

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve proposed amendments to Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 5-7
2. Approve the proposed revisions to Official Bankruptcy Form 7 p. 7
3. Approve proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 9-12

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- ▶ Federal Rules of Appellate Procedure pp. 3-5
- ▶ Federal Rules of Bankruptcy Procedure pp. 5-9
- ▶ Federal Rules of Civil Procedure pp. 9-13
- ▶ Federal Rules of Criminal Procedure pp.13-15
- ▶ Federal Rules of Evidence p. 15
- ▶ Rules Governing Attorney Conduct pp.15-16
- ▶ Privacy and Access to Electronic Case Files p. 16
- ▶ Posting Local Rules on the Internet pp.16-17
- ▶ Long-Range Planning and Budgeting p. 17
- ▶ Report to the Chief Justice p. 17

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure met on June 7-8, 2000. All members attended the meeting. The Department of Justice was represented by Daniel Marcus, Acting Associate Attorney General. Roger A. Pauley, Director, Department of Justice, Office of Legislation, Criminal Division, also attended part of the meeting.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, attending on behalf of Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Judge James A. Parker, former chair of the Subcommittee on Style; Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, Deputy Chief of the Administrative Office's Rules Committee Support Office; Abel J. Mattos, chief of

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the Court Administration Policy Staff; Marie Leary of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Professor R. Joseph Kimble and Joseph F. Spaniol, consultants to the Committee.

PARALLEL LANGUAGE OF RULES

Different sets of rules, i.e., Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules, often deal with the same subjects. Over the years, independent actions by different advisory committees have produced differences of expression that may generate confusion. The Standing Committee is now assisting the advisory committees in adopting language that is as uniform as possible when the rules deal with common topics. Amendments requiring a party to disclose financial interests and establishing procedures governing service of papers by electronic means are two such overlapping issues addressed by the advisory committees.

New Civil Rule 7.1 and Criminal Rule 12.4 are based on a revised Appellate Rule 26.1, which requires a nongovernmental corporate party to disclose any parent corporation. The rules and amendments proposed for publication are very similar to each other with minor differences accounting for different contexts. Meanwhile, the Advisory Committee on Bankruptcy Rules continues to consider similar amendments, but it requires additional time to study the issues, which are more complicated in the bankruptcy field.

The Advisory Committees on Bankruptcy and Civil Rules are submitting to the Judicial Conference for approval proposed rule amendments permitting service of papers and transmission of court notices by electronic means on parties who consent, and providing a three-day response time in these cases similar to the three days provided under the general "mail rule." The proposed amendments to Civil Rules 5, 6, 77 and Bankruptcy Rules 9006 and 9022

implementing these proposals are similar to amendments to Appellate Rules 25, 26, 36, and 45, which are proposed for publication.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed amendments to Rules 4, 5, 21, 25, 26, 26.1, 36, and 45. At the January 2000 meeting, the Standing Committee approved publication for comment of proposed amendments to Rules 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and new Form 6, which were discussed in the Committee's March 2000 report to the Judicial Conference. With the notable exceptions of amendments to Rules 4(a)(7) and 26.1, the presently proposed changes, as well as those approved in January for publication, are generally "housekeeping." Several amendments have been under study since 1997, but have been reserved until now to allow the bench and bar to become familiar with the comprehensive restyled appellate rules, which took effect in December 1998. For comparison purposes, the proposed rule amendments would take effect no earlier than December 2002.

Rule 4(a)(7)(Entry Defined) would be amended to address conflicting decisions of the courts of appeals regarding the time to appeal judgments. The issue arises when a district court's order or judgment has been entered on the civil docket but not on a separate document in accordance with Civil Rule 58, because neither the time to bring a post-judgment motion nor the time to appeal ever begins to run. Consequently, judgments improperly entered years ago may still be open to appeal. The proposed amendment to Rule 4(a)(7), in combination with proposed amendments to Civil Rule 58, cures this problem. The rules provide that when a separate document is required, judgment is entered on either of two events, whichever is earlier: when the judgment is entered on the civil docket and set forth on a separate document, or when 60 days

have run from entry of the judgment on the civil docket. Under the proposed amendments to Civil Rules 54 and 58, moreover, orders disposing of certain post-judgment motions would no longer need to be entered on a separate document.

The proposed amendment to Rule 5 (Form of Papers; Number of Copies) corrects a cross reference and limits petitions for permission to appeal to 20 pages.

The proposed amendment to Rule 21(d) (Writs of Mandamus and Prohibition, and Other Extraordinary Writs) similarly corrects a cross reference and limits petitions for extraordinary relief to 20 pages.

The proposed amendments to Rules 25, 26, 36, and 45 set out procedures providing service and notice by electronic means. Rule 25(c)-(d) (Filing and Service) would be amended to permit electronic service on parties who consent. Rule 26(c) (Computing and Extending Time) would be amended consistent with the existing three-day “mail rule” to provide a party with an additional three calendar days to respond to a paper served by electronic means. Under proposed amendments to Rule 36(b) (Entry of Judgment; Notice) and Rule 45(c) (Clerk’s Duties), a clerk of court would be permitted to serve a judgment or a notice of entry of an order or judgment, respectively, on a party who has consented to such service by electronic means.

At the request of the Committee on Codes of Conduct, the advisory committees considered changes to their respective rules requiring a nongovernmental corporate party to disclose financial interests as presently required under Appellate Rule 26.1, so that a judge could ascertain whether recusal is necessary. The rules committees requested the Federal Judicial Center to survey local rules that require disclosure to determine the range of financial interests that the courts have required parties to disclose. The Center found that current disclosure

practices varied significantly, with most appellate and several district courts requiring information beyond that presently called for under Appellate Rule 26.1.

The proposed amendment of Rule 26.1 (Disclosure Statement) is similar to amendments proposed to the Civil and Criminal Rules. Under the proposed amendments, a nongovernmental corporate party would continue to disclose any parent corporation and any publicly held corporation that owns 10 percent of its stock, or state that no such corporation exists. Moreover, a party would also be required to disclose any information that may be required by the Judicial Conference and supplement its disclosures when circumstances change. The rules committees believe that the Judicial Conference is best suited to adopt any additional disclosure requirements that experience proves desirable and feasible.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022, and Official Form 7 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 1999. The scheduled public hearing was canceled because the single request to testify was withdrawn.

Under the proposed amendment to Rule 1007 (Lists, Schedules, and Statements; Time Limits), a debtor who knows that a creditor is an infant or incompetent person would be required to include in the list of creditors and schedules the name, address, and legal relationship of any representative of that creditor.

The proposed amendments to Rule 2002 (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would require that a party who is entitled to notice of a plan confirmation hearing be given adequate notice of any injunction that would enjoin conduct not otherwise enjoined by the Bankruptcy Code. The amendments also clarify provisions governing mailing addresses of creditors and indenture trustees.

Rule 3016 (Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases) would be amended to require adequate notice of a proposed injunction to entities whose conduct would be enjoined under a plan rather than by the Bankruptcy Code.

The proposed amendment to Rule 3017 (Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases) would require a court to consider prescribing procedures that would provide adequate notice of an injunction to be issued under a proposed plan, rather than by operation of the Bankruptcy Code, to entities who are neither creditors nor equity security holders.

Rule 3020 (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would be amended to require that an order of confirmation describe in reasonable detail the terms, scope, and conditions of an injunction issued under a plan, enjoining conduct not otherwise enjoined by the Bankruptcy Code.

The proposed amendment of Rule 9006(f) (Time) would provide a party with an additional three days to respond to a paper served by electronic means.

The proposed amendments to Rule 9020 (Contempt Proceedings) would apply the procedures governing contested matters to a motion filed by an United States trustee or a party in interest for an order of contempt. The amendment only sets out a procedure for handling a

motion for contempt; it does not address the existence of the power of a bankruptcy court to issue a contempt order.

Rule 9022 (Notice of Judgment or Order) would be amended to permit the clerk of court to use electronic means to serve notice of entry of an order or judgment on a party who has consented to such service.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Official Form 7 (Statement of Financial Affairs) would be revised to provide additional information regarding the debtor to taxing authorities, pension fund supervisors, and government units charged with environmental protection and regulation. The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed revisions to Official Bankruptcy Form 7.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the revision of Official Form 7 are in Appendix A together with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, new Rule 1004.1, and revisions of Official Form 1 with a recommendation that they be published for comment.

Rule 1004 would be amended to clarify the procedures governing an involuntary petition against a partnership filed by fewer than all of the general partners. Proposed new Rule 1004.1

establishes procedures for a case commenced on behalf of an infant or an incompetent person. Rule 2004 would be amended to compel a witness to attend an examination of an entity under procedures governing a subpoena in Civil Rule 45, whether the examination is conducted within or outside the district in which the case is pending. Under the proposed amendments to Rule 2014, a professional seeking to render services in a bankruptcy case must disclose to the court certain information substantiating the person's "disinterestedness" in the case. Rule 2015 would be amended to clarify the trustee's or debtor in possession's duty to report disbursements. Under the proposed amendment of Rule 4004, the filing of a motion to dismiss under § 707 of the Bankruptcy Code would postpone the entry of discharge in a chapter 7 case.

Rule 9014 governs contested matters. It would be amended to permit service by electronic means, clarify that an evidentiary hearing must be held if a disputed, unresolved material issue of fact exists, and establish procedures notifying attorneys at an early date of a hearing at which witnesses are to appear. Rule 9027 would be amended to clarify the time limits for filing a notice of removal of a claim or cause of action filed after the commencement of a bankruptcy case, whether the bankruptcy case is still pending or has been suspended, dismissed, or closed. Finally, Official Form 1 would be revised to require the debtor to disclose ownership or possession of property that poses a threat of harm to the public health or safety.

The Committee approved the recommendations of the advisory committee to circulate the proposed rule amendments and Official Form revision to the bench and bar for comment.

Informational Item

The advisory committee continues to monitor pending legislation that would substantially reform the Bankruptcy Code. A few provisions in the pending bills would directly affect the bankruptcy rules, and the committee had notified Congress of its concerns. If bankruptcy reform

legislation were to pass, the rules and Official Forms would need substantial and prompt revision to implement the statutory changes.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of the Copyright Rules with a recommendation that they be approved and transmitted to the Judicial Conference. With the exception of the amendments to Rule 82, which involve only a technical conforming change, the amendments were published for comment by the bench and bar in August 1999. The scheduled public hearing was canceled because the single request to testify was withdrawn.

Electronic and Other Service

The proposed amendment of Rule 5(b) (Service and Filing of Pleadings and Other Papers) would permit electronic service on parties who give written consent. Under the amendment, electronic service would be complete on transmission. But service by electronic means is not effective if the party making service learns that the attempted service did not reach the person served. (Civil Rule 5 is cross-referenced in Bankruptcy Rule 7005 and Criminal Rule 49(b), which extend the application of Rule 5 to adversary proceedings in bankruptcy cases and to criminal cases.) The language and formatting of Rule 5(b) also were restyled.

Rule 6(e) (Time) would be amended to provide a party with an additional three days to respond to a paper served by electronic means. Although electronic service often is instantaneous, delays frequently occur. The added three-day response time is consistent with the three-day "mail rule" and is intended to eliminate any perceived disadvantage in using electronic means.

The proposed amendments to Rule 77(d) (District Courts and Clerks) would permit courts to serve notices by electronic means on parties who have so consented.

Copyright Rules

The Copyright Rules of Practice were prescribed by the Supreme Court and are set out in 17 U.S.C.A. following § 501. They deal only with prejudgment seizure of copies alleged to infringe a copyright. The rules were written for the 1909 Copyright Act and have not been changed to reflect inconsistent provisions in the 1976 Copyright Act. They do not conform to modern concepts of due process. In 1964 the advisory committee challenged the seizure procedure as one that:

is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

These problems prompted the advisory committee in 1964 to recommend that the Copyright Rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. The recommendation was withdrawn because Congress was considering a thorough revision of the copyright laws that was eventually enacted in 1976.

The advisory committee actively solicited comment in 1997 from organizations and experienced counsel on the need to update the Copyright Rules. The advisory committee notified staff of the House Judiciary Subcommittee on Courts and Intellectual Property of its intent to recommend that the Copyright Rules be abrogated. Representative Howard Coble (R-NC), chairman of the subcommittee, expressed concern that any proposed amendment might interfere with pending copyright legislation and ongoing United States multilateral treaty obligations. The

United States has been actively encouraging all countries to provide effective intellectual property protections. At Chairman Coble's request, the advisory committee deferred recommending publication of the proposals for one year.

During the one-year delay, Congress acted on pending measures. The advisory committee has now concluded that the Copyright Rules should be abrogated and Civil Rule 65 be amended to expressly govern impoundment proceedings. Under the proposed amendments, impoundment may still be ordered on an ex parte basis if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. But the proposed changes would eliminate the concern that the rules may be invalid and will help ensure that the United States is in compliance with its international obligations.

Amendments to Rule 81 (Applicability in General) are proposed to conform to the abrogation of the Copyright Rules, to eliminate an outdated reference to mental health proceedings, and to clarify a reference to the Bankruptcy Rules.

Technical Conforming Amendment

Rule 82 (Jurisdiction and Venue Unaffected) would be amended to correct a citation to a repealed section of title 28 of the United States Code. In accordance with Judicial Conference procedures governing the rulemaking process, the Committee determined that the change need not be published for comment because it was solely a technical conforming amendment.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and the abrogation of the Copyright Rules are in Appendix B together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and transmit these changes to the Supreme Court for its

consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 54, 58, 81, and a new Rule 7.1 with a recommendation that they be published for comment.

Proposed new Rule 7.1 (Disclosure Statement) would require a nongovernmental corporate party to disclose any parent corporation and any publicly held corporation that owns 10 percent of its stock, or state that no such corporation exists. Under the amendment, a party is also required to disclose any information that may be required by the Judicial Conference and supplement the disclosure when circumstances change. The proposed new rule is similar to proposed changes to the Appellate and Criminal Rules. But it adds a requirement that clerks deliver the disclosure statement to the judge acting in the proceeding to account for the greater likelihood at the civil trial stage that another judge may act on a part of the case.

The proposed amendments to Rules 54 (Judgments; Costs) and 58 (Entry of Judgment) are intended to address problems caused when a judgment or order is not entered on a separate document and as a result the time for appeal purposes never begins to run under the Appellate Rules. In conjunction with proposed changes to Appellate Rule 4(a)(7), the amended rules cure this problem by providing that when a separate document is required, judgment is entered on either of two events, whichever is earlier: when the judgment is entered on the civil docket and set forth on a separate document, or when 60 days have run from entry of the judgment on the civil docket. Under the proposed amendments to Rules 54 and 58, moreover, orders disposing of certain post-judgment motions would no longer have to be entered on a separate document.

Rule 81(a)(2) (Applicability in General) would be amended to conform the time limits governing a writ of habeas corpus with the rules governing § 2254 and § 2255 proceedings.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments to the bench and bar for comment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules completed a style revision of Criminal Rules 1-60 using uniform drafting guidelines. It also proposed substantive amendments to several rules that have been under consideration outside the style project. The advisory committee has submitted both sets with a recommendation that they be published separately for public comment.

Proposed Comprehensive Style Revision of Criminal Rules

The style revision of the Criminal Rules is part of a comprehensive effort to clarify and simplify the language of the procedural rules. It is similar in nature to the revision of the Federal Rules of Appellate Procedure, which took effect in December 1998. As in that earlier project, the advisory committee has identified ambiguities in the rules that require substantive revisions. These limited changes have been specifically identified in the Committee Notes to the rules.

In its style project, the advisory committee focused on several major elements. First, it attempted to eliminate the existing confusion regarding key terms and phrases that appear throughout the rules by simplifying and standardizing them. Second, it deleted provisions that no longer are necessary, usually because case law has evolved since the rule was first promulgated. Third, it completely reorganized several rules to make them easier to read and apply. Over the years, these rules have evolved inconsistently, resulting in convoluted provisions.

Proposed Substantive Amendments to Criminal Rules

The advisory committee has also been working on separate substantive amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43 and new Rule 12.4; Rules 2, 3, 6, 8, 9, and 10 Governing Section 2254 Proceedings; and Rules 2, 3, 8, 9, and 10 Governing Section 2255 Proceedings. The advisory committee recommended that these proposed amendments be published separately from the restylized version to highlight them and make clear the differences between the two versions.

The proposed amendments to Rules 5, 10, and 43 would authorize a court, upon the defendant's consent, to permit videoconferencing of an initial appearance proceeding and an arraignment. The public's comments on alternative versions that would not require the defendant's consent are also solicited. In accordance with Judicial Conference instructions, Rule 5.1 would be amended to authorize a United States magistrate judge to grant a continuance for a preliminary hearing. Under the proposed amendments to Rule 12.2, the procedures governing the ordering, consideration, and disclosure of expert testimony on mental condition are clarified. New Rule 12.4 closely tracks the financial disclosure provisions proposed in similar amendments to the Appellate and Civil Rules. It also would require the government to disclose the identity of any organizational victim, which could affect a judge's recusal decision if restitution is ordered. The proposed amendment of Rule 26 would permit a party to produce a witness's testimony at trial under certain limited circumstances. Rule 30 would be amended to clarify the timing of a request for jury instructions. Rule 32 would be amended to clarify the requirement to rule on unresolved, controverted matters in a presentence report. The proposed amendment of Rule 35 would clarify circumstances when a sentence can be reduced to account for the defendant's substantial assistance in providing information helpful to the government in prosecuting another

person when the information was known but not fully appreciated nor acted on within the prescribed time. Rule 41 would be amended to provide procedures for issuing a warrant for covert observations, which had been authorized by two courts of appeals. The advisory committee was persuaded that the growing number of these types of searches warranted regulation in the rules, although it took no position on whether such a "search" was permissible.

Proposed Amendments Governing Habeas Corpus Rules

The amendments to the rules governing § 2254 and § 2255 proceedings are proposed to conform the rules with the Antiterrorism and Effective Death Penalty Act and recent amendments of the Criminal Rules, including consistent references to "magistrate judge." Among other changes, the proposed amendments account for a statutory revision limiting the ability of petitioners and movants to obtain habeas corpus relief on successive motions.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action. It continues to review the status of evidentiary privileges in light of congressional activity in this area.

RULES GOVERNING ATTORNEY CONDUCT

A conference of experts and practitioners in the attorney disciplinary field met in February to discuss the desirability of national rules governing attorney conduct in certain specific areas of particular concern to federal courts. The meeting was sponsored by the Subcommittee on Attorney Rules, which includes representatives from the advisory rules committees, Standing Committee, and the Committees on Court Administration and Case Management and Federal/State Jurisdiction. The subcommittee continues to monitor pending

Congressional legislation on the subject, some of which would require the rules committees to propose attorney conduct rules within a short period of time.

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES

The Committee's liaison to the Court Administration and Case Management Subcommittee on Privacy and Access to Electronic Case Files reported on the subcommittee's work exploring privacy issues attendant to Internet access to case file information. The subcommittee is considering several alternative approaches to handle the privacy issues and is asking certain Judicial Conference committees for their initial reactions. Abel J. Mattos, chief of the Court Administration Policy Staff, advised the Committee of a recent legislative effort to establish a Privacy Commission that would study and within 18 months make recommendations governing electronic access by the public to a variety of information, including government records. The Committee discussed the various options, but it did not reach a final conclusion on any of them. It did offer some suggestions and raised concerns regarding the options, however, which will be communicated to the subcommittee.

POSTING LOCAL RULES ON THE INTERNET

On the recommendation of the five advisory rules committees, the Committee endorsed a proposal that would encourage courts to place their local rules on the Internet so that the rules could be accessed from one site. In particular, the Committee approved the following recommendations: (1) that courts be encouraged to post their local rules in a prominent location on their own web sites, or establish a web site if only to post their local rules on it; (2) that courts be encouraged to include on their sites a uniform statement indicating the posted rules are current; and (3) that the Administrative Office be directed to link local court web sites to its "Federal Rulemaking" web page. The Committee approved sending its recommendations to the

Committee on Court Administration and Case Management with a request that it endorse and submit them to the Judicial Conference for its consideration.

LONG-RANGE PLANNING AND BUDGETING

The Committee considered an agenda item on long-range planning and budgeting. On the issue of coordination with other Judicial Conference committees, it concluded that is important to continue the present coordinating procedures, maintaining a great degree of sensitivity to alerting other committees to overlapping issues.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select proposed amendments generating controversy is set forth in Appendix C.

Respectfully submitted,



Anthony J. Scirica
Chair

David M. Bernick	Phyllis A. Kravitch
Michael Boudin	Gene W. Lafitte
Frank W. Bullock, Jr.	Patrick F. McCartan
Charles J. Cooper	J. Garvin Murtha
Geoffrey C. Hazard, Jr.	A. Wallace Tashima
Eric H. Holder, Jr.	E. Norman Veasey

Appendix A — Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Form 7
Appendix B — Proposed Amendments to the Federal Rules of Civil Procedure
Appendix C — Report to the Chief Justice on Proposed Rules Amendments Generating Controversy

TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 11, 2000

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 9-10, 2000, in Key Largo, Florida. The Advisory Committee considered public comments regarding proposed amendments to the Bankruptcy Rules that were published in August 1999.

The proposed amendments published in 1999, include revisions to eight Bankruptcy Rules (Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022). The Advisory Committee received thirteen written comments on the proposed rules. Several of the comments were offered on behalf of groups, including the Bankruptcy Judges of the Northern District of Illinois, and the Chief Bankruptcy Judges of the Ninth Circuit. One person initially requested an opportunity to appear at a public hearing on the proposed amendments, but he later withdrew that request and rested on his written submission. The Advisory Committee considered the comments at its March 2000 meeting and approved each of the proposed amendments to the Rules, and will present them to the Standing Committee at its June 2000 meeting for final approval and transmission to the Judicial Conference. The Advisory Committee also will present amendments to Official Form 7 (Statement of Financial Affairs) to the Standing Committee for final approval and transmission to the Judicial Conference.

The proposed amendments to this Form were published in August 1998 and the Advisory Committee considered the comments at its March 1999 and September 1999 meetings.

* * * * *

II Action Items

A. Proposed Amendments to Bankruptcy Rules 1007, 2002(c)(3), 2002(g), 3016, 3017, 3020, 9006(f)¹, 9020, and 9022, and Official Form 7 Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

The Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 1999, and a public hearing on the preliminary draft was scheduled for January 18, 2000. The public hearing was canceled when the only person submitting comments on the proposals who requested to appear at the scheduled hearing withdrew that request.

There were thirteen comments received regarding the proposed amendments to the rules. The comments contained in these submissions are summarized on a rule-by-rule basis following the text of each rule in the GAP Report set out below. The Advisory Committee reviewed these comments, and, as a result, it made several revisions to the published draft. The post-publication revisions are identified in the GAP Report.

The proposed amendments to Official Form 7 were published for comment in August 1998. The Advisory Committee received six comments on the proposed amendments to the form, and those comments are summarized following the text of the form.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1007 is amended so that, if the debtor knows that a creditor is an infant or incompetent person, the debtor will be required to include in the list of creditors and schedules the name, address, and legal relationship of any representative upon whom process would be served in an adversary proceeding against the infant or incompetent

¹ Rule 9006(f) extends the three day "mail rule" to electronic service of documents. Proposed amendments to Civil Rule 5(b), on the other hand, do not provide additional time when service is accomplished electronically. The Advisory Committee considered the public comments and concluded that retention of the additional three days is preferable to the provisions in proposed Rule 5(b) F. R. Civ. P. The Advisory Committee, however, also believes strongly that the bankruptcy and civil rules should be consistent. [After reviewing public comments, the Advisory Committee on Civil Rules approved extending the three-day mail rule to service of papers by electronic means in civil cases.]

person. This information will enable the clerk to mail notices required under Rule 2002 to the appropriate representative.

(b) Rule 2002(c) is amended to assure that parties entitled to notice of a hearing on confirmation of a plan are given adequate notice of any injunction included in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

(c) Rule 2002(g) is amended to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a different mailing address, the last paper filed determines the proper address, and that a request designating a mailing address is effective only with respect to a particular case. The amendments also clarify that a filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A new paragraph has been added to assure that notices to an infant or incompetent person are mailed to the person's legal representative identified in the debtor's schedules or list of creditors.

(d) Rule 3016 is amended to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Bankruptcy Code, are given adequate notice of the proposed injunction. The amendment would require that the plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined and to identify the entities that would be subject to the injunction.

(e) Rule 3017 is amended to assure that entities whose conduct would be enjoined under a plan, but who would not ordinarily receive copies of the plan and disclosure statement or information regarding the confirmation hearing because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction, the confirmation hearing, and the deadline for objecting to confirmation of the plan.

(f) Rule 3020 is amended so that, if a plan contains an injunction against conduct not otherwise enjoined under the Code, the order confirming the plan must describe in detail all acts enjoined and identify the entities subject to the injunction. The amendment also requires that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

(g) Rule 9006(f) is amended to expand the 3-day rule so that it will apply to any method of service, including service by electronic means, authorized under proposed amendments to Civil Rule 5(b), other than service by personal delivery.

(h) Rule 9020 is amended to delete provisions that delay for 10 days the effectiveness of an order of civil contempt issued by a bankruptcy judge and that render the order subject to *de novo* review by the district court. Other procedural provisions in the rule are replaced with a statement that a motion for an order of contempt made by the United States trustee or a party in interest is governed by Rule 9014 (contested matters).

(i) Rule 9022(a) is amended to authorize the clerk to serve notice of entry of a judgment or order of a bankruptcy judge by any method of service, including service by electronic means, permitted under the proposed amendments to Civil Rule 5(b).

3. *Text of Proposed Amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022.*

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY
PROCEDURE***

Rule 1007. Lists, Schedules and Statements; Time Limits

1

* * * * *

2

(m) *Infants and Incompetent Persons.* If the debtor

3

knows that a person on the list of creditors or schedules is an

4

infant or incompetent person, the debtor also shall include the

5

name, address, and legal relationship of any person upon

6

whom process would be served in an adversary proceeding

7

against the infant or incompetent person in accordance with

8

Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (m) is added to enable the person required to mail notices under Rule 2002 to mail them to the appropriate guardian or other representative when the debtor knows that a creditor or other person listed is an infant or incompetent person.

*New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

The proper mailing address of the representative is determined in accordance with Rule 7004(b)(2), which requires mailing to the person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

Public Comment on Proposed Amendments to Rule 1007(m):

- (1) Karen Eddy (Clerk, Bankr. S.D. Fl.) suggested that the Rule set out a format for submitting the address on the service matrix. She also proposed that the Official Forms be amended to include a column for listing a guardian or representative of the creditor.

GAP Report on Rule 1007(m). No changes since publication.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

1

* * * * *

2

(c) *Content of Notice.*

3

* * * * *

4

(3) Notice of Hearing on Confirmation When Plan

5

Provides for an Injunction. If a plan provides for an

6

injunction against conduct not otherwise enjoined under

FEDERAL RULES OF BANKRUPTCY PROCEDURE 3

7 the Code, the notice required under Rule 2002(b)(2)

8 shall:

9 (A) include in conspicuous language (bold,
10 italic, or underlined text) a statement that the plan
11 proposes an injunction;

12 (B) describe briefly the nature of the injunction;

13 and

14 (C) identify the entities that would be subject to
15 the injunction.

16 * * * * *

17 ~~(g) *Addresses of Notices.* All notices required to be~~
18 ~~mailed under this rule to a creditor, equity security holder, or~~
19 ~~indenture trustee shall be addressed as such entity or an~~
20 ~~authorized agent may direct in a filed request; otherwise, to~~
21 ~~the address shown in the list of creditors or the schedule,~~
22 ~~whichever is filed later. If a different address is stated in a~~

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23 ~~proof of claim duly filed, that address shall be used unless a~~
24 ~~notice of no dividend has been given.~~

25 (g) *Addressing Notices.*

26 (1) Notices required to be mailed under Rule 2002
27 to a creditor, indenture trustee, or equity security holder
28 shall be addressed as such entity or an authorized agent
29 has directed in its last request filed in the particular case.

30 For the purposes of this subdivision —

31 (A) a proof of claim filed by a creditor or
32 indenture trustee that designates a mailing address
33 constitutes a filed request to mail notices to that
34 address, unless a notice of no dividend has been
35 given under Rule 2002(e) and a later notice of
36 possible dividend under Rule 3002(c)(5) has not
37 been given; and

38 (B) a proof of interest filed by an equity security
39 holder that designates a mailing address constitutes
40 a filed request to mail notices to that address.

41 (2) If a creditor or indenture trustee has not filed a
42 request designating a mailing address under
43 Rule 2002(g)(1), the notices shall be mailed to the
44 address shown on the list of creditors or schedule of
45 liabilities, whichever is filed later. If an equity security
46 holder has not filed a request designating a mailing
47 address under Rule 2002(g)(1), the notices shall be
48 mailed to the address shown on the list of equity security
49 holders.

50 (3) If a list or schedule filed under Rule 1007
51 includes the name and address of a legal representative of
52 an infant or incompetent person, and a person other than
53 that representative files a request or proof of claim
54 designating a name and mailing address that differs from

6 FEDERAL RULES OF BANKRUPTCY PROCEDURE

55 the name and address of the representative included in the
56 list or schedule, unless the court orders otherwise,
57 notices under Rule 2002 shall be mailed to the
58 representative included in the list or schedules and to the
59 name and address designated in the request or proof of
60 claim.

61 * * * * *

COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties given notice of a hearing to consider confirmation of a plan under subdivision (b) are given adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

The notice requirement of subdivision (c)(3) is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 2002(c)(3) would not apply because that conduct would be enjoined under § 524(a)(2) upon the debtor's discharge. But if a plan provides that creditors will be enjoined from asserting claims against persons who are not debtors in the case, the notice of the confirmation

hearing must include the information required under Rule 2002(c)(3) because that conduct would not be enjoined by operation of the Code. *See* § 524(e).

The requirement that the notice identify the entities that would be subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the notice may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the notice to identify the entities as "all creditors of the debtor" and for the notice to be published in a manner that satisfies due process requirements.

Subdivision (g) has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only with respect to a particular case.

Under Rule 2002(g), a duly filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A duly filed proof of interest is considered a request designating a mailing address of an equity security holder.

Rule 2002(g)(3) is added to assure that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative. Under Rule 1007(m), if the debtor knows that a creditor is an infant or incompetent person, the debtor is required to include in the list and schedule of creditors the name and address of the person upon whom process would be served

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in an adversary proceeding in accordance with Rule 7004(b)(2). If the infant or incompetent person, or another person, files a request or proof of claim designating a different name and mailing address, the notices would have to be mailed to both names and addresses until the court resolved the issue as to the proper mailing address.

The other amendments to Rule 2002(g) are stylistic.

Public Comment on Proposed Amendments to Rule 2002(c)(3):

- (1) Jack E. Horsley, Esq. (Mattoon, Il.) urged that the notice include a statement of the reason why entities would be subject to an injunction.
- (2) Matthew E. Wilkins, Esq. (Detroit, Mi.) supports the notion of increased notice to parties that are subject to injunctions, but he asserts that the proposed amendments will encourage the issuance of injunctions not authorized by the Bankruptcy Code.
- (3) Hon. S. Martin Teel, Jr. (Bankr. D.D.C.) supports improving notice to parties subject to injunctions, but suggests that the rule require the title of the notice to state that the plan includes an injunction. He also suggests that the rule include a remedy in the event of a failure to comply with its provisions.
- (4) Hon. Susan Pierson Sonderby (Bankr. N.D. Il.), on behalf of the Bankruptcy Judges for the Northern District of Illinois, supports the proposed amendments.
- (5) Hon. Louise DeCarl Adler (Bankr. S.D. Cal.), on behalf of the Conference of Chief Bankruptcy Judges of the Ninth

Circuit, expressed concern that the amendments go beyond establishing procedural protection and may engender disputes.

GAP Report on Rule 2002(c)(3). In Rule 2002(c)(3), the word “highlighted” was replaced with “underlined” because highlighted documents are difficult to scan electronically for inclusion in the clerks’ files. The Committee Note was revised to put in a more prominent position the statement that the validity and effect of any injunction provided for in a plan are substantive matters beyond the scope of the rules.

Public Comment on Proposed Amendments to Rule 2002(g):

- (1) Karen Eddy (Clerk, Bankr. S.D. Fl.) proposed that the Rule be clarified to give greater assistance to clerks who receive multiple requests for service by or on behalf of the same creditor. She suggested that a national form “Request for Service” be developed.
- (2) Mark A. Cronin, Esq. (Fort Washington, Pa.) finds the proposed amendments preferable, and joins with Raymond P. Bell, Jr. (Bankruptcy Manager, Fleet Credit Card Services, L.P., Horsham, Pa.) to suggest that claims in all cases be “deemed allowed” without the need for filing proof of the claim unless the claim is listed as disputed, contingent, or unliquidated.

GAP Report on Proposed Amendments to Rule 2002(g). No changes since publication.

will be permanently enjoined from asserting claims against persons who are not debtors in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). *See* § 524(e).

The requirement in this rule that the plan and disclosure statement identify the entities that would be subject to the injunction requires reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the plan and disclosure statement may describe them by class or category. For example, it may be sufficient to identify the subjects of the injunction as "all creditors of the debtor."

Public Comment on Proposed Amendments to Rule 3016:

- (1) Jack E. Horsley, Esq. (Mattoon, Il.) believes that the proposed amendments will ensure that adequate notice of the injunction is given.
- (2) Matthew E. Wilkins, Esq. (Detroit, Mi.) opposed the amendments because they could constitute an endorsement of the issuance of injunctions which the courts have no authority to issue.
- (3) Hon. Louise DeCarl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, contends that the proposed amendments go beyond procedural change and are substantive in nature.

GAP Report on Rule 3016. The word "highlighted" in the parenthesis was replaced with "underlined" because highlighted documents are difficult to scan electronically for inclusion in the clerks' files. The Committee Note was revised to put in a more

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prominent position the statement that the validity and effect of any injunction provided for in a plan are substantive matters beyond the scope of the rules. Other stylistic changes were made to the Committee Note.

Rule 3017. Court Consideration of Disclosure Statement in a Chapter 9 Municipality and or Chapter 11 Reorganization Cases Case

1 * * * * *

2 (f) Notice and Transmission of Documents to Entities

3 Subject to an Injunction Under a Plan. If a plan provides for
4 an injunction against conduct not otherwise enjoined under the
5 Code and an entity that would be subject to the injunction is
6 not a creditor or equity security holder, at the hearing held
7 under Rule 3017(a), the court shall consider procedures for
8 providing the entity with:

9 (1) at least 25 days' notice of the time fixed for
10 filing objections and the hearing on confirmation of the
11 plan containing the information described in Rule
12 2002(c)(3); and

- 13 (2) to the extent feasible, a copy of the plan and
14 disclosure statement.

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction. It does not address any substantive law issues relating to the validity or effect of any injunction provided under a plan, or any due process or other constitutional issues relating to notice. These issues are beyond the scope of these rules and are left for judicial determination.

This rule recognizes the need for adequate notice to subjects of an injunction, but that reasonable flexibility under the circumstances may be required. If a known and identifiable entity would be subject to the injunction, and the notice, plan, and disclosure statement could be mailed to that entity, the court should require that they be mailed at the same time that the plan, disclosure statement and related documents are mailed to creditors under Rule 3017(d). If mailing notices and other documents is not feasible because the entities subject to the injunction are described in the plan and disclosure statement by class or category and they cannot be identified individually by name and address, the court may require that notice under Rule 3017(f)(1) be published.

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Public Comment on Proposed Amendments to Rule 3017:

- (1) Jack E. Horsley, Esq. (Mattoon, Il.) believes that the proposed amendments will ensure that adequate notice of the injunction is given.
- (2) Matthew E. Wilkins, Esq. (Detroit, Mi.) opposed the amendments because they could constitute an endorsement of the issuance of injunctions which the courts have no authority to issue.
- (3) Hon. Louise DeCarl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, contends that the proposed amendments go beyond procedural change and are substantive in nature.

GAP Report on Rule 3017. No changes in the text of the proposed amendments since publication. The Committee Note was revised to put in a more prominent position the statement that the rule does not address related substantive law issues which are beyond the scope of the rules.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case.

1

* * * * *

2

(c) *Order of Confirmation.*

3

(1) The order of confirmation shall conform to the

4

appropriate Official Form and If the plan provides for an

16 FEDERAL RULES OF BANKRUPTCY PROCEDURE

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

The requirement that the order of confirmation identify the entities subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient to identify the entities as "all creditors of the debtor."

Public Comment on Proposed Amendments to Rule 3020:

- (1) Matthew E. Wilkins, Esq. (Detroit, Mi.) opposed the amendments because they could constitute an endorsement of the issuance of injunctions which the courts have no authority to issue.
- (2) Hon. Louise DeCarl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, contends that the proposed amendments go beyond procedural change and are substantive in nature.

GAP Report on Rule 3020. No changes in the text of the proposed amendments since publication. The Committee Note was revised to put in a more prominent position the statement that the

validity and effect of injunctions provided for in plans is beyond the scope of the rules.

Rule 9006. Time

1

* * * * *

2

(f) *Additional Time after Service by Mail or Under Rule*

3

5(b)(2)(C) or (D) F. R. Civ. P. When there is a right or

4

requirement to do some act or undertake some proceedings

5

within a prescribed period after service of a notice or other

6

paper and the notice or paper other than process is served by

7

mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days

8

shall be added to the prescribed period.

9

* * * * *

COMMITTEE NOTE

Rule 5(b) F. R. Civ. P., which is made applicable in adversary proceedings by Rule 7005, is being restyled and amended to authorize service by electronic means — or any other means not otherwise authorized under Rule 5(b) — if consent is obtained from the person served. The amendment to Rule 9006(f) is intended to extend the three-day "mail rule" to service under Rule 5(b)(2)(D), including service by electronic means. The three-day rule also will apply to

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service under Rule 5(b)(2)(C) F. R. Civ. P. when the person served has no known address and the paper is served by leaving a copy with the clerk of the court.

Public Comment on Proposed Amendments to Rule 9006:

- (1) Jack E. Horsley, Esq. (Mattoon, Il.) supports service by electronic means but suggests that "electronic means" should be more explicitly defined in the rule.
- (2) Mark D. Reed, Esq. (Des Moines, Ia.) wholeheartedly supports service by electronic means.
- (3) Hon. Susan Pierson Sonderby (Bankr. N.D. Il.), on behalf of the Bankruptcy Judges for the Northern District of Illinois, strongly supports service by electronic means and proposed that such service be allowed even in the absence of the consent of the party to be served. She also states those judges' opposition to retaining the 3-day rule to service by electronic means.
- (4) Hon. Louise DeCarl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, stated that there are good arguments for and against adding 3 days to the response period after electronic service, and she expressed no preference other than that the rule be identical under both the bankruptcy rules and the civil rules.
- (5) Ralph W. Brenner, Esq., David H. Marion, Esq., and Stephen A. Madva, Esq. (Philadelphia, Pa.) all strongly support electronic service and recommend that the bankruptcy rules and the civil rules be made consistent.

- (6) Francis Patrick Newell, Esq. (Philadelphia, Pa.) strongly supports electronic service and recommends that the bankruptcy rules and the civil rules be made consistent.
- (7) Martha L. Davis, Esq., General Counsel, Executive Office for United States Trustees (Washington, D.C.) supports the amendments permitting service by electronic means on persons who consent to that form of service. She also supports the adoption of a 3-day rule comparable to the mailing grace period already contained in the rules as a means of encouraging electronic service as well as to avoid artificially shortening the period due to electronic transmission errors, incompatible message formats, and the like.
- (8) Michael E. Kunz (Clerk, E.D. Pa.) states that the 3-day rule is unnecessary when electronic service is employed, and he notes also that the 3-day rule does not apply under the civil rules.

GAP Report on Rule 9006. No changes since publication.

Rule 9020. Contempt Proceedings

- 1 Rule 9014 governs a motion for an order of contempt
- 2 made by the United States trustee or a party in interest.
- 3 ~~(a) Contempt Committed in Presence of Bankruptcy~~
- 4 ~~Judge. Contempt committed in the presence of a bankruptcy~~

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5 ~~judge may be determined summarily by a bankruptcy judge.~~

6 ~~The order of contempt shall recite the facts and shall be signed~~

7 ~~by the bankruptcy judge and entered of record.~~

8 ~~(b) *Other Contempt.* Contempt committed in a case or~~
9 ~~proceeding pending before a bankruptcy judge, except when~~
10 ~~determined as provided in subdivision (a) of this rule, may be~~
11 ~~determined by the bankruptcy judge only after a hearing on~~
12 ~~notice. The notice shall be in writing, shall state the essential~~
13 ~~facts constituting the contempt charged and describe the~~
14 ~~contempt as criminal or civil and shall state the time and place~~
15 ~~of hearing, allowing a reasonable time for the preparation of~~
16 ~~the defense. The notice may be given on the court's own~~
17 ~~initiative or on application of the United States attorney or by~~
18 ~~an attorney appointed by the court for that purpose. If the~~
19 ~~contempt charged involves disrespect to or criticism of a~~
20 ~~bankruptcy judge, that judge is disqualified from presiding at~~
21 ~~the hearing except with the consent of the person charged.~~

22 ~~(c) Service and Effective Date of Order; Review.~~ The
23 clerk shall serve forthwith a copy of the order of contempt on
24 the entity named therein. The order shall be effective 10 days
25 after service of the order and shall have the same force and
26 effect as an order of contempt entered by the district court
27 unless, within the 10 day period, the entity named therein
28 serves and files objections prepared in the manner provided in
29 Rule 9033(b). If timely objections are filed, the order shall be
30 reviewed as provided in Rule 9033.

31 ~~(D) Right to Jury Trial.~~ Nothing in this rule shall be
32 construed to impair the right to jury trial whenever it
33 otherwise exists.

COMMITTEE NOTE

The amendments to this rule cover a motion for an order of contempt filed by the United States trustee or a party in interest. This rule, as amended, does not address a contempt proceeding initiated by the court sua sponte.

Whether the court is acting on motion under this rule or is acting sua sponte, these amendments are not intended to extend, limit, or

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otherwise affect either the contempt power of a bankruptcy judge or the role of the district judge regarding contempt orders. Issues relating to the contempt power of bankruptcy judges are substantive and are left to statutory and judicial development, rather than procedural rules.

This rule, as amended in 1987, delayed for ten days from service the effectiveness of a bankruptcy judge's order of contempt and rendered the order subject to de novo review by the district court. These limitations on contempt orders were added to the rule in response to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which provides that bankruptcy judges are judicial officers of the district court, but does not specifically mention contempt power. *See* 28 U.S.C. § 151. As explained in the committee note to the 1987 amendments to this rule, no decisions of the courts of appeals existed concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

Since 1987, several courts of appeals have held that bankruptcy judges have the power to issue civil contempt orders. *See, e.g., Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609 (5th Cir. 1997); *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996). Several courts have distinguished between a bankruptcy judge's civil contempt power and criminal contempt power. *See, e.g., Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d at 613, n. 3 ("[a]lthough we find that bankruptcy judge's [sic] can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt."). For other decisions regarding criminal contempt power, *see, e.g., In re Ragar*, 3 F.3d 1174 (8th Cir. 1993); *Matter of Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990). To the extent that Rule 9020, as amended in 1987, delayed the effectiveness

of civil contempt orders and required de novo review by the district court, the rule may have been unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

Subdivision (d), which provides that the rule shall not be construed to impair the right to trial by jury, is deleted as unnecessary and is not intended to deprive any party of the right to a jury trial when it otherwise exists.

Public Comment on Proposed Amendments to Rule 9020:

- (1) Hon. Louise DeCarl Adler (Bankr. S.D. Cal.), on behalf of the Chief Bankruptcy Judges of the Ninth Circuit, expressed concern that the proposed amendments could be read to undercut the bankruptcy courts' authority to exercise *sua sponte* contempt powers.
- (2) Martha L. Davis, Esq., General Counsel, Executive Office for United States Trustees (Washington, D.C.) stated strong opposition to the proposed amendments and advocated retention of the existing rule. The basis of her objection is that she is unpersuaded that the judicial developments governing the contempt powers of the bankruptcy courts justify the deletion of the more elaborate system of contempt actions in place under the current rule

GAP Report on Rule 9020. No changes in the text of the proposed amendments since publication. Stylistic changes were made to the Committee Note.

notice of entry of a judgment or order by electronic means if the person served consents, or to use any other means of service authorized under Rule 5(b), including service by mail. This amendment conforms to the amendments made to Rule 77(d) F.R. Civ. P.

Public Comment on Proposed Amendments to Rule 9022:

- (1) Jack E. Horsley, Esq. (Mattoon, Il.) supports the service of notice of entry of judgments and orders by electronic means.
- (2) Martha L. Davis, Esq., General Counsel, Executive Office for United States Trustees (Washington, D.C.) supports the proposed amendments but cautions that the rule could be construed to permit electronic service of judgments and orders even in the absence of consent by the recipient of the notice.

GAP Report on Rule 9022. No changes since publication.

FORM 7. STATEMENT OF FINANCIAL AFFAIRS
UNITED STATES BANKRUPTCY COURT

_____ **DISTRICT OF** _____

In re: _____ Case No. _____
(Name) (if known)
Debtor

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

1. Income from employment or operation of business

None

State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT

SOURCE (if more than one)

2. Income other than from employment or operation of business

None

State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT

SOURCE

3. Payments to creditors

None

a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than \$600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING
------------------------------	-------------------	-------------	--------------------

None

b. List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING
---	-----------------	-------------	--------------------

4. Suits and administrative proceedings, executions, garnishments and attachments

None

a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION
---------------------------------	----------------------	------------------------------	-----------------------

- None b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY
--	--------------------	---

5. Repossessions, foreclosures and returns

- None List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY
---	---	---

6. Assignments and receiverships

- None a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT
---------------------------------	-----------------------	---

- None b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY
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7. Gifts

None

List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member and charitable contributions aggregating less than \$100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT
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8. Losses

None

List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case or **since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS
---	--	-----------------

9. Payments related to debt counseling or bankruptcy

None

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY
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10. Other transfers

None

List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED
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11. Closed financial accounts

None

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING
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12. Safe deposit boxes

None

List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY
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13. Setoffs

None

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF
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14. Property held for another person

None

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY
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- None c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS
OF GOVERNMENTAL UNIT

DOCKET NUMBER

STATUS OR
DISPOSITION

18 . Nature, location and name of business

- None a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES
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- None b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS
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The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

19. Books, records and financial statements

- None a. List all bookkeepers and accountants who within the **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS

DATES SERVICES RENDERED

- None b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME

ADDRESS

DATES SERVICES RENDERED

- None c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME

ADDRESS

- None d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS

DATE ISSUED

20. Inventories

- None a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY

INVENTORY SUPERVISOR

DOLLAR AMOUNT OF INVENTORY
(Specify cost, market or other basis)

- None b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY

NAME AND ADDRESSES OF CUSTODIAN
OF INVENTORY RECORDS

21 . Current Partners, Officers, Directors and Shareholders

None a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS NATURE OF INTEREST PERCENTAGE OF INTEREST

None b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS TITLE NATURE AND PERCENTAGE
OF STOCK OWNERSHIP

22 . Former partners, officers, directors and shareholders

None a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME ADDRESS DATE OF WITHDRAWAL

None b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS TITLE DATE OF TERMINATION

23 . Withdrawals from a partnership or distributions by a corporation

None If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS DATE AND PURPOSE AMOUNT OF MONEY
OF RECIPIENT, OF WITHDRAWAL OR DESCRIPTION
RELATIONSHIP TO DEBTOR AND VALUE OF PROPERTY

24. Tax Consolidation Group.

None If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION

TAXPAYER IDENTIFICATION NUMBER

25. Pension Funds.

None If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PENSION FUND

TAXPAYER IDENTIFICATION NUMBER

* * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____

Signature _____
of Debtor

Date _____

Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____

Signature _____

Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

_____ continuation sheets attached

Penalty for making a false statement: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer

Social Security No.

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____
Signature of Bankruptcy Petition Preparer

Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

COMMITTEE NOTE

The form has been amended to provide more information to taxing authorities, pension fund supervisors, and governmental units charged with environmental protection and regulation. Four new questions have been added to the form, covering community property owned by a debtor and the debtor's non-filing spouse or former spouse (Question 16), environmental information (Question 17), any consolidated tax group of a corporate debtor (Question 24), and the debtor's contributions to any employee pension fund (Question 25). In addition, every debtor will be required to state on the form whether the debtor has been in business within six years before filing the petition and, if so, must answer the remaining questions on the form (Questions 19-25). This is an enlargement of the two-year period previously specified. One reason for the longer "reach back" period is that business debtors often owe taxes that have been owed for more than two years. Another is that some of the questions already addressed to business debtors request information for the six-year period before the commencement of the case. Application of a six-year period to this section of the form will assure disclosure of all relevant information.

Public Comment on Official Form 7:

- (1) Jay W. Browder, General Manager of Forms, Inc. noted that the form is unclear as to whether a debtor who is not engaged in business must answer "none" or leave those boxes blank in the portion of the form addressed to business debtors. He also noted that Question 10 contains a subpart (a) but no other subparts.
- (2) Thomas J. Yerbich, Esq. (Alaska) suggested adding Alaska to the list of community property states set out in Question 16.

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- (3) Bankruptcy and Reorganization Committee, Assoc. of the Bar of the City of New York supports the proposed changes to Form 7.
- (4) Sandra Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U. S. Environmental Protection Agency, supported the addition of Question 25 to the form.
- (5) Stephen J. Csontos, Senior Legislative Counsel, Tax Division, U.S. Dept. of Justice, supports the proposed changes to Form 7.
- (6) Karen J. Cordry, Esq., on behalf of the Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General, stated that the amendments are generally helpful, but urged that the debtor be required to serve a copy of the petition and schedules on the relevant environmental agencies.

GAP Report on Official Form 7. The Form was revised in several respects. First, Alaska was added to the list of community property states listed in Question 16 of the Form. Second, the instructions on page 1 of the Form were restyled to clarify that non-business debtors need not answer Questions 18-25 of the Form. The Questions relating to environmental hazards were renumbered to be made applicable to all debtors, not just those engaged in business.

To: Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice
and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules
of Civil Procedure

Date: May 2000

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of rules amendments that were published for comment in August 1999, with some modifications in response to the public comments. Part I of this report details these recommendations with respect to two packages. The first package, covering electronic service of papers after initial process, includes changes in Rules 5(b), 6(e), and 77(d). The second package, covering abrogation of the obsolete Copyright Rules of Practice, includes abrogation of those rules, a new Rule 65(f), and a corresponding change in Rule 81(a)(1). A third proposal for adoption included in this package would make an overdue technical correction to Rule 82; it is recommended that it be adopted without publication for comment.

* * * * *

I Action Items: Amendments Proposed for Adoption

The Advisory Committee recommends that each of the amendments discussed in this section be transmitted to the Judicial Conference with recommendations for adoption. The electronic service and copyright proposals were published for comment in August 1999. The changes made in response to the public comments are described with each package. [The Advisory Committee and Standing Committee did not consider several comments submitted after the expiration of the 6-month public comment period. The comments are summarized at the end of this section. There is little new in these comments, and the Advisory Committee had considered all of the issues raised in them in its earlier deliberations.] The technical conforming change to Rule 82 has not been published for comment, but is recommended for adoption without publication.

A. Electronic and Other Service: Rules 5(b), 6(e), and 77(d)

The proposed amendments to Rules 5(b) and 77(d) were published for comment in August 1999. The Advisory Committee had voted not to recommend any change in Rule 6(e), but also published as an "alternative proposal" the change that it now recommends for adoption.

Rule 5(b) is restyled. Rule 5(b)(1) is clarified by expressly limiting it to service under Rules 5(a) and 77(d). The restyling of Rule 5(b)(2)(A), (B), and (C) is intended to make no change in the meaning of the present rule.

Rule 5(b)(2)(D) is new. Although the proposal emerged from the work of the Standing Committee's Technology Subcommittee and was designed to authorize electronic service, it also reaches service by other means. Written consent of the person served is required.

Rule 6(e) would be amended to allow an additional 3 days to respond when service is made under Rule 5(b)(2)(C) by leaving a copy with the clerk of the court, or by any means consented to under Rule 5(b)(2)(D). This amendment extends the present provision that adds 3 days when service is made by mail.

Rule 77(d) is amended to allow the clerk of court to serve notice of an order or judgment in any manner provided for in Rule 5(b). The immediate purpose is to support notice by facsimile or computer.

The public comments suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap report.

The Advisory Committee deliberations are summarized at pages 4 to 9 of the draft Minutes.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

1
2 ~~(b) Same: How Made.~~ Whenever under these rules
3 service is required or permitted to be made upon a party
4 represented by an attorney the service shall be made upon the
5 attorney unless service upon the party is ordered by the court.
6 Service upon the attorney or upon a party shall be made by
7 delivering a copy to the party or attorney or by mailing it to
8 the party or attorney at the attorney's or party's last known
9 address or, if no address is known, by leaving it with the clerk
10 of the court. ~~Delivery of a copy within this rule means:~~
11 ~~handing it to the attorney or to the party; or leaving it at the~~
12 ~~attorney's or party's office with a clerk or other person in~~
13 ~~charge thereof; or, if there is no one in charge, leaving it in~~

*New matter is underlined; matter to be omitted is lined through.

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14 a conspicuous place therein; or, if the office is closed or the
15 person to be served has no office, leaving it at the person's
16 dwelling house or usual place of abode with some person of
17 suitable age and discretion then residing therein. Service by
18 mail is complete upon mailing.

19 **(b) Making Service.**

20 **(1) Service under Rules 5(a) and 77(d) on a party**
21 **represented by an attorney is made on the attorney**
22 **unless the court orders service on the party.**

23 **(2) Service under Rule 5(a) is made by:**

24 **(A) Delivering a copy to the person served by:**

25 **(i) handing it to the person;**

26 **(ii) leaving it at the person's office with a**
27 **clerk or other person in charge, or if no one is**
28 **in charge leaving it in a conspicuous place in**
29 **the office; or**

30 (iii) if the person has no office or the office is
31 closed, leaving it at the person's dwelling
32 house or usual place of abode with someone
33 of suitable age and discretion residing there.

34 (B) Mailing a copy to the last known address of
35 the person served. Service by mail is complete on
36 mailing.

37 (C) If the person served has no known address,
38 leaving a copy with the clerk of the court.

39 (D) Delivering a copy by any other means,
40 including electronic means, consented to in
41 writing by the person served. Service by
42 electronic means is complete on transmission;
43 service by other consented means is complete
44 when the person making service delivers the copy
45 to the agency designated to make delivery. If
46 authorized by local rule, a party may make service

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47 under this subparagraph (D) through the court's
48 transmission facilities.

49 (3) Service by electronic means under Rule 5(b)(2)(D)
50 is not effective if the party making service learns that
51 the attempted service did not reach the person to be
52 served.

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by

nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. Parties are encouraged to specify the scope and duration of the consent. The specification should include at least the persons to whom service should be made, the appropriate address or location for such service — such as the e-mail address or facsimile machine number, and the format to be used for attachments. A district court may establish a registry or other facility that allows advance consent to service by specified means for future actions.

Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not relieve a party who consents to service under Rule 5(b)(2)(D) of the

responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

Summary of Comments

Hurshal C. Tummelson, Esq., 99-CV-002: Addressing his comments to Rules 5(b), 65, 77(d), and 81, focuses on the “consented to by the person served” element of proposed Rule 5(b)(2)(D). Suggests “some specific clarification with reference to this form of service” because

“there are so many possible means of service electronically or otherwise which might be used that the end result could be very confusing.”

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2, 1999 installment): “[E]lectronic means” may not be clear to all readers. It might be expanded to read: “Internet, fax, computer transmittal or other electronic means.” The November 11 installment concludes that “authorizing service by electronic means is consistent with current developments.”

Joseph W. Phebus, Esq., 99-CV-006: Relays information from the firm’s computer specialist. The e-mail system used by the firm provides date and time stamping for incoming and outgoing mail. It also automatically provides notice that a message is not delivered. If the address is not valid, notice is provided immediately. If the address is valid, the system attempts delivery every 20 minutes for four hours, then every four hours for the next 48 hours; at the end of that period, notice is given if delivery could not be accomplished.

David E. Romine, Esq., 99-CV-007: Strongly favors the “complete on transmission” rule. This rule is clear. Clarity prevents doubts and ensuing disputes about the time for responding. If service were made complete only on receipt, every party would need to consult every other party to confirm the time of receipt, and then would feel compelled to send a written memorial of the understanding to every other party. “What a waste.” The ambiguity will be even worse when—as often happens—electronic service is made on a Friday afternoon. “[T]here will be a four-day window of plausibility,” and the window “would be extended by holidays, vacations, or even business trips * * *.” Resolution of disputes, finally, would turn on fact disputes that will be burdensome to litigate.

Charles L. Schlumberger, Esq., 99-CV-008: Opposes electronic service, even with consent. Notes that he had difficulty transmitting these comments to the Administrative Office. Electronic service will be abused — as it is, attorneys often fax papers late in the evening. Is round-the-clock monitoring of fax and e-mail to be required? Even from out-of-town? Must an attorney defeat the security system that prevents even staff from reading the attorney's e-mail? If papers contain sensitive or protected information, the e-mail system offers no reliable security unless the information is encrypted. There should be express provisions detailing whether consent can be open-ended for an entire action, specific for particular papers, or revoked. Filing by electronic means is proper, notice under Rule 77(d) by electronic means is proper, but not service by attorneys — “I trust the clerks but not the lawyers.”

Hon. Susan Pierson Sonderby, 99-CV-010: Service by electronic means or fax “should be valid, irrespective of consent, where available to the recipient.” If the recipient is not equipped to receive such messages, the person responsible for making service can resort to mail or personal service. At the least, Rule 5(b) should authorize local district rules that permit electronic service without consent of the person served. And the provision for “other means” is puzzling: commercial express carrier service is routine now, on the theory that delivery constitutes hand delivery.

J. Michael Schaefer, Esq., 99-CV-011: There should be a page limit on fax transmissions: “I have had 50 pages faxes dumped into my machine, creating a burden to deal with unattached bulk paper and dissipating a toner supply.” And seems to urge that “any pleading exceeding 10 pages” should be permitted only with the specific consent of the recipient no matter what method of service is used.

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Approves proposed Rule 5(b), but would amend the proposal to require simultaneous mailing of a clean copy of any document served by fax.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Supports the basic proposal; the requirement of consent, and the exclusion of initial service of process, “provide adequate safeguards of due process rights.” Something should be done to make it clear that consent can be given either for all service during an action or only for service of specified papers. Some recipients may be reluctant to commit to the obligation to monitor continually for electronic receipt, which “may require a technical office capacity that is currently unavailable to some practitioners.” It would help to prepare a Consent Form that accommodates various forms of service, provides specific address information, and is filed with the court. The Consent Form would specify whether consent is for all purposes of the action or is more limited. It is proper to make service complete on transmission, but some additional time should be provided to respond because messages often “must travel through multiple servers, compounding the risk of technical failures.” See the comment on Rule 6(e).

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Fully supports use of electronic service with consent of the person served. But there is a risk that implied consent will be found, even from such simple acts as listing a fax or e-mail address on a letterhead. Rule 5(b)(2)(D) should be amended to refer to “other means, including electronic means, consented to in writing by the person served.” And the Committee Note should include this added language:

To be valid under subparagraph (D), consent must be explicit and in writing, and may not be implied. Parties are encouraged to specify the scope and duration of the consent, including, at a minimum, the persons to whom service should be made, the appropriate address or location for such service (e.g., for electronic service, the e-mail address or fax machine number), the format to be used for attachments, and the filings within a lawsuit to which the consent applies (e.g., the consent applies to all filings, only certain filings, or all non-judicial filings). Such written consent may be provided through electronic communication.

Ralph W. Brenner, Esq., David H. Marion, Esq., and Stephen A. Madva, Esq., 99-CV-015: Support Rule 5 and 77 proposals. The "increase in efficiency will allow for our office to provide for more prompt and less costly service for our clients."

Francis Patrick Newell, Esq., 99-CV-016: Supports the Rule 5 and 77 proposals in terms similar to 99-CV-015.

William A. Fenwick, Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: (1) As a matter of style, urges that in 5(b)(1) and 5(b)(2) the expression "service is made" be changed to "service shall be made"; the change eliminates ambiguity and indicates clearly "that this provision is mandatory." (2) The reference to "address" in 5(b)(2)(B) and (C) should specify home address, office address, or either [present Rule 5(b) does not provide this specification]. (3) The provision that service is complete on "transmission" is ambiguous. The rule or the Committee Note should state that "service is complete upon successfully serving the document from the sender's server to the e-mail address designated in court papers by recipient." And it

should make clear that the proper e-mail address is the one specified in the consent or in court papers.

Mark D. Reed, Esq., 99-BK-005: Wholeheartedly approves electronic service "(i.e. facsimile)"; "this manner of service is more effective than ordinary mail."

Hon. Dean Whipple, 99-CV-019 : Chief Judge Whipple reports on experience in W.D.Mo. as a prototype CM/ECF court. A lawyer who agrees to participate in the CM/ECF system signs a statement agreeing to receive service of electronic filing on behalf of the client by hand, facsimile, authorized e-mail, or first-class mail. The party served in this way can read or download the paper from the court's system. An electronic notice of filing apparently includes a hyperlink to the paper, facilitating prompt access. Chief Judge Whipple suggests this change in the language proposed for Rule 5(b)(2)(D): "Delivering a copy by any other means, including electronic means notice, consented to * * *"

Gap Report

Rule 5(b)(2)(D) was changed to require that consent be "in writing."

Rule 5(b)(3) is new. The published proposal did not address the question of failed service in the text of the rule. Instead, the Committee Note included this statement: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency." The addition of paragraph (3) was prompted by consideration of the draft Appellate Rule 25(c) that

was prepared for the meeting of the Appellate Rules Advisory Committee. This draft provided: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." Although Appellate Rule 25(c) is being prepared for publication and comment, while Civil Rule 5(b) has been published and otherwise is ready to recommend for adoption, it seemed desirable to achieve some parallel between the two rules.

The draft Rule 5(b)(3) submitted for consideration by the Advisory Committee covered all means of service except for leaving a copy with the clerk of the court when the person to be served has no known address. It was not limited to electronic service for fear that a provision limited to electronic service might generate unintended negative implications as to service by other means, particularly mail. This concern was strengthened by a small number of opinions that say that service by mail is effective, because complete on mailing, even when the person making service has prompt actual notice that the mail was not delivered. The Advisory Committee voted to limit Rule 5(b)(3) to service by electronic means because this means of service is relatively new, and seems likely to miscarry more frequently than service by post. It was suggested during the Advisory Committee meeting that the question of negative implication could be addressed in the Committee Note. There was little discussion of this possibility. The Committee Note submitted above includes a "no negative implications" paragraph prepared by the Reporter for consideration by the Standing Committee.

The Advisory Committee did not consider at all a question that was framed during the later meeting of the Appellate Rules Advisory Committee. As approved by the Advisory Committee, Rule 5(b)(3) defeats service by electronic means "if the party making service learns that the attempted service did not reach the person to be

served.” It says nothing about the time relevant to learning of the failure. The omission may seem glaring. Curing the omission, however, requires selection of a time. As revised, proposed Appellate Rule 25(c) requires that the party making service learn of the failure within three calendar days. The Appellate Rules Advisory Committee will have the luxury of public comment and another year to consider the desirability of this short period. If Civil Rule 5(b) is to be recommended for adoption now, no such luxury is available. This issue deserves careful consideration by the Standing Committee.

Several changes are made in the Committee Note. (1) It requires that consent “be express, and cannot be implied from conduct.” This addition reflects a more general concern stimulated by a reported ruling that an e-mail address on a firm’s letterhead implied consent to email service. (2) The paragraph discussing service through the court’s facilities is expanded by describing alternative methods, including an “electronic link.” (3) There is a new paragraph that states that the requirement of written consent can be satisfied by electronic means, and that suggests matters that should be addressed by the consent. (4) A paragraph is added to note the additional response time provided by amended Rule 6(e). (5) The final two paragraphs address newly added Rule 5(b)(3). The first explains the rule that electronic service is not effective if the person making service learns that it did not reach the person to be served. The second paragraph seeks to defeat any negative implications that might arise from limiting Rule 5(b)(3) to electronic service, not mail, not other means consented to such as commercial express service, and not service on another person on behalf of the person to be served.

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that will make electronic service ever more attractive. Consistency with the Bankruptcy Rules will be a good thing, and the Bankruptcy Rules Advisory Committee believes the additional three days should be allowed.

Rule 6. Time

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**(e) Additional Time After Service by ~~Mail~~ under
Rule 5(b)(2)(B), (C), or (D). Whenever a party has the
right or is required to do some act or take some
proceedings within a prescribed period after the service of**

6 a notice or other paper upon the party and the notice or
7 paper is served upon the party ~~by mail~~ under
8 Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the
9 prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Summary of Comments

Rule 6(e)

Robert F. Baker, Esq., 99-CV-001: Favors extending the 3-day rule to “any method of service other than personal delivery. This would cover those situations where electronic service is made on week-ends or the recipient is away from their home or office for three days or less.”

James E. Seibert, Esq., 99-CV-003: The 3-day rule should apply “to all service, other than personal delivery,” so “there will be less confusion” and consistency with the bankruptcy rules.

John P. Calandra, Esq., 99-CV-005: Wants 3-days in electronic service cases. Electronic service late Friday might not be seen until

Monday, or after a further week for vacation. “There are enough sources of pressure on our practices without imposing a new one.”

Joseph W. Phebus, Esq., 99-CV-006: Relays the responses of the firm’s computer specialist. The specialist, focusing on date and time stamping and eventual notice that a message is not delivered, believes there is no need for the extra three days.

David E. Romine, Esq., 99-CV-007: Favors the added three days. E-mail is not yet as reliable as postal delivery. Most firms now have the capacity to make or receive service by electronic means, but few actually do so. The fear stems from continuing experience that some messages arrive in garbled or completely unusable form. It may take a few days to reach the other attorney and arrange for usable delivery. A party who is thinking of resort to electronic service is not likely to be deterred by a rule allowing an additional three days to respond — “[m]y decision as to method of service has never been driven by my opponent’s response time,” and the desire to shorten response time does not seem to affect other lawyers in deciding between personal service or mail service. The added three days, in short, will not discourage people from asking for consent to electronic service, and will encourage people to give consent.

Charles L. Schlumberger, Esq., 99-CV-008: The three-day rule should be dropped entirely; all current deadlines could be extended by three or five days. “But ultimately, who really cares? If someone needs three days, they’re going to get the extension in just about every case, unless they’ve managed to badly get on the wrong side of the judge.”

Hon. Susan Pierson Sonderby: Agrees that Rule 6(e) should not be amended to provide an additional three days following service by electronic means. The three days allowed for service by mail reflects

the typical period required for delivery by mail. Electronic service should “entail the presumption of same day delivery.”

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Recommends against extending the response time when service is made under Rule 5(b)(2)(D), in part because of the recommendation that Rule 5(b)(2)(D) should be amended to require that service by fax be supplemented by simultaneously mailing a clean copy of the document.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Recommend that one additional day be allowed when service is made by electronic means or by overnight courier, and that three additional days be allowed when service is made by non-overnight courier service. This balances the incentives for the party asking for consent to alternative means of service and for the party asked to give consent.

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Favors at least one added day. Current e-mail technology “is not always instantaneous and is not uniformly reliable.” Few e-mail systems have “return receipt” mechanisms that are as reliable as those available for fax transmission. If large volumes of material are transmitted, the receiving equipment may lack the ability to store or print the material. Additional time also will encourage use of electronic service. Expanded use will encourage more rapid development of legal and technical standards, and will prompt lawyers to develop better methods for dealing with incoming materials. These developments will speed the migration toward electronic service.

Ralph W. Brenner, Esq., David H. Marion, Esq., Stephen A. Madva, Esq., 99-CV-015: Comments at the end that consistency between Civil Rules and Bankruptcy Rules “will enhance speedy and smooth processing of litigation.” This comment may be intended to bear on the Rule 6(e) question. (The same comment is made by Francis Patrick Newell, 99-CV-016.)

William A. Fenwick, Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The extra three days should be given. This will encourage consent; it reflects the potential for delay in transmission; and it will avoid any incentive to litigation gamesmanship.

Hon. Louise de Carl Adler, for Conference of Chief Bankruptcy Judges of Ninth Circuit, 99-BK-009: There are good arguments on both sides of the extra three-days question, but “we unanimously concluded that whatever policy is ultimately adopted, it should be the same for both the bankruptcy rules and the civil rules.”

Martha L. Davis, Esq., for Executive Office for U.S. Trustees, 99-BK-012: Supports giving the additional three days. E-mail and other means of communication are still infants, and will experience technical difficulties. A transmitted message may be received after significant delay, and may not be intact; attached files may be corrupted and require retransmission; incompatible word-processing programs may create difficulties; offices with many lawyers may need to develop tracking systems. Consent will be encouraged by adding the three days. The three-day rule is familiar for mail service, and has not unduly delayed proceedings. If the three days are not allowed, parties may seek time extensions. And, looking to Civil Rule 6(e), uniformity between the bankruptcy and civil rules is important.

Gap Report

Proposed Rule 6(e) is the same as the “alternative proposal” that was published in August 1999.

Rule 77. District Courts and Clerks

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2

(d) Notice of Orders or Judgments. Immediately upon

3

the entry of an order or judgment the clerk shall serve a

4

notice of the entry ~~by mail~~ in the manner provided for in

5

Rule 5(b) upon each party who is not in default for failure

6

to appear, and shall make a note in the docket of the

7

mailing service. Any party may in addition serve a notice

8

of such entry in the manner provided in Rule 5(b) for the

9

service of papers.

10

* * * * *

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because

service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Summary of Comments

Rule 77(d)

Jack E. Horsley, Esq., 99-CV-004: Recommends adding these words: “the clerk shall serve a notice of the entry by hand or otherwise in the manner provided for in Rule 5(b) * * *.”

Charles L. Schlumberger, Esq., 99-CV-008: Favors electronic notice from the clerk, although not among lawyers. The Eighth Circuit’s VIA program seems to work satisfactorily.

Hon. Susan Pierson Sonderby, 99-CV-010: there is a drafting error at the end of the first sentence, to be corrected: “and shall make a note in the docket of the mailing service.” (A similar suggestion is made by the Committees of the Association of the Bar of the City of New York, 99-CV-013, except that they would change “mailing” to “transmission.” “Service” seems to fit better the general incorporation of Rule 5(b).)

William A. Fenwick, Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: They propose deleting the second sentence of present Rule 77(d), which authorizes a party to serve notice of the entry of judgment. This provision is characterized as “excess verbiage.” The relationship of this sentence to Appellate Rule 4(a)(6)(A) is not noted.

Michael E. Kunz, Clerk of Court, E.D.Pa., 99-CV-018: Provides extensive statistics on the highly successful use of facsimile transmission to provide Rule 77(d) notice. The program “has been remarkably successful,” effecting notice more rapidly and at lower cost than postal delivery. Mr. Kunz is pleased that his recommendation for amendments in Rule 5(b) and 77(d) has been endorsed by the Advisory Committee.

Gap Report

Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note “service,” not “mailing,” on the docket.

B. Abrogate Copyright Rules; Amend Rules 65(g), 81(a)(1)

The proposals published in August 1999 include a package that would abrogate the obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be added, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to the Copyright Rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. The Advisory Committee discussion is summarized at page 9 of the draft Minutes.

Rule 65. Injunctions

1

* * * * *

2

(f) Copyright impoundment. This rule applies to

3

copyright impoundment proceedings.**Committee Note**

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*,

923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Summary of Comments

The only comments are incidental to the brief comments on the Copyright Rules of Practice, set out below. They approve the proposal.

Gap Report

No change has been made.

Rule 81. Applicability in General

1 (a) ~~To What Proceedings to which the Rules~~
2 ~~Applyicable.~~

3 (1) These rules do not apply to prize proceedings in
4 admiralty governed by Title 10, U.S.C., §§ 7651-
5 7681. They do not apply to proceedings in bankruptcy
6 to the extent provided by the Federal Rules of
7 Bankruptcy Procedure ~~or to proceedings in copyright~~
8 ~~under Title 17, U.S.C., except in so far as they may be~~
9 ~~made applicable thereto by rules promulgated by the~~
10 ~~Supreme Court of the United States. They do not~~
11 ~~apply to mental health proceedings in the United~~
12 ~~States District Court for the District of Columbia.~~

13 * * * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules

leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision that the Civil Rules do not apply to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

Summary of Comments

Prof. Peter Lushing, 99-CV-009: The Committee Note to Rule 81 should say that the amendment deletes the provision that the rules do not apply in D.C. mental health proceedings.

Gap Report

The Committee Note was amended to correct the inadvertent omission of a negative. As revised, it correctly reflects the language that is stricken from the rule.

~~RULES OF PRACTICE AS AMENDED~~1 **Rule 1**

2 ~~Proceedings in actions brought under section 25 of the~~
3 ~~Act of March 4, 1909, entitled "An Act to amend and~~
4 ~~consolidate the acts respecting copyright", including~~
5 ~~proceedings relating to the perfecting of appeals, shall be~~
6 ~~governed by the Rules of Civil Procedure, in so far as they~~
7 ~~are not inconsistent with these rules.~~

8 **Rule 3**

9 ~~Upon the institution of any action, suit or proceeding,~~
10 ~~or at any time thereafter, and before the entry of final~~
11 ~~judgment or decree therein, the plaintiff or complainant, or~~
12 ~~his authorized agent or attorney, may file with the clerk of~~
13 ~~any court given jurisdiction under section 34 of the Act of~~
14 ~~March 4, 1909, an affidavit stating upon the best of his~~
15 ~~knowledge, information and belief, the number and~~
16 ~~location, as near as may be, of the alleged infringing~~

17 ~~copies, records, plates, molds, matrices, etc., or other~~
18 ~~means for making the copies alleged to infringe the~~
19 ~~copyright, and the value of the same, and with such~~
20 ~~affidavit shall file with the clerk a bond executed by at~~
21 ~~least two sureties and approved by the court or a~~
22 ~~commissioner thereof.~~

23 **Rule 4**

24 ~~Such bond shall bind the sureties in a specified sum, to~~
25 ~~be fixed by the court, but not less than twice the~~
26 ~~reasonable value of such infringing copies, plates, records,~~
27 ~~molds, matrices, or other means for making such~~
28 ~~infringing copies, and be conditioned for the prompt~~
29 ~~prosecution of the action, suit or proceeding, for the~~
30 ~~return of said articles to the defendant, if they or any of~~
31 ~~them are adjudged not to be infringements, or if the action~~
32 ~~abates, or is discontinued before they are returned to the~~
33 ~~defendant, and for the payment to the defendant of any~~

28 FEDERAL RULES OF CIVIL PROCEDURE

34 ~~damages which the court may award to him against the~~
35 ~~plaintiff or complainant. Upon the filing of said affidavit~~
36 ~~and bond, and the approval of said bond, the clerk shall~~
37 ~~issue a writ directed to the marshal of the district where~~
38 ~~the said infringing copies, plates, records, molds, matrices,~~
39 ~~etc., or other means of making such infringing copies shall~~
40 ~~be stated in said affidavit to be located, and generally to~~
41 ~~any marshal of the United States, directing the said~~
42 ~~marshal to forthwith seize and hold the same subject to the~~
43 ~~order of the court issuing said writ, or of the court of the~~
44 ~~district in which the seizure shall be made.~~

45 **Rule 5**

46 ~~— The marshal shall thereupon seize said articles or any~~
47 ~~smaller or larger part thereof he may then or thereafter~~
48 ~~find, using such force as may be reasonably necessary in~~
49 ~~the premises, and serve on the defendant a copy of the~~
50 ~~affidavit, writ, and bond by delivering the same to him~~

51 ~~personally, if he can be found within the district, or if he~~
52 ~~can not be found, to his agent, if any, or to the person~~
53 ~~from whose possession the articles are taken, or if the~~
54 ~~owner, agent, or such person can not be found within the~~
55 ~~district, by leaving said copy at the usual place of abode of~~
56 ~~such owner or agent, with a person of suitable age and~~
57 ~~discretion, or at the place where said articles are found,~~
58 ~~and shall make immediate return of such seizure, or~~
59 ~~attempted seizure, to the court. He shall also attach to~~
60 ~~said articles a tag or label stating the fact of such seizure~~
61 ~~and warning all persons from in any manner interfering~~
62 ~~therewith.~~

63 **Rule 6**

64 ~~— A marshal who has seized alleged infringing articles,~~
65 ~~shall retain them in his possession, keeping them in a~~
66 ~~secure place, subject to the order of the court.~~

30 FEDERAL RULES OF CIVIL PROCEDURE

67 **Rule 7**

68 ~~Within three days after the articles are seized, and a~~
69 ~~copy of the affidavit, writ and bond are served as~~
70 ~~hereinbefore provided, the defendant shall serve upon the~~
71 ~~clerk a notice that he excepts to the amount of the penalty~~
72 ~~of the bond, or to the sureties of the plaintiff or~~
73 ~~complainant, or both, otherwise he shall be deemed to~~
74 ~~have waived all objection to the amount of the penalty of~~
75 ~~the bond and the sufficiency of the sureties thereon. If the~~
76 ~~court sustain the exceptions it may order a new bond to be~~
77 ~~executed by the plaintiff or complainant, or in default~~
78 ~~thereof within a time to be named by the court, the~~
79 ~~property to be returned to the defendant.~~

80 **Rule 8**

81 ~~Within ten days after service of such notice, the~~
82 ~~attorney of the plaintiff or complainant shall serve upon~~
83 ~~the defendant or his attorney a notice of the justification of~~

84 ~~the sureties, and said sureties shall justify before the court~~
85 ~~or a judge thereof at the time therein stated.~~

86 **Rule 9**

87 ~~—— The defendant, if he does not except to the amount of~~
88 ~~the penalty of the bond or the sufficiency of the sureties of~~
89 ~~the plaintiff or complainant, may make application to the~~
90 ~~court for the return to him of the articles seized, upon~~
91 ~~filing an affidavit stating all material facts and~~
92 ~~circumstances tending to show that the articles seized are~~
93 ~~not infringing copies, records, plates, molds, matrices, or~~
94 ~~means for making the copies alleged to infringe the~~
95 ~~copyright.~~

96 **Rule 10**

97 ~~—— Thereupon the court in its discretion, and after such~~
98 ~~hearing as it may direct, may order such return upon the~~
99 ~~filing by the defendant of a bond executed by at least two~~
100 ~~sureties, binding them in a specified sum to be fixed in the~~

32 FEDERAL RULES OF CIVIL PROCEDURE

101 ~~discretion of the court, and conditioned for the delivery of~~
102 ~~said specified articles to abide the order of the court. The~~
103 ~~plaintiff or complainant may require such sureties to justify~~
104 ~~within ten days of the filing of such bond.~~

105 **Rule 11**

106 ~~— Upon the granting of such application and the~~
107 ~~justification of the sureties on the bond, the marshal shall~~
108 ~~immediately deliver the articles seized to the defendant.~~

109 **Rule 12**

110 ~~— Any service required to be performed by any marshal~~
111 ~~may be performed by any deputy of such marshal.~~

112 **Rule 13**

113 ~~— For services in cases arising under this section the~~
114 ~~marshal shall be entitled to the same fees as are allowed~~
115 ~~for similar services in other cases.~~

Summary of Comments

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2 installment): The observation that the Copyright Rules are antiquated is “well taken.” But is concerned that perhaps Copyright Rule 13 should be renumbered and preserved in some form because there is “nothing else which would address the matter of service in disputes involving the marshal or their being entitlement to the same fees as those allowed for similar services.”

Charles L. Schlumberger, Esq., 99-CV-008: “Wholeheartedly” agrees with abrogation and the corresponding changes in Rules 65(f) and 81. Not only are some lawyers unaware of the Copyright Rules; “there are some judges who fall into that category, too!”

William A. Fenwick, Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The firm specializes in high technology law, including copyright law. They “fully support” abrogation of the copyright rules and the corresponding changes in Rules 65(f) and 81. “[T]he Copyright Rules of Practice are arcane and fundamentally unfair.”

Gap Report

No change has been made.

C. Rule 82

Rule 82 concludes by referring to 28 U.S.C. §§ 1391 to 1393. Section 1393 was repealed in 1988. The Advisory Committee recommends correction of the anomaly as a technical conforming change that can be adopted without publication for comment. As revised, the final sentence of Rule 82 would read:

Rule 82. Jurisdiction and Venue Unaffected

1 These rules shall not be construed to extend or limit the
2 jurisdiction of the United States district courts or the venue of
3 actions therein. An admiralty or maritime claim within the
4 meaning of Rule 9(h) shall not be treated as a civil action for
5 the purposes of Title 28, U.S.C., §§ 1391-~~93~~1392.

Committee Note

The final sentence of Rule 82 is amended to delete the reference to 28 U.S.C. § 1393, which has been repealed.

Style Comment

The recommendation that the change be made without publication carries with it a recommendation that style changes not be made. Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not "extend or limit the jurisdiction of the United States district courts." That sentence is a

flat lie if “jurisdiction” includes personal or quasi-in rem jurisdiction. The styling project on this rule requires publication and comment.

Late-Received Comments

The following comments were received well after the close of the comment period and were not considered by the Advisory Committee or by the Standing Committee, apart from Judge Whipple’s comments on Rule 5(b), which were noted with the timely comments because of earlier receipt by the Reporter.

Rule 5(b)

Hon. Dennis Beck, for Federal Magistrate Judges Assn.: Supports.

Hon. Dean Whipple: Suggests “electronic notification” and otherwise supports.

Hon. Marilyn Hall Patel: For the Northern District of California, urges that in addition to consent, electronic service be allowed when “provided for by local rule or order.” Her court is an “alpha court” in the CM/ECF project. N.D.Cal. General Order 45 provides that when a case is assigned to a judge who is participating in the ECF project, the case is “presumptively designated for participation in the court’s ECF program, and the parties shall be deemed to have consented to their assignment to ECF and to their participation in the program.” The General Order further provides that “by participating in ECF, parties consent to the electronic service of all documents.” Receipt of a message of filing is service. (There are further provisions for service on a party who has not registered as a filing user.) Judge Patel believes that if consent of the person to be served is required, without allowing for local rules or orders that take the place of consent, “the success of the electronic filing program in our district” would be

greatly hindered. She further urges that local variations are appropriate because some districts — as the Northern District of California — have practitioners who have demonstrated “the ability and willingness to utilize this technological innovation.”

Rule 6(e)

Hon. Dennis Beck for Federal Magistrate Judges Assn.: Supports allowing an additional 3 days when electronic service is made.

Hon. Dean Whipple: Believes it is not necessary to allow an additional 3 days after electronic service.

Hon. Marilyn Hall Patel: Would not allow an additional 3 days after electronic service. N.D.Cal. General Order 45 provides that “Service by electronic mail does not constitute service by mail pursuant to Federal Rule of Civil Procedure 6(e).”

Rule 65

Hon. Dennis Beck for Federal Magistrate Judges Assn.: Supports the proposal.

Rule 77

Hon. Dennis Beck for Federal Magistrate Judges Assn.: Supports the proposal.

Rule 81

Hon. Dennis Beck for Federal Magistrate Judges Assn.: Summarizes the proposal. The comment on Rule 65 may be intended to approve abrogation of the Copyright Rules of Practice.

**PROPOSED RULE AMENDMENTS
OF SIGNIFICANT INTEREST**

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on two topics that raised significant interest, although they were not controversial. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Civil Procedure

I. Abrogation of Copyright Rules

A. Brief Description

The Copyright Rules are set out in 17 U.S.C.A. following § 501. The rules were written in accordance with the 1909 Copyright Act. They deal with prejudgment seizure of copies alleged to infringe a copyright.

B. Arguments in Favor

The Copyright Rules have not been changed to reflect inconsistent provisions in the 1976 Copyright Act. They do not conform to modern concepts of due process. An attempt to abrogate the rules in 1964 was halted because Congress was considering a thorough revision of the copyright laws that was eventually enacted in 1976. Since then, the overwhelming practice of the bench and bar has been to neglect the Copyright Rules and rely on the Federal Rules of Civil Procedure in impoundment proceedings. Under the proposed amendments, Civil Rule 65 would make it clear that the rule covers these proceedings.

C. Objections

The committee is unaware of any objections to the proposed abrogation. At the request of Congressman Howard Coble, chairman of the House Judiciary Subcommittee on Courts and Intellectual Property, the rulemaking process was delayed for one year in order to ensure that the proposal would not interfere with pending copyright legislation and ongoing United States multilateral treaty obligations, which were aimed at fostering stronger international enforcement of copyright laws. During the one-year delay, Congress acted on the pending measures.

D. Rules Committees Consideration

The rules committees concluded that nothing in the proposed amendments would hinder the vigorous enforcement of the copyright laws. Impoundment may still be ordered on an ex parte basis if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. But the proposed changes would eliminate the concerns that the rules may be invalid and will help ensure that the United States is in compliance with its international obligations.

Federal Rules of Civil and Bankruptcy Procedure

I. Civil Rules 5, 6, 77 and Bankruptcy Rules 9006 and 9022

A. Brief Description

The proposed amendments to these rules would permit the service of papers and the transmission of court notices by electronic means upon the parties' consent.

B. Arguments in Favor

The proposed amendments would remove rules-related impediments that prevent willing parties and courts from using modern communication systems and other technological advances during litigation.

C. Objections

There was virtually no expressed resistance to the proposed amendments. Several commentators advocated quicker adoption of technological advancements. They would eliminate the need for parties' consent and require parties to serve and accept papers by electronic means.

D. Rules Committees Consideration

The rules committees found that the experiences and the technological expertise of the bench and bar were too disparate at this time to mandate uniform, automated procedures. Until more widespread familiarity and expertise with technological advancements are shown, the committees are persuaded that amendments in the rules to account for technological changes should proceed deliberately.