a change from the current rule, Rule 8007 would apply to appeals taken directly to the court of appeals, as well as to ones taken to the district court or the bankruptcy appellate panel. It retains a feature of current Rule 8005 that differs from Rule 8. If a bankruptcy court grants a stay or other relief authorized under subdivision (a) of the rule, a party may seek to have that order vacated or modified by means of a motion filed in the reviewing court, rather than by filing a notice of appeal.

Rule 8008 (Indicative Rulings). This rule would add to the Bankruptcy Rules a provision governing indicative rulings. Because it addresses procedures in both the trial and appellate courts, the proposed rule is a combination of Civil Rule 62.1 and Appellate Rule 12.1. Subdivision (a), which authorizes the bankruptcy court to issue an indicative ruling, and subdivision (b), which requires the movant to notify the "court in which the appeal is pending" of the bankruptcy court's ruling, would apply when a bankruptcy appeal is pending in the court of appeals, as well as when an appeal is pending in the district court or bankruptcy appellate panel. Subdivision (c), however, which authorizes the "appellate court" to remand for further proceedings, would apply only to district courts and bankruptcy appellate panels. Appellate Rule 12.1(b) would govern the actions of a court of appeals in response to an indicative ruling of a bankruptcy court. However, the procedures of proposed Rule 8008(c) and Appellate Rule 12.1(b) are identical.

Rule 8009 (Record and Issues on Appeal; Sealed Documents). This rule is a revision of current Rule 8006. It borrows provisions from Appellate Rules 10 and 11(a) that would be new to the Bankruptcy Rules, including provisions regarding a statement of the record when no transcript is available, an agreed statement as the record on appeal, and correction or modification of the record. Rule 8009 would continue the current practice in bankruptcy appeals of having the parties designate items to be included in the record on appeal. It would include a new provision regarding the handling of documents under seal that are designated for inclusion in the record. That provision has no counterpart in the Appellate Rules. Rule 8009 would apply to direct appeals to the court of appeals, as well as to appeals to the district court and the bankruptcy appellate panel.

Rule 8010 (Completion and Transmission of the Record). This rule is derived from current Rule 8007 and Appellate Rule 11. The rule clarifies that in courts that record proceedings without a reporter present in the courtroom, the term

"reporter" includes the person or service designated by the court to transcribe the recording. Unlike FRAP 11, proposed Rule 8010 does not require the reporter to send anything to an appellate court. And in a change from current bankruptcy practice, the clerk of the appellate court will no longer docket the appeal when the complete record is received. Docketing will occur upon receipt of the notice of appeal (proposed Rules 8003(d) and 8004(c)). The appellate-court clerk will still provide notice to the parties of the date on which the transmission of the record was received, because under proposed Rule 8018(a) that date generally commences the briefing schedule.

Rule 8011 (Filing and Service; Signature). This rule is based on current Rule 8008 and Appellate Rule 25. It adopts the format, style, and some of the greater detail of Rule 25, and—consistent with the overall goals of the Part VIII revision project—it places a greater emphasis on the electronic filing and service of documents. Subdivision (e) is a new provision that would require an electronic signature of counsel or unrepresented parties for documents filed electronically in the appellate court.

Rule 8012 (Corporate Disclosure Statement). This rule, new to the Part VIII rules, is based on Appellate Rule 26.1.

Rule 8013 (Motions; Intervention). In a change from current bankruptcy practice, the proposed rule does not permit briefs to be filed in support of or in response to motions. Instead, like the practice under FRAP 27, legal arguments must be included in the motion or response.

Proposed subdivision (g) permits motions for intervention in a bankruptcy appeal pending in a district court or BAP. The current Part VIII rules do not address intervention, and the appellate rules provide for intervention only with respect to the review of agency decisions. Someone seeking to intervene in a bankruptcy appeal must explain whether intervention was sought in the bankruptcy court and why intervention is being sought at the appellate stage.

Rule 8014 (Briefs). Proposed subdivision (a)(6) regarding the statement of the case adopts the language of the proposed amendment of FRAP 28(a)(6) for which the Appellate Rules Committee is seeking final approval at this meeting. In a change from existing bankruptcy practice, proposed subdivision (a)(7) would require appellants' and appellees' briefs to contain a summary of the argument. This requirement is consistent with current FRAP 28(a)(8).

The proposed rule departs from the requirements of FRAP 28 by not including provisions regarding references to parties and references to the record. The Committee concluded that this level of detail in the bankruptcy appellate rules is unnecessary.

Subdivision (f) adopts the provision of FRAP 28(j) regarding the submission of supplemental authorities. Unlike the FRAP provision, the proposed rule imposes a definite time limit (seven days) for any response, unless the court orders otherwise.

Rule 8015 (Form and Length of Briefs; Form of Appendices and Other Papers). The proposed rule is modeled on FRAP 32. The title was changed to call attention to the fact that this rule governs the length of briefs. Unlike FRAP 32(a)(2), subdivision (a)(2) of the proposed rule does not prescribe colors for brief covers.

Subdivision (a)(7) decreases the length of principal and reply briefs currently permitted by Rule 8010. This change imposes on briefs filed in a district court or BAP the same page limits that apply to briefs filed in a court of appeals.

Rule 8016 (Cross-Appeals). This provision is new to Part VIII. It is modeled on FRAP 28.1.

Rule 8017 (Brief of an Amicus Curiae). The current Part VIII rules do not provide for amicus briefs. The proposed rule is modeled on FRAP 29. Unlike FRAP 29(a), subdivision (a) of this rule permits the court to request amicus participation.

Rule 8018 (Serving and Filing Briefs; Appendices). This rule continues the existing bankruptcy practice of allowing the appellee to file a separate appendix. It differs in this respect from FRAP 30, which requires the filing of a single appendix by all parties.

The time periods for the appellant and appellee to file their initial briefs are lengthened from fourteen to thirty days. For the appellant, that period will still be shorter than the forty-day period prescribed by FRAP 31.

Rule 8019 (Oral Argument). Subdivision (a) alters existing Rule 8012 by (1) authorizing the court to require the parties to submit a statement about the need for oral argument and (2) permitting statements to explain why oral argument is not needed, rather than only why it should be allowed. The proposed rule tracks FRAP 34(a)(1).

Subdivision (f) differs from FRAP 34(e) by giving the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or postpone argument.

Rule 8020 (Frivolous Appeal and Other Misconduct). Subdivision (a) of the proposed rule is derived from existing Rule 8020, which in turn is modeled on FRAP 38. Subdivision (b) is derived from FRAP 46(c). It expands the FRAP provision to apply to misconduct by parties as well as by attorneys.

Rule 8021 (Costs). FRAP 39 requires both the court of appeals and the district court to be involved in the taxing of costs. The court of appeals fixes maximum rates for producing copies of documents, and the clerk of the court of appeals prepares and certifies an itemized statement of costs for insertion in the mandate. Additional costs on appeal are taxable in the district court. The proposed rule, by contrast, is intended to continue the practice under current Rule 8014 of giving the bankruptcy clerk the entire responsibility for taxing the costs of appeal.

Subdivision (b) adds a provision regarding the taxing of costs against the United States. This provision, which is not included in current Rule 8014, is derived from FRAP 39(b).

Rule 8022 (Motion for Rehearing). Subdivision (a)(1) retains the requirement of current Rule 8015 that in all cases parties must file a motion for rehearing within fourteen days after the judgment is entered. It differs from FRAP 40(a)(1), which allows 45 days for filing the motion in a civil case if the United States is a party.

The provision in existing Rule 8015 that specifies when the time for appeal to the court of appeals begins to run is not retained because the matter is addressed by FRAP 6(b)(2).

Rule 8023 (Voluntary Dismissal). The provision of current Rule 8001(c)(1) for dismissal by the bankruptcy court prior to the docketing of the appeal has been omitted. Under the proposed rules, appeals would be docketed shortly after the notice of appeal is filed—a period likely to be especially short if the notice of appeal is transmitted electronically. The Committee therefore thought it unlikely that a voluntary dismissal of the appeal would be sought after the appellant filed the notice of appeal but before the appeal had been docketed. It noted, however, that FRAP 42 has a provision for dismissal by the district court prior to docketing, even though docketing under FRAP 12 also occurs upon receipt by the circuit clerk of the notice of appeal (and docket entries).

FRAP 42(b) provides that the circuit clerk "may" dismiss an appeal if the parties (1) file a signed dismissal agreement specifying how costs are to be paid and (2) pay any fees that are due. The proposed rule requires the clerk of the district court or BAP to dismiss under those circumstances. That requirement is consistent with current Rule 8001(c)(2).

Rule 8024 (Clerk's Duties on Disposition of the Appeal). The only change from existing Rule 8016, other than stylistic ones, is the recognition that in some cases no original documents may have been transmitted to the appellate court.

Rule 8025 (Stay of District Court or BAP Judgment). The proposed rule is derived from current Rule 8017. Only subdivision (c) is new. It provides for the stay of a bankruptcy court's order, judgment, or decree that is affirmed on appeal for the duration of any stay of the appellate judgment.

Rule 8026 (Rules by Circuit Councils and District Courts; Procedure When There Is No Controlling Law). The only changes from current Rule 8018 are stylistic.

Rule 8027 (Mediation). This rule is new and has no counterpart in the Appellate Rules. It provides that if a district court or BAP has a mediation procedure that is applicable to bankruptcy appeals, the clerk must advise the parties—promptly after the docketing of the appeal—that the procedure applies, what its requirements are, and how the procedure affects the time for filing briefs in the appeal.

Rule 8028 (Suspension of Rules in Part VIII). This rule provides a more expansive list of rules that may not be suspended than either current Rule 8019 or FRAP 2.

Deletion of Current Rule 8013. The proposed Part VIII rules do not include a rule similar to current Rule 8013 (Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact). The Committee concluded that no rule is needed to specify the actions that a district court or BAP may take (affirm, modify, reverse, or remand with instructions) in ruling on bankruptcy appeals. It further concluded that the remainder of the rule—prescribing the weight to be accorded the bankruptcy court's findings of fact—duplicates Rule 7052, which applies in adversary proceedings and is made applicable to contested matters by Rule 9014. The Appellate Rules do not contain a similar rule. The Committee's decision not to include in revised Part VIII a rule similar to current Rule 8013 is not intended to change existing law. It merely reflects a determination that the rule is unnecessary.

5. Rules 9023 and 9024

These rules would be amended to refer to the procedure in proposed new Rule 8008 governing indicative rulings. Unlike the Civil and Appellate Rules, the Bankruptcy Rules would include a single rule prescribing the procedure for indicative rulings in both the bankruptcy and appellate courts. Proposed Rule 8008 would govern the issuance of indicative rulings by bankruptcy judges and the corresponding procedures applicable in district courts and bankruptcy appellate panels. In order to remind litigants who file postjudgment motions of the possibility of seeking an indicative ruling from a bankruptcy court that lacks jurisdiction to grant relief due to the pendency of an appeal, the Committee voted at its fall 2008 meeting to amend Rules 9023 and 9024 to add a cross-reference to Rule 8008.

6. Initial revised forms for individual debtors

The nine forms published for comment are the initial products of the Forms Modernization Project or FMP, a multi-year endeavor of the Advisory Committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF (NextGen), and the modernized forms are being designed to use enhanced technology that will become available through NextGen. From a forms perspective, the major change in NextGen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose.

The FMP made a preliminary decision that the debtor forms for individuals and entities other than individuals should be separated. There is a greater need for the forms submitted by individuals to be less technical, because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the forms for individual debtors are

designed to use language more common in ordinary conversation, to employ more intuitive layouts, and to include both clearer instructions, examples within the forms, and more extensive separate instruction sheets.

This approach in form drafting was followed in the new forms adopted in connection with proofs of claim for certain mortgages in chapter 13 cases—Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2)—that went into effect on December 1, 2011. The format of these new forms has generally been well accepted.

The nine forms now published are among those that an individual debtor would file at the outset of a case.

Before adoption by the Advisory Committee, drafts of all of the individual debtor forms were circulated to organizations representing a range of users and to other reviewers. A concern expressed by some of the user groups was that the new format resulted in forms of greater length, creating additional difficulty in locating the information needed by the users. This problem would be addressed by allowing extraction of data from the forms, which could be reported in formats tailored to the users' needs, but the availability of such access depends in part on the timing of the development of NextGen, which is not certain.

Accordingly, the Advisory Committee has suggested an incremental approach. The nine forms now being proposed for publication—the fee waiver and installment fee forms, the income and expense forms, and the means test forms—reflect the FMP approach to form-drafting without imposing major changes in utility. These particular forms make no change in the substantive content and simply replace existing forms. They are not significantly longer than the forms they replace, they all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. Trustees, and case trustees, for varied purposes. Their publication and, if adopted, their use, will provide a useful gauge of the effectiveness of the FMP approach.

Official Forms 3A and 3B. These forms both deal with payment of the filing fee for an individual's bankruptcy case, and replace current Official Forms 3A and 3B. Form 3A is the application for paying the filing fee installments; Form 3B is the application for waiver of the filing fee in a chapter 7 case. Because these forms are most frequently completed by unrepresented debtors, the Advisory Committee concluded that the additional clarity of the FMP approach may be of particular value here. The only changes in Form 3A are stylistic, consistent with the overall approach of the project.

Official Form 3B also includes three technical changes. First, Line 1 of the form asks the size of the debtor's family. Because the debtor's dependents are now proposed to be listed in revised Official Form 6J, rather than in Official Form 6I, as done presently, the reference to the number of dependents changed from Schedule I to Schedule J. Second, consistent with the Judicial Conference Interim Procedures

For Waiver of Chapter 7 Fees, proposed Official Form 3B specifies that non-cash governmental assistance (such as food stamps or housing subsidies) should not be included in stating the debtor's income level for purposes of determining eligibility for a fee waiver, although it continues to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Official Forms 6I and 6J. These forms—usually referred to as Schedules I and J—set out the income and expenses of an individual debtor. In addition to the stylistic changes made as part of the Forms Modernization Project, the revised versions of the forms contain several changes intended to provide more accurate and useful information.

The revised forms address the situation of a debtor who lives with and pools assets with other people who are not related by blood or marriage to debtor. Schedule I now includes as income any contributions made by someone else to the expenses listed on Schedule J, and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

Revised Schedule J now requests separate information on dependents who live with the debtor, dependents who live separately, and other members of the household.

In chapter 13 cases, revised Schedule J asks for expenses at two different points in time—the date the debtor files bankruptcy (Column A) and the date a proposed 13 plan is confirmed (Column B). This allows Schedule J to state what the debtor's expenses will be as a result of the confirmed plan, thus facilitating a determination of the plan's feasibility.

A new line 23 is added to Schedule J, setting out a calculation of the debtor's monthly net income.

Official Forms 22A-1, 22A-2, 22B, 22C-1, 22C-2. These forms are used in determining a debtor's current monthly income under 11 U.S.C. § 110(10A), and—in chapter 7 and 13 cases—in determining income remaining after deduction of expenses specified in statutes governing those chapters. The forms for chapter 7 and 13 cases are generally referred to as the "means test" forms. In Official Form 22B, the statement of current monthly income in chapter 11 cases filed by individuals, the only changes are stylistic, conforming to the overall approach of the Forms Modernization Project. For chapters 7 and 13, however, the means test forms have been revised in several additional ways.

First, and most significantly, the means test forms have been divided into two separate forms: one for income (Official Form 22A-1 in chapter 7, Official Form 22C-

1 in chapter 13), and the other for expenses (Official Form 22A-2 in chapter 7, Official Form 22C-2 in chapter 13). Because expense information is only required of debtors whose currently monthly income exceeds the applicable state median income, most debtors will not have to complete the expense forms, thereby reducing the volume of the filed forms.

Second, in both the chapter 7 and chapter 13 forms, the deduction for cell phone and internet expenses is modified to reflect more accurately the IRS allowances incorporated by the Bankruptcy Code. Under the applicable IRS "other necessary expense" standard, cell phone and other optional telecommunication services expenses are deductible not only if necessary for the health and welfare of the debtor and the debtor's dependents, as stated in the current forms, but also if necessary for the production of income if not reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. Revised Official Form 22A- 2 (in line 23) and Official Form 22C-2 (in line 19) make this correction. On the other hand, unlike their counterparts in the current forms, these lines do not permit deduction of basic home internet expenses, because under IRS guidelines adopted in 2011, these expenses are included in the Local Standards for housing and utilities.

Third, line 60 of current Official Form 22C has not been repeated in Official Form 22C- 2. Line 60 allows debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Finally, Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court stated in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b) requires consideration of changes to income or expenses that, at the time of plan confirmation, have occurred or are virtually certain to occur. Such changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

D. Matters under consideration for future publication

1. Official form for chapter 13 plan and related amended rules

During the past year, on the basis of suggestions received from a bankruptcy judge and an organization of state attorneys general, the Advisory Committee has

been exploring the adoption of an official form for chapter 13 plans. The adoption of an official form would have several benefits. First, it would make more uniform the practice of plan confirmation, which now varies substantially among the districts. Many districts require the use of local model plans containing distinctive features. These differences impose substantial costs on both on creditors with regional or national businesses and on software vendors, whose products must accommodate all of the local variations. Second, a national form would also allow for earlier resolution of differences in interpretation. And finally, a national form could provide a specific location within the form for any variances from its standard provisions, allowing for easier review by the court, trustees, and creditors, consistent with the Supreme Court's direction in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (March 23, 2010), that bankruptcy judges independently review chapter 13 plans for conformity with applicable law.

A survey of the bankruptcy bench established widespread support for a national form plan, and the Advisory Committee has established a working group to develop one. The working group has discussed an initial draft and expects soon to have a draft that can be informally circulated for comments. Additionally, in the course of the group's work, it became apparent that the effectiveness of a national form plan would depend, to a large extent, on amendments to the Bankruptcy Rules harmonizing practice among the local courts and eliminating ambiguity about the extent to which official forms may be modified locally. The working group has drafted several such amendments, governing the need to file proofs of secured claims, establishing shortened filing deadlines, and clarifying procedures for treatment of claims, which the Advisory Committee will consider in the coming year. The Committee expects to be able to propose an official form for a Chapter 13 plan, with accompanying rule amendments, during 2013.

2. September mini-conference on the new mortgage forms

The Advisory Committee held a mini-conference on the effectiveness of new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), which were designed to implement the new mortgage claim disclosure requirements in Rules 3001(c) and 3002.1. The rules and forms went into effect on December 1, 2011.

When the Advisory Committee gave final approval to the forms at the spring 2011 meeting, it considered written comments and hearing testimony that suggested the need for a detailed loan history, rather than just an itemization of prepetition fees, expenses, and charges. It also considered questions about the sufficiency of the information sought regarding escrow accounts. The Committee concluded that it was important for the forms to go into effect simultaneously with the new rules, which it had approved the year before, but that it would be useful to convene a mini-conference on the effectiveness of the forms after a period of experience with them.

The purpose of the mini-conference was to ensure that the new forms are enabling debtors and trustees to obtain the information they need to deal properly

with home mortgages in bankruptcy, particularly in chapter 13 cases, and that the disclosure requirements are not imposing an undue burden on mortgage creditors or costs on the debtors not commensurate with the benefits. The specific goals of the mini-conference are to learn how the forms are operating in actual practice and to determine whether any modifications are needed. Home mortgage servicers and attorneys (or others who are actually filing the documents), consumer debtor attorneys, chapter 13 trustees, bankruptcy judges, and clerks of court were invited to attend.

3. Forms Modernization Project

As discussed above, the Forms Modernization Project began its work by revising forms used in cases of individual debtors, and several of these forms are now being recommended for publication and comment. The FMP's work on all of the individual debtor forms is now nearly complete, and the FMP has begun revision of forms for non-individual cases.

As with its initial work, the FMP discussed the format of non-individual forms with a variety of professionals who use them, including attorneys, software providers, claims managers, trustees, and staff of the United States Trustee Program. These discussions resulted in the FMP's adoption of several goals for revision of the non-individual forms. Among the principal goals that emerged from these discussion were:

- revising the forms to eliminate unnecessary requests for information (such as questions relevant only in the cases of individuals),

- seeking information in the form that businesses commonly keep their financial records, and

- providing clear direction for reporting information that departs from the data maintained according to standard accounting practices.

Drafting of revised non-individual forms has begun, and the initial drafts will be tested and modified, as necessary, before being recommended for publication. In this process, the FMP continues to have the assistance of its forms consultant.

Through the FMP's work, the Advisory Committee expects to recommend adoption of the remaining revised forms for both individual and non-individual cases.

4. Electronic signatures

As part of the Forms Modernization Project, the Advisory Committee has considered the use of electronic signatures. Two initial questions were presented. The first is whether and under what circumstances bankruptcy courts should accept for filing documents signed electronically without requiring the retention of a paper copy containing a "wet" or original signature. If retention of an original signature is required, the second question is who should be required to maintain the paper document bearing the signature.

The Advisory Committee was presented with three alternative approaches in response. One is set out in a model local rule adopted by several bankruptcy courts, which requires retention of original documents with wet signatures, and imposes the duty of retention on the entity—most commonly the debtor's attorney— that files the document electronically. Another approach, used in at least two other bankruptcy courts, does not require retention of paper documents with original signatures. Instead, these courts require that, for any electronically- filed document signed by someone other than the filing attorney, the document be accompanied by a declaration of authenticity wet-signed by the non-attorney. That declaration is scanned and maintained, in electronic form, by the clerk's office. A third approach is taken by the Internal Revenue Service, pursuant to 26 U.S.C. § 6061(b)(2), which validates electronic signatures on tax returns. The IRS uses personal identification numbers as electronic signatures, with no requirement for any original wet-signed document.

The Advisory Committee has been informed that, although the issue will arise in the context of the procedures of other federal courts, it would be appropriate for electronic signatures to be addressed initially in the bankruptcy context. Accordingly, the Advisory Committee will continue to examine the issue with the goal of recommending an amendment to the bankruptcy rules that establishes a uniform procedure for electronic signatures.