COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

Summary of Report

The annexed report recommends:

1. Approval of the comments of the Advisory Committee on Rules of Evidence and this committee set out in Appendix B on the House Subcommittee draft of H.R.5463 relating to the Federal Rules of Evidence.

2. Approval of the proposed rules and official forms under Chapter XI of the Bankruptcy Act set out in Appendix C, and their transmittal to the Supreme Court.

3. Approval of the corrective amendments to Official Bankruptcy Form No.7 set out in Appendix D, and to Criminal Rules 41(a) and 50 set out in Appendix E, and their transmittal to the Supreme Court.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

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RULES OF EVIDENCE

REPORT

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The standing Committee on Rules of Practice and Procedure has held two meetings since the last session of the Judicial Conference. The first was a special joint meeting with the Advisory Committee on Rules of Evidence held in Washington on July 18 and 19, 1973 to consider the changes in the Federal Rules of Evidence tentatively proposed by the House Judiciary Subcommittee on Criminal Justice in its committee print of H.R.5463, the pending bill to enact the rules. The second meeting of the standing committee was its regular meeting held in Washington on August 30, 1973. A quorum of the committee was present at each meeting.

Rules of Evidence

The Federal Rules of Evidence which were prescribed by the Supreme Court on November 20, 1972, were transmitted by the Chief Justice to the two Houses of Congress on February 5, 1973. On March 30, 1973 an Act of Congress was approved which directs that these rules shall have no effect "except to the extent, and with such amendments, as they may be expressly approved by Act of Congress." Pub.L.93-12. A bill, H.R.5463, to enact the Federal Rules of Evidence had been introduced in the House of Representatives

on March 12, 1973 which along with the order of the Supreme Court prescribing the rules had been referred to a Subcommittee of the House Judiciary Committee of which Representative William L. Hungate of Missouri is chairman and which is now designated as the Subcommittee on Criminal Justice. That Subcommittee held extensive hearings on the rules at two sessions at which Albert E. Jenner, Jr., chairman, and Prof. Edward W. Cleary, reporter, of the Advisory Committee on Rules of Evidence, and the undersigned chairman of the standing committee were requested to, and did, testify on the rules.

The House Subcommittee gave extensive consideration to the rules, holding 17 markup sessions, and on June 28, 1973 released a committee print of H.R. 5463 amended to incorporate the changes proposed by the Subcommittee in the rules as prescribed by the Supreme Court and transmitted to the Congress. A copy was transmitted to the Chief Justice for the consideration and comments of the Judicial Conference and was referred to the committees for consideration. Chairman Hungate of the Subcommittee requested that comments be forwarded to the Subcommittee by July 31,1973 so that they might be considered by the staff in August and by the Subcommittee early in September to the end that a final draft might be approved in September for submission to the full committee and, if approved, to the House for passage in the fall. This time schedule appears to be necessary if the Senate is to be given a full year for consideration of the rules enacting legislation before the final adjournment of the present

Congress when all unenacted bills would die.

Accordingly the standing committee held the joint meeting on July 18 and 19 with the Advisory Committee on Rules of Evidence, which is reported above, at which all of the amendments to the Federal Rules of Evidence proposed by the House Subcommittee were considered at length, together with the accompanying explanatory Subcommittee Notes. The two committees agreed in formulating their comments on each of the proposed amendments. In addition the two committees considered the proposal of the Subcommittee to add to H.R.5463 a new section 2 which would add to title 28, U.S.C., a new section 1657 giving to the Supreme Court express authority to prescribe amendments to the Federal Rules of Evidence. The committees very much approve this proposal which would eliminate any question as to the power of the Court in this regard. The proposal, however, contains a proviso that either House may by its own resolution reject such a rules-proposal prescribed by the Court in which case it shall not take effect. Similar provisions in S.2432 of the 92d Congress were disapproved by the Judicial Conference at its session in October 1971 (Rep.Jud.Conf.Oct.1971, p.57). The two committees were united in disapproving this provision of the Subcommittee's proposal.

The committee print of H.R. 5463 which sets out the amendments proposed by the Subcommittee is annexed to this report as Appendix A and the comments of the standing committee and the advisory committee are annexed as Appendix B. In view of the

request of the House Subcommittee, with which it was believed the Judicial Conference would want to cooperate, the Chief Justice authorized the committees' comments which appear herein as Appendix B to be submitted to the House Subcommittee on July 31st upon the explicit understanding that they constitute merely a working paper and have not received the consideration or approval of the Conference. This was done.

The standing committee would recommend that the Conference consider and approve Appendix B and authorize the immediate release of your action to the House Subcommittee. The Subcommittee has informed us that it will welcome this action and that information as to the views of the Conference will be most useful to it even after September 14th.

Bankruptcy Rules

The standing committee is happy to be able to report that the Bankruptcy Rules and Official Forms covering Chapters I-VII and Chapter XIII which were approved by the Conference in October 1972 were prescribed by the Supreme Court by order entered April 24,1973, to be effective October 1,1973. They were promptly transmitted to the Congress by the Chief Justice. It is not anticipated that either House of Congress will have any problem with them.

The Advisory Committee on Bankruptcy Rules met in Washington on July 18-21, 1973 and approved a definitive draft of the proposed rules and official forms under Chapter XI (Arrangements) of the Bankruptcy Act. The draft was submitted to the standing committee at its meeting on August 20th and with a modification of Rule 11-15 approved. It is annexed

to this report as Appendix C. The standing committee recommends that the Conference approve the draft rules and transmit them to the Supreme Court with the recommendation that they be prescribed for use in proceedings under Chapter XI of the Act effective, if possible, July 1, 1974.

The Advisory Committee at its July meeting gave consideration to the comments and suggestions received from the public and the Securities and Exchange Commission on the preliminary draft of Chapter X Rules (Corporate Reorganization) which was printed and circulated under date of December 1972 but did not complete its consideration of those rules. It will give them further consideration at its next meeting, at which it will also consider a preliminary draft of rules under Chapter IX (Composition of Indebtedness of Local Taxing Agencies) which has been prepared by Prof. Lawrence P. King, one of the associate reporters to the Advisory Committee. Following preliminary approval, that draft will be printed for public circulation. A preliminary draft of Chapter XII Rules (Real Property Arrangements) is now in the hands of the Government Printing Office and will be distributed to the bench and bar for comments as soon as the printed pamphlets are available.

A draft of the last set of rules required under the Bankruptcy Act, those covering railroad reorganization proceedings under Chapter VIII, section 77, of the Act, is now in the course of preparation by Prof. Walter J. Taggart, one of the associate reporters to the Advisory Committee, and will be printed and cir-

culated to the bench and bar after it is completed and approved in preliminary form by the Advisory Committee. The standing committee is, therefore, able to report that the end is in sight for the completion of the tremendous work which has been confided to the Advisory Committee on Bankruptcy Rules of preparing comprehensive rules of procedure under all the provisions of the Bankruptcy Act.

Civil Rules

The Advisory Committee has not held a formal meeting since the last session of the Conference. Its reporter is continuing his study of Rule 23 relating to class actions. In addition, the committee is undertaking a study of the possible amendment of Rule 48 to provide for a six member jury and a lesser number of peremptory challenges in view of the decision of the Supreme Court in Colgrove v. Battin, decided June 21, 1973.

Criminal Rules

The Advisory Committee on Criminal Rules met on August 2d and 3d, 1973 in Washington. The Advisory Committee's preliminary drafts of amendments to Cr nal Rules 6, 11, 23, 24, 35, 41 and 43, new Criminal Rule 40.., Rules Governing Habeas Corpus Proceedings, Rules Governing §2255 Proceedings and amendment to Appellate Rule 4 which were published in January 1973 are presently being considered by the bench and bar and will be further considered by the Advisory Committee in the spring in the light

of the comments received.

At its recent meeting the Advisory Committee gave extended consideration to suggestions with respect to the operation and use of the grand jury and to the legal problems connected therewith. The committee is continuing its study of this subject. It also gave preliminary consideration to a number of other proposals for amendment of the Criminal Rules. These will be given further study by the committee.

Corrective Rules Amendments

Official Bankruptcy Form No.7. In Official Form No.7, which was forwarded by the Conference to the Supreme Court with the Bankruptcy Rules and other Official Forms on January 10,1973 and which was prescribed by the Court April 24,1973, a portion of subdivisions 14 and 15 was inadvertently omitted. An amendment to correct this omission is annexed hereto as Exhibit D.

Criminal Rule 41(a). In the amendment of subdivision (a) of Rule 41 of the Federal Rules of Criminal Procedure, which was forwarded by the Conference to the Supreme Court on April 10, 1972 and which was prescribed by the Court on April 24, 1972, the words "court of record" were inadvertently omitted. An amendment to restore these words is included in Appendix E annexed hereto.

Criminal Rule 50. In the amendment of Rule 50, which was prescribed by the Supreme Court on April 24, 1972 and which added subdivision (b) to the rule, the previously existing single paragraph of the rule was not amended to add the desig-

nating letter "(a)" and the title "Calendars" to distinguish it from new subdivision (b). The Conference at its session in October 1972 approved an amendment to accomplish this. The amendment is included in Appendix E.

The committee recommends that the corrective amendments set out in Appendices D and E be approved by transmittal to the Supreme Court.

On behalf of the Committee,

Albert B. Maris
Chairman

August 21, 1973

[COMMITTEE PRINT]

[JUNE 28, 1973]

H.R. 5463

93d Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary

NOTE: Changes proposed by the Subcommittee to the Rules of Evidence as transmitted to the Congress from the Supreme Court are shown as follows: The rules as transmitted to the Congress are printed in roman; brackets indicate material deleted by the Subcommittee; and italics indicate material added by the Subcommittee.

A BILL To establish [rules of evidence for certain courts and proceedings] *the Federal Rules of Evidence, and for other purposes*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following rules, which may be cited as the "Federal Rules of Evidence," shall be[.] effective six months after the date of the enactment of this Act[.]. [the rules of evidence, to the extent set forth in such rules, in the United States courts of appeals, the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands, and before United States magistrates]:

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RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling.—The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. He may direct the making of an offer in question and answer form.

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.—Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivision (b). In making his determination he is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require *or, when an accused is a witness, it he so requests.*

(d) Testimony by accused.—The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility.—This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Subcommittee Note

The Subcommittee adopted the March 1971 draft version of subdivision (c). Although recognizing that in some instances duplication of evidence would occur and that the procedure could be subject to abuse, the Subcommittee felt that a proper regard for the right of an accused not to testify generally in the case requires that he be given an option to testify out of the presence of the jury on preliminary matters.

[Rule 105. Summing Up and Comment by Judge

[After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.]

Subcommittee Note

The Subcommittee recognized that the Rule was consistent with existing practice in the Federal courts but felt that the question whether the trial judge should be allowed to comment on the weight of the evidence and the credibility of witnesses was primarily procedural rather than evidentiary and thus inappropriate in a code of evidence.

Rule 10[6] *5.* Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 10[7] *6.* Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice [of Adjudicative Facts]

[(a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.]

[(b)](*a*) Kinds of facts.—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[(c)](*b*) When discretionary.—A judge or court may take judicial notice, whether requested or not.

[(d)](*c*) When mandatory.—A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

[(e)](*d*) Opportunity to be heard.—A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

[(f)](*e*) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.

[(g) Instructing jury.—The judge shall instruct the jury to accept as established any facts judicially noticed.]

Subcommittee Note

As proposed, Article II was restricted by subdivision (a) to "adjudicative" facts, as contrasted with "legislative" facts. The import of both terms was discussed in the Advisory Committee's note, but the Subcommittee nonetheless felt that the distinction was not clear and would breed litigation. The Subcommittee also felt that differing treatment for the two types of facts was unjustified. Accordingly, subdivision (a) was deleted.

As proposed, subdivision (g) would have precluded a judge from admitting evidence in disproof of facts of which judicial notice had been taken. Believing that judicial notice should be treated on the same basis as any other evidence which is admitted—subject to refutation—the Subcommittee deleted this subdivision.

ARTICLE III. PRESUMPTIONS *IN CIVIL ACTIONS*

Rule 301. Presumptions in General *in Civil Actions*

In all *civil* [cases] *actions* not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Subcommittee Note

The word "civil" was added to effectuate the Subcommittee's decision not to deal with the question of presumptions in criminal cases. See Rule 303. Throughout, references to "civil cases" have been made "civil actions", the term used in the Federal Rules of Civil Procedure.

Rule 302. Applicability of State Law in Civil [Cases] *Actions*

In civil actions, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

[Rule 303. Presumptions in Criminal Cases

[(a) Scope.—Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

[(b) Submission to jury.—The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

[(c) Instructing the jury.—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic

facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.]

Subcommittee Note

Rule 303 was deleted since the subject of presumptions in criminal cases is dealt with in the proposals of the Brown Commission and S. 1 to revise the criminal code. The Subcommittee determined to consider the issue in the course of its study of these proposals, commencing later this Congress.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority*. Evidence which is not relevant is not admissible.

Subcommittee Note

To accommodate the view that the Congress should do nothing which would indicate congressional acquiescence in the judgment that the Court has authority to promulgate Rules of Evidence, and the concern that the Congress must not affect adversely whatever authority the Court does have to promulgate rules, the Subcommittee amended "by other rules adopted by the Supreme Court" to read "by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other rules where the reference appears.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; *Exceptions; Other Crimes*

(a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of

proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused.—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. [This subdivision does not exclude the evidence when offered] *It may, however, be admissible* for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Subcommittee Note

In the March 1971 draft the second sentence of (b) began "It may, however, be admissible for other purposes . . ." The Subcommittee preferred the 1971 formulation as placing greater emphasis on admissibility than did the final Court version.

Rule 405. Methods of Proving Character

(a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

Subcommittee Note

The Subcommittee approved subdivision (b) as proposed by the Court, with the specific understanding that the Rule applies only in those relatively rare situations where character is truly an issue in the case.

Rule 406. Habit; Routine Practice

(a) Admissibility.—Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) Method of proof.—Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Subcommittee Note

This rule was approved as proposed by the Court, although the Subcommittee was aware of the comments submitted to the Advisory Committee when the 1969 and 1971 drafts were circulated. The comments

brought to the Subcommittee's attention were excerpted by the Reporter from reports of the following:

Association of the Bar of the City of New York, Second Circuit Conference Committee on Trial Practice and Technique, New York County Lawyers Association Committee on Federal Courts, Arizona State Bar Trial Practice Section, Washington State Bar Association Committee, American College of Trial Lawyers Committee, Florida State Bar Federal Rules Committee, Department of Justice, South Carolina Chapter of the American College of Trial Lawyers, the Virginia Trial Lawyers Association, the District of Columbia Judicial Conference Special Committee, and the American Bar Association Special Committees on Federal Rules of Procedure and Uniform Rules of Evidence for Federal Courts.

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and Offers To Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Offer To Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence

of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

ARTICLE V. PRIVILEGES

Rule 501. [Privileges Recognized Only as Provided] *General Rule*

[Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience: Provided, That in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Subcommittee Note

The Subcommittee eliminated the proposed specific rules on privileges and through a single Rule, 501, left the law of privileges in its present state to be developed by the Federal courts in accordance with the standard contained in Rule 26 of the Federal Rules of Criminal Procedure. That is, privileges shall be governed by the principles of the common law as interpreted by the courts in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added to the lone term "witnesses" used in Rule 26 to make clear, that, as under present law, not only witnesses may have privileges.

The proviso in Rule 501 as adopted by the Subcommittee, is modeled after Rule 302 and is similar to language added by the Subcommittee to Rule 601 relating to the competency of witnesses. It is designed to mandate the application of State privilege law in civil actions governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64, a result in accord with current Federal court decisions. The Subcommittee deemed the proviso to be necessary in light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under *Erie*.

[Rule 502. Required Reports Privileged by Statute

[A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides.

No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

[Rule 503. Lawyer-Client Privilege

[(a) Definitions.—As used in this rule:

[(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

[(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any State or nation.

[(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

[(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

[(b) General rule of privilege.—A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

[(c) Who may claim the privilege.—The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

[(d) Exceptions.—There is no privilege under this rule:

[(1) Furtherance of crime or fraud.—If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

[(2) Claimants through same deceased client.—As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

[(3) Breach of duty by lawyer or client.—As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

[(4) Document attested by lawyer.—As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

[(5) Joint clients.—As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

[Rule 501. Psychotherapist-Patient Privilege

[(a) Definitions—

[(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

[(2) A "psychotherapist" is (A) a person authorized to practice medicine in any State or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any State or nation, while similarly engaged.

[(3) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

[(b) General rule of privilege.—A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

[(c) Who may claim the privilege.—The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

[(d) Exceptions—

[(1) Proceedings for hospitalization.—There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

[(2) Examination by order of judge.—If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

[(3) Condition an element of claim or defense.—There is no privilege under this rule as to communications relevant to an issue

of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

[Rule 505. Husband-Wife Privilege

[(a) General rule of privilege.—An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

[(b) Who may claim the privilege.—The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

[(c) Exceptions.—There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of section 1328 of title 8, United States Code, with transporting a female in interstate commerce for immoral purposes or other offense in violation of sections 2421–2424 of title 18, United States Code, or with violation of other similar statutes.

[Rule 506. Communications to Clergymen

[(a) Definitions.—As used in this rule—

[(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

[(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

[(b) General rule of privilege.—A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

[(c) Who may claim the privilege.—The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

[Rule 507. Political Vote

[Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

[Rule 508. Trade Secrets

[A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from

disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

[Rule 509. Secrets of State and Other Official Information

[(a) Definitions.—

[(1) Secret of state.—A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

[(2) Official information.—"Official information" is information within the custody or control of a department or agency of the Government the disclosure of which is shown to be contrary to the public interest and which consists of (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of section 3500 of title 18, United States Code, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to section 552 of title 5, United States Code.

[(b) General rule of privilege.—The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

[(c) Procedures.—The privilege for secrets of state may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge, upon motion of the Government, may permit the Government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The judge may take any protective measure which the interests of the Government and the furtherance of justice may require.

[(d) Notice to Government.—If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of

knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

[(e) Effect of sustaining claim.—If a claim of privilege is sustained in a proceeding to which the Government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the Government upon an issue as to which the evidence is relevant, or dismissing the action.

[Rule 510. Identity of Informer

[(a) Rule of privilege.—The Government or a State or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

[(b) Who may claim.—The privilege may be claimed by an appropriate representative of the Government, [illegible] whether the information was furnished to an officer of the Government or of a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the Government objects.

[(c) Exceptions.—

[(1) Voluntary disclosure; informer a witness.—No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the Government.

[(2) Testimony on merits.—If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the Government is a party, and the Government invokes the privilege, the judge shall give the Government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the Government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents

shall not otherwise be revealed without consent of the Government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

[(3) Legality of obtaining evidence.—If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the Government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the Government.

[Rule 511. Waiver of Privilege by Voluntary Disclosure

[A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

[Rule 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity To Claim Privilege

[Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

[Rule 513. Comment Upon or Inference From Claim of Privilege; Instruction

[(a) Comment or inference not permitted.—The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

[(b) Claiming privilege without knowledge of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

[(c) Jury instruction.—Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.]

ARTICLE VI WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. *However, in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.*

Subcommittee Note

One effect of the Rule as originally proposed would have been to abolish religious belief, conviction of crime, and other grounds recognized in some jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the Federal courts the so-called Dead Man's Statutes which exist in some States. Recognizing that there is substantial disagreement as to the merit of Dead Man's Statutes, the Subcommittee nevertheless felt that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling Federal interest. The Subcommittee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to claims or defenses as to which the State law supplies the rule of decision.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) At the trial.—A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.— Upon an inquiry into the validity of a verdict or indictment, a juror may not testify [as to any matter or statement occurring during the course of the jury's deliberations or to] *concerning* the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith [except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror]. Nor may his affidavit or evidence of any statement by him [concerning a matter about which he would be precluded from testifying] *indicating an effect of this kind* be received *for these purposes.*

Subcommittee Note

As proposed, subdivision (b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family); he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury deliberations.

The 1969 and the 1971 drafts would have permitted a member of the jury to testify concerning irregularities occurring in the jury room. The Advisory Committee comment to subdivision (b) in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented in the 1971 draft that:

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room * * *. The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Apparently, objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Subcommittee approved subdivision (b) in the text of those drafts.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character.—The credibility of a witness may be attacked or supported by evidence in the form

of reputation or opinion, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness [and not remote in time], be inquired into on cross-examination of the witness [himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness] (*1*) *concerning his character for truthfulness or untruthfulness, or* (*2*) *concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.*

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Subcommittee Note

The second sentence of subdivision (b) as proposed permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness and not remote in time. Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Subcommittee redrafted the second sentence to emphasize the discretionary role of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). The Subcommittee is of the view that explicitly referring to the discretion of the court and deleting the reference to remoteness is a more practical way to deal with the subject. As recast, the subdivision makes clear the antecedent of "his" in the original.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the credibility of a witness, *evidence that* he has been convicted of a crime is admissible *if, but only if* [*the crime* (*1*) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (*2*)] (*1*) *the crime* involved dishonesty or false statement [regardless of the punishment], *or* (*2*) *the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction.*

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of *conviction or of* the release of the witness from confinement [imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction], whichever is the later date.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the

conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a substantial showing of rehabilitation and the witness has not been convicted of a subsequent crime, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, *in a criminal case*, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Subcommittee Note

The Advisory Committee note stated: "There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose." The Subcommittee consideration of this Rule made this clear. Sentiment was expressed that only convictions of offenses bearing on credibility should be admissible; as proposed, the Rule had no such limitation. Sentiment was expressed in support of the formulation of the 1971 draft—no conviction should be admissible if "the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." Concern was voiced as to whether there should be an arbitrary time limitation such as that contained in subdivision (b), and whether and under what circumstances juvenile adjudications should be admissible.

The Subcommittee draft addresses and disposes of these considerations as follows:

(1) Subdivision (a) was amended so that convictions of crimes involving dishonesty or false statements are always admissible to attack credibility. However, for all other crimes, convictions of only those which are felonies by Federal standards will be admissible unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the convictions.

(2) Subdivision (b) was amended to read in the text of the 1971 Advisory Committee draft as constituting a fairer, more reasonable, time measure than that in the draft submitted to the Congress.

(3) Subdivision (d) was amended to confer upon a judge discretion to admit evidence of juvenile adjudications in criminal cases only. This appeared to be the intention of the Court, judging from the use of the word "accused" in the second sentence of subdivision (d) as submitted to the Congress.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Rule 611. Mode of Order of Interrogation and Presentation

(a) Control by judge.—The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective

for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.—[A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.] *Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.*

(c) Leading questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. In civil [cases] *actions*, a party is entitled to call an adverse party or witness identified with [him] *such adverse party* and interrogate by leading questions.

Subcommitee Note

The Subcommittee amended subdivision (b) to return to the rule which prevails in the Federal courts and 39 State jurisdictions. As amended, the Rule is in the text of the 1969 draft; it limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more. This more traditional rule facilitates orderly presentations and progress at trial. Further, in the light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The Subcommittee change in (c) is intended merely to clarify that the "him" in the last line of the Rule as submitted to the Congress is the adverse party.

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, [either before or while testifying] *either*——

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have [it] *the writing* produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in his discretion determines that the interests of justice so require, declaring a mistrial.

Subcommittee Note

Permitting an adverse party to require the production of writings used *before* testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial. The Subcommittee recast the first sentence of the Rule to permit access to any such writings only if the court determines access is in the interest of justice

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement.—In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 614. Calling and Interrogation of Witnesses by Judge

(a) Calling by judge.—The judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by judge.—The judge may interrogate witnesses, whether called by himself or by a party.

(c) Objections.—Objections to the calling of witnesses by the judge or to interrogation by him may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses

At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order of his own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Article VII. Opinions and Expert Testimony

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment.—The judge may on his own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of his own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the judge or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation.—Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under the fifth amendment. In other civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.—In the exercise of his discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.—Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Article VIII. Hearsay

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him: *Provided, That a prior inconsistent statement under clause (A) shall not be admissible as proof of the facts stated unless it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury*; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Subcommittee Note

Present Federal law generally permits the use of prior inconsistent statements of a witness for impeachment only. Subdivision (d)(1) as proposed by the Court would permit such statements to be admissible as substantive evidence. Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation, the Subcommittee tentatively decided to adopt a compromise version of the Rule patterned after the position of the Second Circuit. See *United States* v. *De Sisto*, 329 F.2d 929, cert. denied, 377 U.S. 979; *United States* v. *Cunningham*, 446 F.2d 194. The Rule as approved draws a distinction between types of prior inconsistent state-

ments and allows only those made before a grand jury, or at a trial or hearing, or in a deposition, to be admissible for their truth. The rationale of the Subcommittee's decision was that (1) unlike in other situations, there can be no dispute as to whether the prior statement was made, and (2) the context of a formal proceeding and an oath provide firm additional assurances of the reliability of the statement. The Subcommittee intends that nothing in the Rule should be deemed to affect the secrecy of grand jury investigations.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority* or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted *business or professional* activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, [all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other

circumstances indicate lack of trustworthiness.] *if kept in the course of a regularly conducted business or professional activity, and if it was the regular practice of such business or professional activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*

(7) Absence of entry in records [of regularly conducted activity] *kept in accordance with the provisions of paragraph (6).*—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, [of a regularly conducted activity] *kept in accordance with the provisions of paragraph (6)*, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law, or (C) in civil [cases] *actions* and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.—To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.—Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.—Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more [whose authenticity] *the authenticity of which* is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.—Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history.—Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.—Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries.—Judgments as proof of matters of personal, family

or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

Subcommittee Note

Subdivision (4) was approved as submitted by the Court, with the understanding that it was not intended in any way adversely to affect substantive privilege laws or any privilege rules which might be adopted.

Subdivision (5) was approved as submitted by the Court, with the understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. Moreover, the same principle was deemed applicable to all the hearsay rules.

Subdivision (6) of the Court Rule permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Subcommittee believed that there were insufficient guarantees of reliability in records made in the course of regularly conducted non-business or non-professional activities. Moreover, it concluded that the additional requirement of present law (28 U.S.C. 1732) that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Rule was accordingly redrafted to incorporate these limitations.

Subdivision (7) was amended to reflect the Subcommittee's action with respect to subdivision (6).

Subdivision (8) was approved as submitted by the Court, with the understanding that evaluations or opinions contained in public reports would not be admissible, and intending that the term "factual findings" should be strictly construed.

The Subcommittee made a purely formal amendment to subdivision (16).

The Subcommittee agreed to delete subdivision (24) as injecting too much uncertainty into the law of evidence. It was noted that Rule 102 directs the courts to construe these Rules of Evidence so as to promote "growth and development." If additional hearsay exceptions are to be created, they should be by amendments to these Rules, not on a case-by-case basis.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance *or testimony* by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procure-

ment or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity to develop the testimony by direct, cross, or redirect examination.*

[(2) Statement of recent perception.—A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.]

[(3)](*2*) Statement under belief of impending death.—[A] *In a prosecution for homicide or in a civil case, a* statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

[(4)](*3*) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to [civil or] criminal liability [or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace,] that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless [corroborated.] *corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not admissible.*

[(5)] (*4*) Statement of personal or family history.—(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

[(6) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

Subcommittee Note

The Subcommittee amendment to subdivision (a)(5) is primarily designed to require that an attempt be made to depose a witness as a precondition to the witness' being deemed "unavailable."

Subdivision (b)(1) of the Court Rule allowed prior testimony of a witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Subcommittee believed it is generally unfair to impose upon the party against whom the hearsay is being offered responsibility for the manner in which the witness was previously handled. The sole exception to this, in the Subcommittee's view, is where a party's predecessor in interest had the prior opportunity to examine the witness. The subdivision was amended to reflect these policy determinations.

The Subcommittee tentatively voted to delete subdivision (b)(2) as creating a new and unwarranted hearsay exception of great potential breadth. The Subcommittee did not believe that statements of the type referred to in the proposed Court Rule bore sufficient guarantees of trustworthiness to justify admissibility.

Subdivision (b)(3) of the Court Rule proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Subcommittee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions where exceptional need for the evidence is present. At the same time, the Subcommittee approved the expansion to civil cases, although noting the possibility that this could lead to forum shopping in some cases.

Subdivision (b)(4) proposed to expand the hearsay exception from its present Federal limitation (i.e. statements against pecuniary or proprietary interest) to include statements subjecting the declarant to civil or criminal liability, statements rendering invalid a claim by the declarant against another, and statements tending to make the declarant an object of hatred, ridicule, or disgrace. The Subcommittee was of the view that all of these additional varieties of "against interest" statements other than those tending to expose the declarant to criminal liability, lacked sufficient guarantees of reliability. It therefore eliminated these from the subdivision. As for statements against penal interest, the Subcommittee also believed, as did the Court, that statements of this type tending to exculpate the accused were more suspect and so should be conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Subcommittee settled on the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in cases like *Donnelly* v. *United States*, 228 U.S. 243, where the circumstances clearly indicated reliability, would be changed. The Subcommittee also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the doctrine of *Bruton* v. *United States*, 391 U.S. 123. The Subcommittee did not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule since in that event the declarant would not be "unavailable."

Subdivision (b)(6) was deleted for the same reasons underlying the deletion of Rule 803(24).

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Article IX. Authentication and Identification

Rule 901. Requirement of Authentication or Identification

(a) General provision.—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge.—Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting.—Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness.—Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like.—Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification.—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations.—Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports.—Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilations.—Evidence that a document or data compilation, in any form, (A) is in such condi-

tion as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system.—Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule.—Any method of authentication or identification provided by Act of Congress or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.*

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.—A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal.—A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents.—A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or légation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized

by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.*

(5) Official publications.—Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals.—Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like.—Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents.—Documents accompanied by a certificate of acknowledgment [under the hand and seal of] *executed in the manner provided by law by* a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents.—Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress.—Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Subcommittee Note

Subdivision (8) was redrafted to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended, the Rule merely requires that the document be executed in the manner required by the law of the State which authorized the notary to take the acknowledgment.

The Subcommittee determined tentatively to approve subdivision (9) as submitted by the Court. However, there was considerable discussion concerning the meaning of the term "general commercial law". The Subcommittee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that Federal commercial law will apply where Federal commercial paper is involved. Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Article X. Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions

For purposes of this article the following definitions are applicable.

(1) Writings and recordings.—"Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down

by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs.—"Photographs" include still photographs, X-ray films, *cideo tapes*, and motion pictures.

(3) Original.—An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate.—A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

Subcommittee Note

The Subcommittee amended subdivision (2) specifically to include video tapes in the definition of "photographs."

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Subcommittee Note

Although the Subcommittee approved this Rule without change, some concern was expressed about any possible impact it might have on the so-called "best evidence" rule.

With respect to clause (1), the Subcommittee intends that the courts should be liberal in deciding "a genuine question is raised as to the authenticity of the original."

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed.—All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable.—No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent.—At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the con-

tents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters.—The writing, recording, or photograph is not closely related to a controlling issue.

Subcommittee Note

With respect to subdivision (1), the Subcommittee assumes that loss or destruction of an original by another at the instigation of the proponent would be tantamount to loss or destruction by the proponent himself.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Judge and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the judge to determine. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Article XI. Miscellaneous Rules

Rule. 1101. Applicability of Rules

(a) Courts and magistrates.—These rules apply to the United States District Courts, the District Court of Guam, the District Court

of the Virgin Islands, the District Court for the District of the Canal Zone, the United States Courts of Appeals, and to United States magistrates, in the proceedings and to the extent hereinafter set forth. The word "judge" in these rules includes United States magistrates and referees in bankruptcy.

(b) Proceedings generally.—These rules apply generally to civil actions, including admiralty and maritime cases, to criminal proceedings, to contempt proceedings except those in which the judge may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege.—The [rules] *rule* with respect to privileges [apply] *applies* at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than [those] with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under rule 104(a).

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules [adopted] *prescribed* by the Supreme Court *under statutory authority*: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial *de novo* under section 706(2)(F) of title 5, United States Code; [review of orders of Secretary of Agriculture under sections 292, 499f and 499g (c) of title 7, United States Code; naturalization and revocation of naturalization under sections 1421–1429 of title 8, United States Code; prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of Secretary of the Interior under section 522 of title 15, United States Code; review of orders of petroleum control boards under section 715d of title 15, United States Code; actions for fines, penalties, or forfeitures under the Tariff Act of 1930 (19 U.S.C., c. 4, part V), or under the Anti-Smuggling Act (19 U.S.C., c. 5); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C., c. 9); disputes between seamen under sections 256–258 of title 22, United States Code; habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside, or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 679 of title 46, United States Code; actions against the United States for damages caused by or for towage or salvage services rendered to public vessels under chapter 22 of title 46, United States Code, as implemented by section 7730 of title 10, United States Code.] *review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize associations of producers of*

agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and recocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside, or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

Subcommittee Note

Technical changes were made in subdivisions (c) and (d) to reflect the Subcommittee's action with respect to Article V.

Subdivision (e) was amended to substitute positive law citations for those which were not.

Rule 1102. Title

These rules may be known and cited as the Federal Rules of Evidence.

Sec. 2. Title 28 of the United States Code is amended—

(1) by inserting immediately after section 1656 the following new section:

"*§ 1657. Rules of Evidence*

"*The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of*

Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect."; and

(2) by adding at the end of the table of sections of chapter 111 the following new item:

"*1657. Rules of Evidence.*"

Sec. [2] *3.* The Congress expressly approves the amendments to the Federal Rules of Civil Procedure, and the amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect six months after the date of the enactment of this Act.

○

FEDERAL RULES OF EVIDENCE

HR 5463, 93d Cong.

COMMENTS OF STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND ADVISORY COMMITTEE ON RULES OF EVIDENCE ON AMENDMENTS PROPOSED BY HOUSE SUBCOMMITTEE ON CRIMINAL JUSTICE (Committee Print June 28, 1973)

On July 18 and 19, 1973 the standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States met in joint session for the purpose of considering amendments to the Federal Rules of Evidence proposed to be incorporated in HR 5463, 93d Cong. by the House Subcommittee on Criminal Justice (Committee Print June 28, 1973). The two committees fully considered all of the proposed amendments as well as the Subcommittee Notes in explanation of them and agreed upon the following comments thereto:

RULE 104

(c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require *or, when an accused is a witness, if he so requests.*

The committees express no disagreement with the proposed amendment to subdivision (c).

RULE 105

[Rule 105. Summing Up and Comment by Judge

[After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.]

The committees are unable to agree with the proposal to delete this rule. It is believed to embody a constitutional mandate, Capital Traction Co. v. Hof, 174 U.S. 1 (1899), which it is useful to set forth in these rules. Since the rules are to be enacted by the Congress, considerations of whether the matter involves procedure or evidence are lacking in importance. Incorporating the principle in these rules is simpler than amending both the Civil and Criminal Rules.

RULE 201

Rule 201. Judicial Notice [of Adjudicative Facts]

[(a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.]

[(b)](*a*) Kinds of facts.—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[(c)](*b*) When discretionary.—A judge or court may take judicial notice, whether requested or not.

[(d)](*c*) When mandatory.—A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

[(e)](*d*) Opportunity to be heard.—A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

[(f)](*e*) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.

[(g) Instructing jury.—The judge shall instruct the jury to accept as established any facts judicially noticed.]

The committees are sympathetic to the Subcommittee's dissatisfaction with the term "adjudicative." It is believed, however, that a basic and fundamental difference exists between the historical facts of the particular litigation and social, economic, and scientific data that enter into the lawmaking process, whether by legislature or courts. The former have always been thought to demand a high measure of certainty, while the latter have been treated on the same basis of informality as has governed ascertainment of what the law generally is or ought to be. The deletion of subdivision (a) of the rule would leave both kinds of facts equally subject to the very narrow confines of subdivision (b), a situation in which the judicial system could scarcely function. See, for example, the Hawkins case, discussed in the Advisory Committee's Note, as an illustration of the liberality traditionally found with respect to judicial notice of "legislative" facts. The charge imposed upon the judiciary by proposed amended Rule 501, to interpret the common law in the light of reason and experience, would face a virtually insurmountable obstacle in the amendment. The committees suggest a return to the language of the Preliminary Draft of 1969, with some amendment, so that subdivision (a) would read: "This rule governs judicial notice of facts in issue or facts from which they may be inferred. It does not govern judicial notice of matters of law." The expression "matters of law" is sufficiently broad to encompass "legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic

and social facts or findings or that indicate contemporary opinion, and similar materials." Cal. Ev. Code 1965, §450, Comment. The rule would not, of course, bar the judiciary from considering such matters when appropriate but would simply free them from the restraints of the rule.

The committees believe that subdivision (g) should be retained for the reasons set forth in the Advisory Committee's Note. The objection taken in the Subcommittee Note is believed to be met by the provisions of subdivision (e) of the rule; if at any time counsel has evidence showing that a judicially noticed matter is subject to reasonable dispute, the judge can take appropriate remedial measures as in other situations where he determines that an earlier ruling was erroneous in light of subsequent developments.

RULE 301

Rule 301. Presumptions in General *in Civil Actions*

In all *civil* [cases] *actions* not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

The substitution of "civil actions" may have the unintended effect of excluding proceedings and cases in bankruptcy from the application of the rule. Proceedings in bankruptcy are not regarded as "actions" and the civil rules which do apply to civil actions, do not apply to bankruptcy proceedings except as made applicable by the bankruptcy rules. Compare Evidence Rule 1101(b), which

distinguishes between civil actions and proceedings and cases under the Bankruptcy Act.

RULE 302

Rule 302. Applicability of State Law in Civil [Cases] *Actions*

In civil actions, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

The caption should be restored and the text amended to read "cases" in lieu of "actions." In this instance the text of Rule 302 as transmitted to the Congress is in error. See comment to Rule 301, above.

RULE 303

[Rule 303. Presumptions in Criminal Cases

[(a) Scope.—Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

[(b) Submission to jury.—The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

[(c) Instructing the jury.—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.]

Subcommittee Note

Rule 303 was deleted since the subject of presumptions in criminal cases is dealt with in the proposals of the Brown Commission and S. 1 to revise the criminal code. The Subcommittee determined to consider the issue in the course of its study of these proposals, commencing later this Congress.

The committees recognize that the decision to defer consideration represents a legislative procedural determination.

RULE 402

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority*. Evidence which is not relevant is not admissible.

The committees express no disagreement with the language of the amendment.

RULE 404

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. [This subdivision does not exclude the evidence when offered] *It may, however, be admissible* for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The committees express no disagreement with the amendment to subdivision (b).

RULE 405

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

Subcommittee Note

The Subcommittee approved subdivision (b) as proposed by the Court with the specific understanding that the Rule applies only in those relatively rare situations where character is truly an issue in the case.

The committees agree with the interpretation of subdivision (b) set forth in the Subcommittee Note.

Rule 501. [Privileges Recognized Only as Provided] *General Rule*

[Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience: Provided, That in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Believing that privileges in the federal courts should be uniform and governed by federal law, the committees are unable to concur with the treatment given privilege by the Subcommittee. While Rules 502-513 if enacted as prescribed by the Court would no doubt make for uniformity in criminal prosecutions, federal question cases, and generally in bankruptcy, the proposed amendment injects an element of doubt. Experience under Rule 26 of the Criminal Rules offers small encouragement for the evolution of a comprehensive and uniform scheme of privileges through the decision-making process. It is hoped that the Subcommittee considers its general approach to privileges no more than a temporary expedient and proposes to return to the subject.

For the reasons set forth in the Advisory Committee's Note to Rule 501, the committees are also unable to agree with

the amendment's particularized treatment of privileges in diversity cases. In brief, the amendment would leave privileges created by State law in the peculiar posture of being effective in diversity cases but ineffective in other federal cases, notably in criminal cases which undoubtedly lie in the area of greatest sensitivity. With these privileges thus rendered largely illusory, their limited recognition is explainable only in terms of possible impact on the outcome of litigation, a result which has been rejected generally elsewhere in the federal procedural field.

RULE 601

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. *However, in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.*

The committees are unable to concur in the amendment. Rules governing the competency of witnesses are essentially legal formulations of credibility, and credibility seems undeniably to be a matter of procedure. To the extent that they are designed to affect outcome, the same is true of procedural provisions generally. The Erie argument thus fails to convince. Moreover, the amendment applies all State rules of competency, not merely those found in the Dead Man's Acts. In this respect it goes beyond the expressions received by the Advisory Committee.

A nationwide study of Dead Man's Acts was made for the Advisory Committee. While the study disclosed wide adherence to the philosophy that the estates of decedents ought to be protected against legal attacks based on perjured testimony, the implementation of this sentiment assumed so great a variety of forms as to lead inescapably to the conclusion that failure is a foregone conclusion. The study was too extended to permit its inclusion in the Advisory Committee's Note, but it has been made available to the Subcommittee. The committees believe that any encouragement of the perpetuation of this remnant of the common law rule of incompetency of parties and interested persons is a disservice to the law of evidence.

Note should also be taken of the fact that the amendment is a step backward from present Civil Rule 43(a), which would be supplanted.

RULE 606

(b) Inquiry into validity of verdict or indictment.— Upon an inquiry into the validity of a verdict or indictment, a juror may not testify [as to any matter or statement occurring during the course of the jury's deliberations or to] *concerning* the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith [except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror]. Nor may his affidavit or evidence of any statement by him [concerning a matter about which he would be precluded from testifying] *indicating an effect of this kind* be received *for these purposes.*

While the committees are satisfied with subdivision (b) as transmitted to the Congress, the difference between it and the amendment is believed not to be great enough to warrant disagreement with the amendment.

RULE 608

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness [and not remote in time], be inquired into on cross-examination of the witness [himself] or on cross examination of a witness who testifies to his character for truthfulness or untruthfulness] *(1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.*

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The committees express no disagreement with the amendment to subdivision (b).

RULE 609

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible *if*, but only if [the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2)] *(1) the crime* involved dishonesty or false statement [regardless of the punishment], *or (2) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction.*

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of *conviction or of* the release of the witness from confinement [imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction], whichever is the later date.

• • •

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, *in a criminal case*, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

The committees express no disagreement with the amendments to subdivisions (a), (b), and (d). Attention is, however, directed to a possible ambiguity in subdivision (a) with regard to whether the "unless" clause applies to both categories of crime or only to those in category (2). The problem could be avoided by reversing the two numbered categories, thus conforming clearly with the meaning expressed in the Subcommittee Note.

RULE 611

(b) Scope of cross-examination.—[A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.] *Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.*

(c) Leading questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. In civil [cases] *actions*, a party is entitled to call an adverse party or witness identified with [him] *such adverse party* and interrogate by leading questions.

With regard to subdivision (b), the committees reaffirm the treatment of scope of cross-examination set forth in the rule as transmitted to the Congress but recognize the existence of a substantial division of opinion in the profession.

With regard to subdivision (c), see the comment on Rule 301, above.

RULE 612

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, [either before or while testifying] *either*—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice.

an adverse party is entitled to have [it] *the writing* produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in his discretion determines that the interests of justice so require, declaring a mistrial.

The committees recognize that resistance has been encountered with regard to the treatment of documents consulted by a witness prior to taking the stand in the rule as transmitted to the Congress. The amendment appears to be an acceptable compromise of the competing interests at stake, and the committees express no disagreement with it.

RULE 801

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him: *Provided, That a prior inconsistent statement under clause (A) shall not be admissible as proof of the facts stated unless it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury*; or

The amendment would virtually destroy the utility of clause (d)(1)(A), which allows prior inconsistent statements to be used as substantive evidence. The instances in which the rule as proposed to be amended would operate would be relatively few in number, because, the prior statement having been made under oath, the threat of a perjury charge would make it highly unlikely that the witness would subsequently relate a different story on the stand, again under oath. The problem area consists of cases in which the prior statement

was not under oath, and a rule which fails to encompass those cases is of slight practical significance.

The first of the two justifications given for the amendment in the Subcommittee Note is that "unlike in other situations, there can be no dispute as to whether the prior statement was made." The underlying assumption appears to be that some factor is present with regard to prior inconsistent statements that requires an extraordinarily high degree of assurance that the statement was in fact made. The nature of this factor is not, however, explained. Presumably the assurance would take the form of a written transcript of testimony, yet the amendment requires none, and it is well established under existing law that former testimony may be proved by the testimony of any person who was present and heard it given. Indeed, many out-of-court statements are now admissible without any requirement that they be in writing. Among them are admissions, including confessions, spontaneous utterances, statements for purposes of diagnosis or treatment, declaration of pedigree, reputation of various kinds, dying declarations, and declarations against interest, as well as former testimony.

The second justification given in the Subcommittee Note for the amendment is that "the context of a formal proceeding and an oath provide firm additional assurances of the reliability of the statement." The premise of the rule as transmitted to the Congress is that sufficient assurances

are already present in the circumstances, without the addition of the further highly limiting provisions of the amendment. If the premise of the amendment is that a statement not made under penalty of perjury is insufficient standing alone to support a conviction and ought therefore not to be admitted, a confusion between the distinct concepts of sufficiency and admissibility is present. If every item of evidence were required to be sufficient to sustain a verdict in order to be admissible, few items, particularly of circumstantial evidence, would ever be admitted. No one claims that this is so. See Advisory Committee's Note to Rule 401. Moreover, of the many kinds of hearsay admitted in evidence, only one, former testimony, is given under oath.

Prior to its action in prescribing the rule, the Supreme Court had occasion to examine a similar provision in the California Evidence Code. While the specific issue before the Court was whether the provision violated the constitutional right of confrontation, the Court's treatment of that question is equally applicable to the question whether a rule of this kind represents a wise approach to the problems of hearsay as a matter of policy. The Court said:

> ...Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [11]

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[11] 5 Wigmore §1367.

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(3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement. The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth." State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). That danger, however, disappears when the witness has changed his testimony so that, far from "hardening," his prior statement has softened to the point where he now repudiates it. [12]

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[12] See Comment, Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence, 4 U.Rich.L.Rev.110, 117-118 (1969); 82 Harv.L.Rev.475 n.16 (1968).

The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a "hostile" witness giving evidence for the prosecution. This difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event. Under such circumstances, the defendant is not likely to be hampered in effectively attacking the prior statement, solely because his attack comes later in time.

Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost.

It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position," but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence[13] nor reason

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13 The California Supreme Court in its earlier decision on this issue stated that "[t]his practical truth [the importance of immediate cross-examination] is daily verified by trial lawyers, not one of whom

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would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client." People v. Johnson, 68 Cal. 2d 646, 655, 441 P.2d 111, 118 (1968), cert. denied, 393 U.S. 1051 (1969). The citations that follow this sentence are to books on trial practice that shed little empirical light on the actual comparative effectiveness of subsequent, as opposed to timely, cross-examination. As the text suggests, where the witness has changed his story at trial to favor the defendant he should, if anything, be more rather then less vulnerable to defense counsel's explanations for the inaccuracy of his former statement.

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convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

California v. Green, 1970, 399 U.S. 149, 158-161.

The committees are unable to express agreement with the proposed amendment.

RULE 802

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority* or by Act of Congress.

The committees express no disagreement with the language of the amendment. See comment under Rule 402.

RULE 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(6) Records of regularly conducted *business or professional* activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses,

made at or near the time by, or from information transmitted by, a person with knowledge, [all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness,] *if kept in the course of a regularly conducted business or professional activity, and if it was the regular practice of such business or professional activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*

(7) Absence of entry in records [of regularly conducted activity] *kept in accordance with the provisions of paragraph (6).*—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, [of a regularly conducted activity] *kept in accordance with the provisions of paragraph (6),* to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law, or (C) in civil [cases] *actions* and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

. . .

[(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

The committees are unable to agree with the amendment to subdivision (6) of the rule. The amendment limits records within this hearsay exception to those kept in the course of a "business or professional activity." This provision is much narrower than present 28 U.S.C. §1732(a), which uses the term "business" but defines it rather broadly to include "business, profession, occupation and calling of every kind." The joint committees believed that even this

definition was not sufficiently broad to meet present day needs. Compare the definition in subdivision (b) of 28 U.S.C. §1732.

Subdivision (7) of the rule would require revision to conform with action taken with regard to subdivision (6).

As to subdivision (8), see comment under Rule 301.

The committees are unable to agree with the proposal to delete subdivision (24). The common law developed the existing hearsay exceptions on a case-by-case basis, and this useful process should be permitted to continue. Neither the rulemaking nor the legislative process possesses the promptness and flexibility required to respond effectively to the immediate needs of a live case pending in the trial court. Compare the Subcommittee's proposal in amended Rule 501 that privilege be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." A formulation of this sort might be included in subdivision (24) in lieu of deleting that subdivision entirely.

RULE 804

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant—

. . .

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance *or testimony* by process or other reasonable means.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity to develop the testimony by direct, cross, or redirect examination.*

[(2) Statement of recent perception.—A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.]

[(3)](2) Statement under belief of impending death.—[A] *In a prosecution for homicide or in a civil case, a* statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

[(4)](3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to [civil or] criminal liability [or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace,] that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless [corroborated.] *corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not admissible.*

. . .

[(6) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

The committees are unable to agree with the proposed amendment to subdivision (a)(5), requiring exhaustion of the possibilities of taking the deposition of the declarant. The most commonly encountered of the hearsay exceptions under this

rule is that for former testimony, which in appearance and reality is virtually indistinguishable from a deposition. The suggested additional requirement would compel the wasteful and needless redoing of what has already been done. Depositions are expensive and time-consuming, and the quality of the evidence under all the hearsay exceptions of this rule are such as to justify doing without this needless pretrial complication. In any event, deposition procedures are available for those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the proposed amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule 32(a)(3) and Criminal Rule 15(e) a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

The committees are unable to agree with the proposed amendments to subdivision (b)(1). A return to the older common law requirement of identity of the party against whom offered (or privity) is needlessly restrictive. Subjecting the evidence to a winnowing and sifting process by a party with like interests furnishes a guarantee of trustworthiness much like that found in declarations against interest. Modern authority supports this position. Tug Raven v. Trexler, 413 F.2d 536 (4th Cir. 1969) (testimony at Coast Guard inquiry admissible in wrongful death action); Cox v. Selover, 171 Minn. 216,

213 N.W. 902 (1927) (testimony against guarantor with corporate connections admissible against corporate guarantor); Bartlett v. Kansas City Public Service Co., 349 Mo. 13, 160 S.W.2d 740, 142 A.L.R. 666 (1942) (testimony for defendant in suit by husband admissible in suit by wife); Travelers Fire Ins. Co. v. Wright, 332 P.2d 417 (Okla. 1958) (testimony against one partner in criminal prosecution for arson admissible in action on fire policy by partners). In another respect, however, the amendment appears unduly lenient in failing to incorporate an equivalent of the common law requirement that the issues be identical or at least similar, with a view to insuring that there was adequate motivation to explore the testimony. In lieu of the mechanical method of the common law, the rule as transmitted to the Congress required that the party to the former proceeding have had a motive and interest similar to those of the party against whom subsequently offered.

The committees are unable to agree with the proposal to delete subdivision (b)(2). The subdivision is designed to avoid the loss of valuable evidence, which may be readily evaluated by a jury, and it is carefully hedged about with safeguarding provisions designed to prevent abuse.

The committees are unable to agree with the amendment to subdivision (b)(3). The illogic of excluding the evidence in nonhomicide criminal cases is evident. Thus, under the amendment, in a narcotics prosecution the dying declaration

of a gang member who had been "executed" would fail to qualify. Cognizance should be taken of the narrow subject-matter scope of the rule, as safeguarding against abuse.

The committees are unable to agree with certain of the amendments to subdivision (b)(4). The proposal to exclude declarations tending to expose the declarant to civil liability or to undermine a claim that he might assert does, it is true, leave declarations against "pecuniary" interest undisturbed in the rule. The latter is, however, apparently intended to be read in the narrow traditional English sense of an acknowledgement of a liquidated debt. The result is contrary to modern cases, including federal, extending the exception to admissions of tort and other unliquidated liabilities. See, e.g. Gichner v. Antonio Triano Tile and Marble Co., 133 U.S.App.D.C. 250, 410 F.2d 238 (1968) (statement that declarant had smoked in building later found burned, held sufficiently against interest). The proposal also fails to afford a satisfactory answer as to the admissibility of a confession of fault by a decedent in jurisdictions holding that privity between decedent and his administrator is lacking in wrongful death actions with the result that declarations of the decedent are denied the status of admissions. Insofar as the amendments exclude declarations tending to make the declarant an object of hatred, ridicule, or disgrace, the pattern of authority is, of course, much less apparent. It is believed, however, that these factors may furnish a motive more powerful than fear of punishment or financial loss.

The committees express no disagreement with the rephrasing in general of the corroboration requirement of subdivision (b)(4). They do suggest, however, deletion of the word "clearly" as imposing a burden beyond those ordinarily attending the admissibility of evidence, particularly evidence offered by defendants in criminal cases, and as providing a prolific source of disputes and appeals.

The committees express no disagreement with the proposed final sentence to be added to subdivision (b)(4). The wording may, however, invite confusion, and it is suggested that "not admissible" be replaced by "not within this exception." The result is consistent with the Subcommittee Note.

The committees disagree with the proposal to delete subdivision (b)(6) for the same reasons stated concerning the similar proposal to delete subdivision (24) of Rule 803.

RULE 901

(10) Methods provided by statute or rule.—Any method of authentication or identification provided by Act of Congress or by other rules [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.*

The committees express no disagreement with the language of the amendment to subdivision (10). See comment to Rule 402.

RULE 902

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.*

. . .

(8) Acknowledged documents.--Documents accompanied by a certificate of acknowledgment [under the hand and seal of] *executed in the manner provided by law by* a notary public or other officer authorized by law to take acknowledgments.

The committees express no disagreement with the language of the amendment to subdivision (4). See comment to Rule 402.

The committees agree with the amendment to subdivision (8).

RULE 1001

Rule 1001. Definitions

For purposes of this article the following definitions are applicable.

. . . . . .

(2) Photographs.—"Photographs" include still photographs, X-ray films, *video tapes*, and motion pictures.

The committees agree with the amendment to subdivision (2).

RULE 1101

(c) Rule of privilege.—The [rules] *rule* with respect to privileges [apply] *applies* at all stages of all actions, cases, and proceedings.

. . .

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules [adopted] *prescribed* by the Supreme Court *under statutory authority*: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial *de novo* under section 706(2)(F) of title 5, United States Code; [review of orders of Secretary of Agriculture under sections 292, 499f and 499g (c) of title 7, United States Code; naturalization and revocation of naturalization under sections 1421–1429 of title 8, United States Code; prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of Secretary of the Interior under section 522 of title 15, United States Code; review of orders of

petroleum control boards under section 715d of title 15, United States Code; actions for fines, penalties, or forfeitures under the Tariff Act of 1930 (19 U.S.C., c. 4, part V), or under the Anti-Smuggling Act (19 U.S.C., c. 5); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C., c. 9); disputes between seamen under sections 256-258 of title 22, United States Code; habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside, or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 679 of title 46, United States Code; actions against the United States for damages caused by or for towage or salvage services rendered to public vessels under chapter 22 of title 46, United States Code, as implemented by section 7730 of title 10, United States Code.]

review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize associations of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code, motions to vacate, set aside, or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

The final form of subdivision (c) will depend upon action taken with regard to Rule 501.

The committees express no disagreement with the language of the amendment to subdivision (e). See the comment to Rule 402.

MATTERS OF STYLE

The committees suggest that the original numbering of the rules be retained, even though a rule or subdivision is deleted entirely. This would appear to be in order as a means of avoiding confusion with regard to the large body of legal literature (opinions, law review articles, texts) in which references to the rules as transmitted to the Congress are already found.

In order to conform to the usage followed in drafting the rules the committees also suggest use of "judge" rather than "court" unless the context clearly requires otherwise. See, e.g., the amendment to Rule 612.

PROPOSED SECTION 2 OF HR 5463

Sec. 2. Title 28 of the United States Code is amended—

(1) by inserting immediately after section 1656 the following new section:

"§ 1657. Rules of Evidence

"The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect."; and

(2) by adding at the end of the table of sections of chapter 111 the following new item:

"1657. Rules of Evidence."

The committees approve the proposal to add a section 1657 to title 28 U.S.C., which would confer upon the Supreme Court power to prescribe amendments to the Federal Rules of Evidence. After these rules have become effective by Act of Congress there will undoubtedly arise instances in which amendments will be found to be in the interest of justice and it will be very much in the public interest in this way to make it perfectly clear that the Court is empowered to deal with them. Likewise the committees are satisfied that it is appropriate to require that all such amendments be reported to the Congress and that they shall not take effect until a specified time has elapsed after they have been so reported, the exact length of that period of time being for the Congress to determine.

The proposed amendment further provides that if either House of Congress disapproves any rules amendment prescribed by the Supreme Court it shall not take effect. The committees understand the problem which this proposal is designed to meet but believe that it is unsound in principle and that it might in practice in some instances defeat a necessary exercise of the rule amending power which the section is designed to grant. It is suggested that the problem which the Subcommittee is seeking to meet could be taken care of adequately by a substitute provision that either

House of Congress should have authority by resolution to postpone the effective date of a rules proposal received from the Supreme Court for such a period of time as it might deem necessary to enable the Congress to give full consideration to it and to take action upon it.

The difficulty which the committees see in the proposal to give a single House of Congress veto power over rules proposals of the Court is that it would make it possible for one House to reject a rules amendment of which the other House approves, thus placing the Court in the impossible position of not being able to meet what might be an urgent problem except by a rule which would be destined for rejection by one House or the other. The committees believe that in a matter as vital to the proper administration of justice as procedural rulemaking, the Supreme Court, having been given primary responsibility, is entitled to have any action by the Congress in this field take the form of binding law, just as the Subcommittee is proposing to do in the case of the Federal Rules of Evidence, and not as a mere negative reaction from a single House.

It is believed, as suggested above, that both objectives, i.e., the need of each House of Congress to have ample time to consider and act upon rules amendments and the need of the Supreme Court, the bench and the bar to have the guidance of statutory law when the Congress acts in this area, will be met if each House is given independent

authority to postpone the effective date of a rules proposal prescribed by the Supreme Court for a period of time sufficient to enable both Houses to act on it.

PROPOSED
RULES OF BANKRUPTCY PROCEDURE

Title V

CHAPTER XI RULES

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE
of the
JUDICIAL CONFERENCE OF THE
UNITED STATES

September 1973

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CHAPTER XI RULES

Rule 11–1. Scope of Chapter XI Rules and Forms; Short Title

The rules and forms in this Title V govern the procedure in courts of bankruptcy in cases under Chapter XI of the Bankruptcy Act. These rules may be known and cited as the Chapter XI Rules. These forms may be known and cited as the Official Chapter XI Forms.

ADVISORY COMMITTEE'S NOTE

A "Chapter XI case," as defined in Rule 11–3, is one wherein a petition has been filed by a person seeking relief under Chapter XI of the Bankruptcy Act. The case includes all of the proceedings and matters which arise in connection with the case and of which the court of bankruptcy is given jurisdiction under Chapter XI and incorporated provisions of Chapters I–VII of the Act. See § 302. These rules and forms thus do not apply to a case initiated under Chapters I–VII of the Act unless a Chapter XI petition is filed in a pending backruptcy case pursuant to Rule 11–7, nor to a case initiated under other debtor-relief chapters (VIII, IX, XII, XIII) or Chapter X unless an order is entered therein directing that the case proceed under Chapter XI. Nor do these rules prescribe except incidentally the practice for actions or "plenary proceedings" brought in state courts or federal district courts to determine controversies that arise in connection with a Chapter XI case.

"Courts of bankruptcy" are defined in § 1(10) of the Bankruptcy Act, 11 U.S.C. § 1(10), to "include the

United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable." (References to the Bankruptcy Act hereinafter will be to the Act and will omit citations to Title 11 of the United States Code.) The courts of bankruptcy clearly include the district courts of Guam and the Virgin Islands. 1 Collier, *Bankruptcy* ¶ 1.10 at 71–72 n. 22 (14th ed. rev. 1968), citing relevant statutory provisions. (Hereinafter citations to the Collier treatise will omit the title and references to the edition but will include the date of the revision of the cited material.) It is problematical whether the District Court for the District of the Canal Zone is a bankruptcy court, but it appears that the court has not undertaken to act as a court of bankruptcy. 1 Collier, *supra* at 72.

Rule 11– 2. Meanings of Words in the Bankruptcy Rules When Applicable in a Chapter XI Case

The following words and phrases used in the Bankruptcy Rules made applicable in Chapter XI cases by these rules have the meanings herein indicated, unless they are inconsistent with the context:

(1) "Bankrupt" means "debtor."

(2) "Bankruptcy" or "bankruptcy case" means "Chapter XI case."

(3) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means the "receiver," "trustee," or "debtor continued in possession" in the Chapter XI case.

ADVISORY COMMITTEE'S NOTE

These rules make many of the Bankruptcy Rules applicable in Chapter XI cases or in proceedings therein, and this rule indicates the substitution or translation of certain terms that is necessary for this purpose.

Rule 11-3. Commencement of Chapter XI Case

(a) Method of Commencement.

A Chapter XI case is commenced by filing a petition with the court seeking relief under Chapter XI of the Act.

(b) When Case May Be Commenced. The petition under Chapter XI may be an original petition or it may be filed in a bankruptcy, Chapter XII, or Chapter XIII case.

ADVISORY COMMITTEE'S NOTE

This rule prescribes the mode for beginning a Chapter XI case, whether by filing an original petition or a petition in a pending bankruptcy case. Original petitions are governed by Rule 11-6 and petitions in pending bankruptcy cases by Rule 11-7 which are derived from §§ 321 and 322 of the Act. A case may also proceed under Chapter XI pursuant to an order entered in a pending Chapter X case. A proceeding initiated by a petition or pursuant to an order in a Chapter X case is designated a "Chapter XI case" for the purposes of these rules. The term embraces all the controversies determinable by the court of bankruptcy and all the matters of administration arising during the pendency of the case. The word "proceeding" as used in these rules generally refers to a litigated matter arising within a case during the course of administration. See particularly Bankruptcy Rule 703, made applicable under Chapter XI by Rule 11-61. The rule assumes the continuing applicability of the definition of petition in § 306(5) of the Act but, as used in these rules, the word refers to the document commencing a Chapter XI case. The place of filing a petition is more fully particularized in Bankruptcy Rule 509.

While § 321 refers only to the filing of a Chapter XI petition in a pending bankruptcy case, subdivision (b) of this rule makes explicit that the pending case may also be a Chapter XII or Chapter XIII case. If a Chapter X case were pending, Rule 10-117 of the Chapter X rules would apply to the conversion of the case to Chapter XI.

Rule 11-4. Chapter XI Cases Originally Commenced Under Another Chapter of the Act

When a case commenced under another chapter of the Act proceeds under Chapter XI, the Chapter XI case shall be deemed to have been originally commenced as of the

date of the filing of the first petition initiating a case under the Act.

ADVISORY COMMITTEE'S NOTE

The purpose of this rule is to protect those rights that develop upon the filing of a petition commencing any case for relief under the Bankruptcy Act. The first case may have been a bankruptcy case which was then transferred to Chapter XI by petition, or a Chapter X case which was transferred to Chapter XI. This rule is not intended to invalidate any action taken in the superseded ~~proceeding~~ case before it was converted to a Chapter XI case.

, Chapter XII or Chapter XIII

by order. See Rules 11-3 and 11-7.

Rule 11-5. Reference of Cases; Withdrawal of Reference and Assignment

Bankruptcy Rule 102 applies in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

Bankruptcy Rule 102 contains a reference to Bankruptcy Rule 115(b) which, because it deals with involuntary petitions, is inapplicable in Chapter XI cases. That cross reference would, therefore, also be inapplicable.

Rule 11-6. Original Petition

An original petition under Chapter XI of the Act shall conform substantially to Official Form No. 11-F1. An original and 4 copies of the petition shall be filed, unless a different number of copies is required by local rule. The clerk shall transmit one copy to the District Director of Internal Revenue for the district in which the case is ~~brought~~ filed, and one copy to the Secretary of the Treasury.

and, if the debtor is a corporation, one copy to the Securities and Exchange Commission at Washington, District of Columbia

ADVISORY COMMITTEE'S NOTE

Official Form No. 11-F1 (*Original Petition under* Chapter XI) has been simplified and shortened but retains the essential features of the official form for a debtor's petition promulgated under former § 30 of the Act. Although no copy of this petition is required to be served on any adverse party, the rule continues the requirement of § 59c of the Act that three copies be filed for court purposes although the petition need not be filed in triplicate original. The rule incorporates the requirements of § 394 and General Order 48(3) with respect to transmittal of copies of the petition to the Secretary of the Treasury and the District Director of Internal Revenue. Additionally, note should be taken of local rules to determine whether or not any additional copies must be filed.

If the debtor is a corporation a copy of the petition must also be sent to the Securities and Exchange Commission. Attached to Official Forms Nos. 11-F1 and 11-F2 is Exhibit "A" which contains information needed by the SEC at the beginning stages of a Chapter XI case of a corporate debtor.

As provided in Rule 11-44, the filing of the petition acts as a stay of other proceedings against the debtor, except a pending Chapter X case.

Only the original need be signed and verified, but the copies must be conformed to the original. See Bankruptcy Rule 911(c). The petition must be filed with the clerk as provided in Bankruptcy Rule 509(a).

Rule 11-7. Petition in Pending Bankruptcy Case

If a bankruptcy case is pending by or against the debtor, any petition under Chapter XI shall be filed therein and may be filed before or after adjudication. Such petition shall conform substantially to Official Form No. 11-F2. The number and distribution of copies shall be as specified in Rule 11-6. The filing of the petition shall act as a stay of adjudication ~~or~~ of administration of ~~the~~ estate in bankruptcy. The court may, for cause shown, terminate, annul, modify or condition the stay.

or a case under Chapter XII or XIII

an

,

and

ADVISORY COMMITTEE'S NOTE

Official Form No. 11-F2 (Chapter XI Petition in Pending ~~Bankruptcy~~ Case) is new. It is designed for use where a bankruptcy case is pending on a petition by or against the debtor and must be filed with the court in which the ~~bankruptcy~~ case is pending. See Rule 11-13(a). Although no copy of the petition is required to be served on any adverse party, the rule continues the requirement of § 59c of the Act that the court have 3 copies of the petition. See Rule 11-6.

or a case under Chapter XII or XIII

other

Although Bankruptcy Rule 509 specifies that the petition is to be filed with the clerk, the petition under this rule in a pending ~~bankruptcy~~ case should be filed with the referee because it is being filed after reference. The court should transmit the copies of the petition as provided in Rule 11-6.

The rule changes the thrust of § 325 of the Act by staying automatically the adjudication or administration of the estate in a bankruptcy case rather than rendering it discretionary with the court to order a stay. As provided in Rule 11-44 the filing of the petition also acts as a stay of most other proceedings against the petitioner. For cause shown, however, the automatic stay may be terminated, modified, etc. as may be necessary in a particular case, and some actions in the pending case may be permitted, such as a sale of property where it would be improvident to halt the sale by the mere filing of the Chapter XI petition.

This stay does not operate to impede the administration of a pending Chapter XII or XIII case. A specific order to that effect could, however, be entered. The stay of administration referred to in this rule is the administration of a straight bankruptcy case under Chapters I-VII of the Act.

Only the original need be signed and verified, but the copies must be conformed to the original. See Bankruptcy Rule 911(c).

Rule 11-8. Partnership Petition

A petition may be filed pursuant to Rule 11-6 or 11-7 by all the general partners on behalf of the partnership.

ADVISORY COMMITTEE'S NOTE

A partnership as such is a debtor capable of being bankrupt under § 4 of the Act and thus is entitled to the benefit of Chapter XI pursuant to § 306(3). There is some question within the Act whether or not a partnership petition may properly be filed by less than all of the general partners. Under § 5 of the Act and Bankruptcy Rule 105 a petition commencing a bankruptcy case may be filed by less than all of the general partners. This procedure, however, is more akin to an involuntary petition, requiring service of the petition on nonassenting partners and a hearing on adjudication, which is inconsistent with the voluntary nature of a Chapter XI case for arrangement. This rule requires a petition on behalf of a partnership to be filed by all of the general partners. This does not mean, necessarily, that all of the general partners physically execute the petition. While all must consent to the petition, less than all may execute the petition which would be on behalf of all. See 8 Collier, ¶ 4.02[4.3] (1963).

Rule 11–9. Caption of Petition

Bankruptcy Rule 106 applies in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

The last sentence of Bankruptcy Rule 106 has reference to involuntary petitions and would therefore not be applicable in a Chapter XI case.

Rule 11–10. Filing Fees

Every petition filed pursuant to Rule 11–6 shall be accompanied by the prescribed filing fees.

ADVISORY COMMITTEE'S NOTE

Filing fees for Chapter XI cases are prescribed by § 324(2) which incorporates §§ 40c(1), 48c and 52a

of the Act. Additional fees and charges may be prescribed in accordance with schedules and regulations approved by the Judicial Conference of the United States pursuant to §§ 40c(2) and (3) of the Act and 28 U.S.C. § 1914(b).

If the original petition commenced a Chapter XIII case, an additional filing fee would be required to be paid with the Chapter XI petition.

Rule 11-11. Schedules, Statement of Affairs, and Statement of Executory Contracts

(a) Schedules and Statements Required. The debtor shall file with the court schedules of all his debts and all his property, a statement of his affairs, and a statement of his executory contracts, prepared by him in the manner prescribed by Official Forms No. 11-F5 and either No. 11-F6 or No. 11-F7, whichever is appropriate. The number of copies of the schedules and statements shall correspond to the number of copies of the petition required by these rules.

(b) Time Limits. Except as otherwise provided herein, the schedules and statements, if not previously filed in a pending bankruptcy case, shall be filed with the petition. A petition shall nevertheless be accepted by the clerk if accompanied by a list of all the debtor's creditors and their addresses, and the schedules and statements may be filed within 15 days thereafter in such case. On application, the court may grant up to 30 additional days for the filing of schedules and the statements; any further extension may be granted only for cause shown and on such notice as the court may direct.

or Chapter XII

(c) Partnership. If the debtor is a part-

nership, the general partners shall prepare and file the schedules of the debts and property, statement of affairs, and statement of executory contracts of the partnership.

(d) Interests Acquired or Arising After Petition. Bankruptcy Rule 108(e) applies in Chapter XI cases except that the supplemental schedule need not be filed with respect to property or interests acquired after confirmation of a plan.

ADVISORY COMMITTEE'S NOTE

Subdivision (a): This rule is an elaboration of § 7a(8) and (9) and § 324(1) of the Act. This list of creditors has been referred to in Schedule A of Official Form 11-F5 as the schedule of debts, and the latter designation is employed in the rules and official form as revised. Section 324 has required the schedules of property, list of creditors and statements to be filed in triplicate, and § 59c of the Act has required petitions to be filed in the same number. Rules 11-6 and 11-7 require petitions to be filed in an original and 4 copies. Each required copy of a petition must be accompanied by a copy of schedules, statement of affairs and statement of executory contracts except as provided in subdivision (b). Only the original need be signed and verified, but the copies should be conformed to the original. See Bankruptcy Rule 911(c).

Subdivision (b) retains the requirement of § 324(1) that the schedules, statement of affairs and statement of executory contracts accompany a petition filed under Rule 11-6 unless a list of creditors and their addresses accompanies the petition. If the Chapter XI petition is filed under Rule 11-7 and schedules, and statement of affairs have already been filed in ~~the~~ a pending bankruptcy case on Official Forms No. 6 and 7 or 8, they need not be refiled on Official Forms No. 11-F5 and 11-F6 or 11-F7 or on Official Forms No. 12-F5 and 12-F6 or 12-F7 in a pending Chapter XII case, unless previously filed in a Chapter XII case, however, the statement of executory contracts must ~~in all cases~~ be filed but no Official Form is provided.

Whereas the option to file with the petition a list of creditors with their addresses is available to the debtor under § 324(1) only if he also files a summary of assets and liabilities and if the court for cause shown gives him further time for filing the schedules and statements, the rule allows the debtor 15 more days for filing the schedules and statement without the necessity of applying for and obtaining an extension of time from the court. A debtor frequently has an urgent need for relief available under Chapter XI of the Act, and allowing him up to 15 days in which to provide the information required on the schedules and in the statements will be less productive of administrative inconvenience and delay than the present requirement of an application for extension of time. Extensions of time beyond the 15 day period allowed by the second sentence of subdivision (b) are governed by the last sentence of the subdivision and by Bankruptcy Rule 906(b). An extension for up to 30 days may be granted on application to the court, but any further extension may be made only for cause shown and after notice as the court may direct.

Subdivision (c), prescribing who shall prepare and file schedules and the statements whenever a debtor is a partnership is new. While the duty to prepare the schedules and the statements of a partnership attaches to all the general partners, one partner may sign these papers on behalf of the partnership. See, *e.g.*, the form of the oath on behalf of a partnership at the foot of Official Form No. 6.

Subdivision (d), which is new, provides a procedure for getting information as to post-petition acquisitions of the debtor prior to confirmation of a plan. This subdivision contemplates that the original schedules and statements will be complete and accurate as of the time of the filing of a petition in bankruptcy, where a petition is filed under Rule 11-7. If that is not the case, they should be corrected by amendment pursuant to Rule 11-12 rather than by the filing of supplemental schedules and statement of affairs pursuant to this rule.

or under Chapter XII

The reference to "bankruptcy" or "date of bankruptcy"

in Bankruptcy Rule 108(e) means the date of the initial petition instituting a case under the Act. The plan or order of confirmation may require the filing of a supplemental schedule if property or interests are acquired before a later date fixed for the revesting of title in the debtor or vesting of title in some other person.

If the ~~proceeding~~ case is converted to bankruptcy, the requirements of subdivision (d) will no longer apply, but the requirements of subdivision (e) of Bankruptcy Rule 11-108 as to reporting post-petition property acquisitions will become applicable.

Rule 11-12. Verification and Amendment of Petition and Accompanying Papers

Bankruptcy Rules 109 and 110 apply in Chapter XI cases to petitions, schedules, statements of affairs, statements of executory contracts, and amendments thereto.

ADVISORY COMMITTEE'S NOTE

Bankruptcy Rules 109 and 110 do not include statements of executory contracts because only schedules and statements of affairs are filed in bankruptcy cases under Bankruptcy Rule 108. In Chapter XI cases however, a statement of executory contracts is required by Rule 11-11 and thus the rules on verification and amendment apply equally to such a statement.

See also Bankruptcy Rule 911(c) requiring that the original be executed and verified and the copies conformed to the original.

Rule 11-13. Venue and Transfer

(a) Proper Venue.

(1) General Venue Requirement. Bankruptcy Rule 116(a)(1) and (2) apply to a petition filed pursuant to Rule 11-6. A

petition filed pursuant to Rule 11-7 shall be filed with the court in which the bankruptcy case is pending.

, Chapter XII, or Chapter XIII

(2) Partner with Partnership or Co-partner. Notwithstanding the foregoing: (A) a petition commencing a Chapter XI case may be filed by a general partner in a district where a petition under ~~Chapter XI or in bankruptcy~~ by or against a partnership is pending; ~~or~~ (B) a petition commencing a Chapter XI case may be filed by a partnership or by any other general partner or any combination of the partnership and the general partners in a district where a petition under ~~Chapter XI or in bankruptcy~~ by or against a general partner is pending.

the Act

the Act

(3) Affiliate. Notwithstanding the foregoing, a petition commencing a Chapter XI case may be filed by an affiliate of a debtor or bankrupt in a district where a petition under ~~Chapter~~ XI ~~or in bankruptcy~~ by or against the debtor or bankrupt is pending.

(b) Transfer of Cases; Dismissal or Retention When Venue Improper; Reference of Transferred Cases. Bankruptcy Rule 116 (b) and (d) apply in Chapter XI cases.

(c) Procedure When Petitions Involving the Same Debtor or Related Debtors Are Filed in Different Courts. Bankruptcy Rule 116(c) applies in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

Paragraph (2) of subdivision (a) incorporates and extends the principle embodied in § 5d of the Act. Like § 2a(1), § 5d has served primarily as a venue provision

though couched in jurisdictional terms. See 1 Collier, ¶ 2.17 [1] (1968). Paragraph (3) goes beyond § 5d by permitting a petition to be filed by a partner or partnership in a district because of the pendency there of a case which may not have been filed in accordance with the provisions of paragraph (1) or (2) of the subdivision that prescribe proper venue for such a case. The procedure for effecting a transfer of both cases, if in the interest of justice and for the convenience of the parties, is provided in subdivision (b). Rule 11-14 *authorizes joint administration of partnership and partners' estates under appropriate circumstances.*

Paragraph (3) of subdivision (a) is derived from but goes considerably beyond § 129 of the Act, *which* authorizes a petition by or against a subsidiary to be filed in a court which has approved a Chapter X petition by or against its parent corporation. An affiliate is defined in Bankruptcy Rule 901(3) to include a subsidiary as defined in Chapter X of the Act (§ 106(13)), a parent corporation, and a variety of persons having connections different from those contemplated by §§ 106(13) and 129 of the Act. Joint administration of the estates of affiliates may be authorized under Rule 11-14.

Rule 11-14. Joint Administration of Cases Pending in Same Court

Bankruptcy Rule 117 (b) and (c) apply in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

This rule recognizes the appropriateness of joint administration in cases where petitions concerning related debtors are pending. Subdivision (a) of Bankruptcy Rule 117 dealing with consolidation of cases involving the same bankrupt is inapplicable in Chapter XI cases. The Chapter XI petition being voluntary, there would not be 2 Chapter XI cases involving the same debtor.

The authority of the court to order a joint administra-

tion under this rule extends to the situation where cases are pending in the same court by virtue of an order from another court pursuant to Rule 11-13.

Rule 11-13. Conversion to Chapter X

(a) ~~*Application*~~ *by Debtor.* A debtor eligible for relief under Chapter X of the Act may, at any time, ~~file an application~~ to have the case proceed under such Chapter.

(b) ~~*Application*~~ *by Party in Interest Other Than Debtor.* At any time until ~~90~~ 120 days after the first date set for the first meeting of creditors in the Chapter XI case, ~~an application~~ may be ~~filed~~ made by the Securities and Exchange Commission or other party in interest to have the case proceed under Chapter X of the Act. ~~The court may, for cause shown, extend the time for filing such application~~. The court may, for cause shown, extend the time for making such motion.

(c) *Form of* ~~*Application*~~*; Answer.* ~~An application filed~~ Motion under this rule shall state why relief under Chapter XI of the Act would not be adequate ~~and that the requirements for approval of a petition under Chapter X have been met. Upon the filing of such application~~ and shall also conform substantially to Official Form No. 10-1. On the making of such motion, the court shall fix a date ~~upon~~ at least 20 days' notice to the parties specified in subdivision (d) of this rule for the filing of answers controverting the allegations of the ~~application~~ motion, which date shall be not less than 10 days before the date set for the hearing under subdivision (d) of this rule.

(d) *Hearing and Order.* After hearing, on notice to the debtor, the Securities and

Exchange Commission, indenture trustee, creditors, and stockholders, and such other persons as the court may direct the court shall, if it finds that the case may properly proceed under Chapter X of the Act, ~~approve~~ grant the ~~application~~ motion and order that the case proceed under that Chapter. The ~~approval~~ granting of the ~~application~~ motion shall be deemed to constitute approval of a petition under Chapter X.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 328 of the Act with several changes. Under § 328 ~~the~~ an application is filed with the district judge but this rule contemplates that the matter will be heard and decided by the bankruptcy judge. The rule provides, in subdivision (b), a time limit within which ~~an application~~ a motion to transfer may be ~~filed~~ made by any party in interest although the court may extend the time for cause. ~~An application filed~~ A motion made by the debtor may be ~~filed~~ made at any time. The rule, as distinguished from § 328, requires a transfer to Chapter X if the court finds after hearing upon notice that the case should have been brought under Chapter X. Section 328 would permit a dismissal if a voluntary or involuntary petition under Chapter X were not filed. Thus, it would be possible, under § 328, that after such a finding the corporate debtor would not be subject to any supervisory control where its financial problems have probably increased substantially.

A Chapter X petition is subject to approval by the court and one of the grounds for denying such approval is that adequate relief can be obtained under Chapter XI. The rule thus requires that any ~~application filed~~ motion made thereunder must allege that such relief is not obtainable under Chapter XI. Additionally, the ~~application~~ motion must allege that the requirements for approval of a Chapter X petition have been met in order for the court to be able to make the finding that the case should have been voluntary

brought under Chapter X An answer to the ~~application~~ may deny the existence of one or more of such requirements. ~~A creditor's application should show the commission of an act of bankruptcy if necessary under Chapter X of the Act.~~

motion

The motion should conform substantially to Official Form No. 10-1 of the Chapter X Forms. This is the form that incorporates the provisions of § 130 of the Act which specify the allegations necessary for a voluntary Chapter X petition.

The effect of the court's order under this rule, if it finds that the case should have been brought under Chapter X, is to have the case proceed thereunder. There would not be the necessity of another hearing on an amended petition or the like Accordingly, the ~~application~~ is treated similar to an amended petition which § 328 contemplated and parties must be afforded an opportunity to contest the ~~application~~ and a hearing on notice must be provided. With the opportunity to file answers, and to have a hearing on notice, the bankruptcy judge can at one time decide the material issues and obviate the necessity for two separate hearings on the same matters. Answers may not be filed thereafter by any party. Approval of the ~~application~~ is deemed to be the same as approval of a Chapter X petition so that relevant consequences and time periods related to approval will be the same.

motion

motion

motion

When a case proceeds under Chapter X pursuant to an order entered under this rule, the continuation of relevant time periods dating from the filing of the first petition is provided for in the Chapter X rules.

Rule 11-16. Death or Insanity of Debtor

In the event of death or insanity of the debtor, a Chapter XI case may be dismissed, or if further administration is feasible and in the best interest of the parties, the estate may be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of § 8 of the Act. If administration continues, it may thereafter be dismissed or converted to bankruptcy for any of the causes any other Chapter XI case may be dismissed or converted to bankruptcy.

Rule 11-17. Debtor Involved in Foreign Proceeding

Bankruptcy Rule 119 applies in Chapter XI cases.

Rule 11-18. Appointment of Receiver; Continuance of Trustee or Debtor in Possession; Removal

(a) Trustee. When a petition is filed under Rule 11-7 after the qualification of a trustee in bankruptcy in the pending bankruptcy case, the court shall continue the trustee in possession.

(b) Retention of Debtor in Possession; Appointment of Receiver. ~~Upon~~ On the filing of a petition under Rule 11-6 or 11-7, if no trustee in bankruptcy has previously qualified, the debtor shall continue in possession. On application of any party in interest, the court may, for cause shown, appoint a receiver to take charge of the property and operate the business of the debtor.

(c) Notice to Receiver of His Appointment; Qualification. The court shall immediately notify the receiver of his appointment, inform him as to how he may qualify, and require him forthwith to

notify the court of his acceptance or rejection of the office. A receiver shall qualify as provided in Rule 11-20.

(d) Eligibility. Only a person who is eligible to be a trustee under Bankruptcy Rule 209(d) may be appointed a receiver.

(e) Removal and Substitution of Receiver. The court may at any time remove the receiver and either appoint a ~~substitute receiver~~ successor or restore the debtor to possession.

(f) Removal of Trustee for Cause. On ~~application~~ motion of any party in interest or on the court's own initiative and after hearing on notice, the court may remove a trustee for cause and either appoint a receiver or ~~restore~~ designate the debtor ~~to~~ possession.

(g) Substitution of Successor. When a trustee or receiver dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a Chapter XI case, his successor is automatically substituted as a party in in any pending action, proceeding, or matter without abatement. as debtor in

ADVISORY COMMITTEE'S NOTE

Subdivisions (a) and (b) of this rule are derived from § 332 of the Act. That section requires retention of a trustee in bankruptcy if one was previously elected or appointed in a pending bankruptcy case but subdivision (a) renders his "qualification" the operative element. The qualification of a trustee in bankruptcy is governed by Bankruptcy Rule 209. A *trustee* is never appointed or elected in a Chapter XI case except where one is already in office because of the pendency of the bankruptcy case. In a Chapter XI case, the creditors may elect a standby

trustee, pursuant to Rule 11–27 but he only takes office if the Chapter XI case is subsequently converted to a bankruptcy case. In the absence of a bankruptcy trustee the proper chapter officer is either the debtor in possession or, when necessary, a receiver. When there is no bankruptcy trustee, the court should continue the debtor in possession unless there is some reason for the appointment of a receiver. A receiver must qualify as provided in subdivision (c) of this rule and Rule 11–20 which is comparable to Bankruptcy Rule 212.

Rule 11–21 continues the policy of the Act of June 7, 1934, 48 Stat. 923, against undue concentration of appointments of trustees and receivers, and Bankruptcy Rule 505 contains safeguards against nepotism and undue influence in such appointments. Bankruptcy Rule 503 incorporates the disqualification by § 39b(2) of the Act, of a referee to act as receiver in any case.

Rule 11–19. Receivers for Estates When Joint Administration Ordered

(a) Appointment of Receivers for Estates Being Jointly Administered. If the court orders a joint administration of 2 or more estates pursuant to Rule 11–14, it may appoint one or more common receivers or separate receivers for the estates being jointly administered. Common receivers shall not be appointed unless the court is satisfied that parties in interest in the different estates will not be prejudiced by conflicts of interest of such receivers.

(b) Separate Accounts. The receiver or receivers of estates being jointly administered shall nevertheless keep separate accounts of the property of each estate.

ADVISORY COMMITTEE'S NOTE

This rule recognizes that economical and expeditious administration of 2 or more estates may be facilitated by the selection of a single receiver whenever estates are being jointly administered pursuant to Rule 11-14. If, after the appointment of a common receiver a conflict of interest materializes, the court must take special and appropriate action to deal with such conflict.

Subdivision (b) is derived from § 5e of the Act and extends the duty of keeping a separate account for each estate to receivers in all cases of joint administration.

Rule 11-20. Qualification by Receiver and Disbursing Agent; Indemnity; Bonds; Evidence

(a) Qualifying Bond or Security. Except as provided hereinafter, every receiver and every person specially appointed as disbursing agent shall, before entering ~~upon~~ the performance of his official duties ~~and within 5 days after his appointment~~, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

within 5 days after his appointment

within the time fixed by the court

(b) Blanket Bond. The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by a receiver in more than one case or by more than one receiver.

(c) Qualification by Filing Acceptance. A receiver for whom a blanket bond has been filed pursuant to subdivision (b) of this rule shall qualify by filing his acceptance of his appointment in lieu of the bond.

(d) Indemnification. The court may after

hearing upon notice to the debtor and such other persons as the court may direct, order the debtor to indemnify or otherwise protect the estate against subsequent loss thereto or diminution thereof until the entry, if any, of an order of adjudication.

(e) Amount of Bond and Sufficiency of Surety; Filing of Bond; Proceeding on Bond. Bankruptcy Rule 212 (e) and (f) apply to the bonds of trustees, receivers, and persons specially appointed as disbursing agents in Chapter XI cases.

(f) Evidence of Qualification; Debtor ~~Retained~~ in Possession. A certified copy of the order approving the bond or other security given by a receiver under subdivision (a) or of his acceptance filed under subdivision (c) of this rule shall constitute conclusive evidence of his appointment and qualification. Whenever evidence that a debtor ~~has been retained~~ in possession ~~is required~~, the court may so certify and the certificate shall constitute conclusive evidence of ~~his retention in possession~~ that fact.

Continued

is required

is a debtor

,

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is based on §§ 50b and 337 of the Act but recognizes that security other than a bond may be given by a receiver as a mode of qualifying under the rule.

Subdivision (b), which is new, gives explicit authority for approval by the court of a single bond to cover (1) a person who qualifies as receiver in a number of cases, and (2) a number of receivers each of whom qualifies in a different case. The cases need not be related in any way. Substantial economies can be effected if a single bond covering a number of different cases can be issued and

approved at one time. When a blanket bond is filed the receiver qualifies under subdivision (c) of the rule by filing an acceptance of the office.

Subdivision (d) is derived from § 326 of the Act and refers to indemnification rather than faithful performance as under subdivision (a). Loss to the estate may be protected against in ways other than filing an indemnifying bond as, for example, the officer or officers foregoing compensation for a period of time and subdivision (d) recognizes such possibilities.

This subdivision is broader in scope than § 326 in that indemnification can be required in all cases. Under § 326, indemnification is limited to cases commenced by the filing of an original petition pursuant to § 322.

Subdivision (f) is a revision of § 21e of the Act to prescribe the evidentiary effect of a certified copy of an order approving any security given by a trustee or receiver under this rule or, a certificate that the debtor has been retained in possession. ~~This rule supplements the Federal Rules of Evidence, which apply in cases under the Bankruptcy Act. See Bankruptcy Rule 917.~~ The order of approval should conform to Official Form No. 11-F11. A certificate that the debtor has been retained in possession should conform to Official Form No. 11-F12. Copies of such certificates are not within § 21g of the Act; in such a case a certified copy of the petition may be recorded pursuant to § 21g.

substantially

substantially

Rule 11-21. Limitation on Appointment of Receivers

Bankruptcy Rule 213 applies in Chapter XI cases.

Rule 11-22. Employment of Attorneys and Accountants

Bankruptcy Rule 215 applies in Chapter XI cases.

to the employment of attorneys and accountants for a trustee, receiver, debtor in possession, or creditors' committee selected pursuant to Rule 11-27

See Attachment

Rule 11-23. Authorization of Trustee, Receiver, or Debtor in Possession to Conduct Business of Debtor

The court may authorize the trustee, re-

Attachment for p. 22.

ADVISORY COMMITTEE'S NOTE

Under Bankruptcy Rule 215 a court order on application is necessary for the appointment of an attorney or accountant for a trustee or receiver. The same is true in a Chapter XI case. Additionally, an official creditors' committee should apply to the court for the employment by it of an attorney or accountant. Such attorney or accountant will be compensated from the estate; accordingly there should be some supervision by the court over the original employment.

ceiver, or debtor in possession to conduct the business and manage the property of the debtor for such time and on such condition as may be in the best interest of the estate.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 343 of the Act. Continuation of the business represents the norm in Chapter XI cases as distinguished from a liquidation of an estate as is usually contemplated in bankruptcy cases. The trustee referred to in the rule is a trustee who had been a trustee in bankruptcy if the Chapter XI case was filed in a pending bankruptcy case.

The conditions which may be imposed by the court include the posting of an indemnification bond pursuant to Rule 11-20.

Rule 11-21. Notice to ~~Creditors~~ and the United States

Parties in Interest

(a) Ten-Day Notices to ~~All Creditors~~. Except as provided hereinafter, the court shall give all creditors, including secured creditors, at least 10 days' notice by mail of (1) a meeting of creditors; (2) any proposed sale of property, other than in the ordinary course of business, including the time and place of any public sale, unless the court ~~upon~~ cause shown shortens the time or orders a sale without notice; (3) the hearing on the approval of a compromise or settlement of a controversy, unless the court ~~upon~~ cause shown directs that notice not be sent; (4) the time for filing objections to confirmation; (5) the hearing to consider confirmation of a plan; (6) the time fixed to reject a proposed modification of a plan

Parties in Interest

the trustee or receiver, the debtor, and

when notice is required by Rule 11–39; and (7) the hearing on an application for allowances for compensation or reimbursement of expenses. The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amount requested.

(b) Other Notices to ~~All Creditors and~~ Parties in Interest. The court shall give notice by mail to the debtor and all creditors, including secured creditors, of (1) dismissal of the case pursuant to Rule 11–42; (2) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c(2) of the Act as provided in Rule 11–~~47~~; and (3) entry of an order confirming a plan pursuant to Rule 11–38.

(c) Addresses of Notices. Bankruptcy Rule 203(e) applies in Chapter XI cases.

(d) Notices to Creditors' Committee. Copies of all notices required to be mailed to creditors under these rules shall be mailed to the creditors' committee elected pursuant to Rule 11–29, if any. Notwithstanding the foregoing subdivisions, if a creditors' committee has been elected, the court may order that notices required by clauses (2), (3), and (7) of subdivision (a) be mailed only to the committee or to its authorized agent and to the creditors who file with the court a request that all notices under these clauses be mailed to them.

(e) Notices to the United States. Copies of all notices required to be mailed to creditors under these rules shall be mailed to the United States in the manner provided in Bankruptcy Rule 203(g).

(f) Notice by Publication. Bankruptcy Rule 203(h) applies in Chapter XI cases.

(g) Caption. The caption of every notice given under this rule shall comply with Rule 11-9.

ADVISORY COMMITTEE'S NOTE

This rule collects the provisions for notices specifically applicable to ~~creditors~~ parties in interest in Chapter XI cases, but reference must be made to other rules for the time and manner in which the notices required by subdivision (b) shall be given. The grant of general authority to the court to regulate notices in Bankruptcy Rule 907 supplements but is subject to the specific provisions of Rule 11-24 and any other rule prescribing the terms of notice.

Subdivision (a) requires that ~~all creditors~~ parties in interest get 10-day notices by mail of the significant events in a Chapter XI case, including creditors' meetings. Since notice by mail is complete on mailing, the requirement of this subdivision is satisfied if the notices it prescribes are deposited in the mail at least 10 days before the event of which notice is to be given, regardless of when the notice is received. See Bankruptcy Rule 906(e); 3 Collier 494(1971).

The time limits prescribed by subdivision (a) cannot be reduced except to the extent and under the conditions stated in this rule. *Cf.* Bankruptcy Rule 906(c). The exceptions referred to by the introductory phrase of subdivision (a) include the modifications in the notice procedure permitted by subdivision (d) as to creditors

who have elected a committee to represent them, and by subdivision (f) when compliance with subdivision (a) is impracticable.

Subdivision (c) recognizes that an agent authorized to receive notices for a creditor may, without a court order, designate how notices to the creditor he represents should be addressed. Such an agent includes an officer of a corporation, an attorney at law, or an attorney in fact if the requisite authority has been given him. It should be noted that Official Form No. 11-F16 does not include an authorization of the holder of a power of attorney to receive notices for the creditor, but neither the form nor this rule carries any implication that such an authorization may not be given in a power of attorney or that a request for notices to be addressed to both the creditor and his duly authorized agent may not be filed.

Subdivision (d) requires that all notices sent to creditors should also be sent to the official creditor's committee, that is, the committee elected under Rule 11-29, if any such committee has been elected. The second sentence of this subdivision regulates those situations where certain notices can be sent only to the elected committee in place of sending them to all creditors.

Subdivision (e) is a revision of § 394 of the Act. The premise of the requirement that the district director of internal revenue receive all notices that creditors receive under subdivisions (a) and (b), is that every debtor is at least potentially a tax debtor of the United States. Notice to the district director alerts him to the possibility that a tax debtor's estate is undergoing arrangement. Where other indebtedness to the Federal government is indicated in the schedule, the United States Attorney or appropriate agency, etc., is to receive the various notices. This rule is not intended to preclude a local rule from requiring a state or local tax authority to receive some or all of the notices creditors are entitled to receive under subdivisions (a) and (b).

Subdivision (f) specifies two kinds of situations in which notice by publication may be appropriate: (1) when notice by mail is impracticable; and (2) when

notice by mail alone is less than adequate. Supplementation of notice by mail is indicated when the debtor's records are incomplete or inaccurate and it is reasonable to believe that publication may reach some of the creditors who would otherwise be missed. Bankruptcy Rule 908 applies when the court directs notice by publication under this rule.

As noted in connection with Rule 11–9, the disclosure requirement in subdivision (g) of this rule follows the practice established in some districts by local rule. Inclusion in notices to creditors of information as to other names used by the debtor will assist them in the preparation of their proofs of claim.

The provisions of § 58c of the Act, requiring notices to be given by the referee unless otherwise ordered by the judge and authorizing written waiver of any notice required by the Act, have been omitted from the Rule as unnecessary. This duty may be delegated to an assistant or an employee in the clerks office as provided in Bankruptcy Rule 506. Bankruptcy Rule 907 authorizes the court to prescribe the manner in which any other notice is to be given under the rules. These rules pose no obstacle to the court's giving notice by mail deposited at the location of a national or regional computer center on the basis of information supplied the center by the court. Waiver of notice may be by conduct as well as in writing, and its effect may be appropriately left to case law. *See, e.g., Connelly v. Hancock, Dorr, Ryan & Shove*, 195 F. 2d 864, 868–69 (2d Cir. 1962); *In re Purrier*, 73 F. Supp. 418, 420 (W.D. Wash. 1947).

~~Pursuant to the definition of "creditor" in Rule 11–62(1), notices under this and all other rules should also be mailed to secured creditors.~~

Pursuant to express inclusion, secured creditors are entitled to the notices sent to creditors under this rule. Thus, secured creditors will receive notice of the pendency of the case and of the stay against lien enforcement provided for by Rule 11–44.

Rule 11-25. Meetings of Creditors

(a) First Meeting.

(1) Date and Place. The first meeting of creditors shall be held not less than 20 nor more than 40 days after the filing of a petition commencing a Chapter XI case but if there is an application or motion to dismiss or to convert to bankruptcy pursuant to Rule 11-42 or an appeal from or a motion to vacate an order entered under that rule, the court may delay fixing a date for such meeting. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(2) Agenda. The bankruptcy judge shall preside over the transaction of all business at the first meeting of creditors, including the examination of the debtor. He shall, when necessary, determine which claims are unsecured and which are secured and to what extent, which claims are entitled to vote at the meeting, which claims have voted for acceptance of a plan, shall conduct the ~~nomination~~, if one is held, of a standby trustee and ~~the election~~, if one is held, of a creditors' committee, and may fix a time for filing a plan if one has not been filed.

election

(b) Special Meetings. The court may call a special meeting of creditors on application or on its own initiative.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is derived from § 334 of the Act and

the time for holding the first meeting of creditors runs from the filing of the petition. Paragraph (2) of this subdivision incorporates the provisions of §§ 336 and 337(3) of the Act. This paragraph adds to the agenda the determination of which claims are secured and unsecured. Although a plan may not deal with secured claims it may be necessary to determine whether a purportedly secured claim is partially unsecured as contemplated by Rules 11–33, 11–36, and 11–37.

The first meeting of creditors by definition includes any adjourned meetings. The standby trustee referred to is one who may take office only if the Chapter XI case is subsequently converted to a bankruptcy case. There is no election of a trustee to administer the Chapter XI case or estate. The proper chapter officer is either the debtor in possession or, when necessary, a receiver. The only time there could be a trustee is if the Chapter XI case was filed in a pending bankruptcy case after a trustee in bankruptcy had qualified. That trustee would then continue as trustee in the Chapter XI case.

Subdivision (b) is derived from § 55d of the Act and Bankruptcy Rule 204(b) vesting general authority in the referee to call a special meeting when necessary.

No provision is made for a final meeting of creditors.

Rule 11–26. Examination

Bankruptcy Rule 205 applies in Chapter XI cases, except that the scope of examination referred to in subdivision (d) thereof may also relate to the liabilities and financial condition of the debtor, the operation of his business and the desirability of the continuance thereof, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration ~~made~~ given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

ADVISORY COMMITTEE'S NOTE

This rule adds, as within the scope of the examination, inquiries concerning the means with which the debtor proposes to carry out the provisions of his proposed plan and any promises or transfers used to obtain such means from third parties. In determining whether to accept or reject a plan, creditors should have all relevant information placed before them; similarly, the court requires the pertinent data to determine whether a proposed plan is in the best interest of creditors and is feasible.

Rule 11-27. ~~Voting at Creditors' Meetings~~ Selection of Creditors' Committee and Standby Trustee

(b) Voting at Creditors' Meetings.

Bankruptcy Rule 207 applies in Chapter XI cases to the voting at creditors' meetings for a standby trustee and a creditors' committee.

ADVISORY COMMITTEE'S NOTE

Only two items are voted on by creditors at the first meeting: the ~~nomination~~ election of a standby trustee and the election of a creditors' committee. The nominated standby trustee, if any, does not function during the pendency of the Chapter XI case. As the title indicates, his is a provisional nomination or election. It is only when the Chapter XI case is converted to bankruptcy that he proceeds to qualify, take office, and administer the ensuing bankruptcy estate. In Chapter XI, the only proper officers are a previously elected and qualified trustee in a pending bankruptcy case or, if none, a receiver appointed by the court or the debtor in possession.

(see Bankruptcy Rule 122)

See attachment

Rule 11-28. Solicitation and Voting of Proxies

Bankruptcy Rule 208 applies in Chapter XI cases, except that the rule does not apply to the solicitation of the acceptance of a plan ~~signed by the owner of a claim~~, or to

~~or Appointment~~ Election

(a) Election of Creditors' Committee and ~~Nomination~~ of Standby Trustee. At the first meeting of creditors, creditors may elect a committee of not less than 3 nor more than 11 creditors if none has previously been elected under Bankruptcy Rule 214 and, if a trustee has not previously been elected or appointed, may ~~nominate~~ a standby trustee.

If creditors fail to elect a committee and if it is in the best interest of the estate, the court may appoint a representative committee from among creditors willing to serve.

elect

ATTACHMENT FOR P. 30

Since these rules contemplate retention of the debtor in possession, the existence of a creditors' committee may be important. When necessary and in the best interest of the estate, the court may appoint one if creditors fail to elect. This provision is new.

the related proof of claim that does not contain a proxy, and except that for the purpose of this rule "$500" in Bankruptcy Rule 208(b)(1)(C) is changed to "$1,000."

ADVISORY COMMITTEE'S NOTE

The first exception in this rule is to recognize and continue the practice in Chapter XI cases permitting solicitation of acceptances and related proofs of claim, usually by the debtor and quite often before the filing of the petition.

The second exception is to make less restrictive an authorized solicitation by a creditors' committee in Chapter XI cases, recognizing that in these cases there will be, ordinarily, more claims of a higher dollar value.

Rule 11-29. Creditors' Committee

(a) ~~*Selection;*~~ *Functions.* ~~The creditors entitled to vote pursuant to Rule 11-27, may, at the first meeting of creditors or at any special meeting called for that purpose, elect a committee of not less than 3 nor more than 11 creditors if none has previously been elected under Bankruptcy Rule 214.~~ The committee may consult with the trustee, receiver, or debtor in possession in connection with the administration of the estate, examine into the conduct of the debtor's affairs and the causes of his involvency or inability to pay his debts as they mature, consider whether the proposed plan is for the best interests of creditors and is feasible, negotiate with the debtor concerning the terms of the proposed plan, advise the creditors of its recommendations with respect to

selected pursuant to Rule 11-27

the proposed plan, report to the creditors concerning the progress of the case, collect and file with the court acceptances of the proposed plan, and perform such other services as may be in the interest of creditors.

(b) Employment of Attorneys, Accountants, and Agents. A committee elected ~~under this rule~~ may employ such attorneys, accountants, and other agents as may be necessary to assist in the performance of its functions.

(c) Reimbursement of Expenses; Compensation. Expenses of the committee, including compensation for attorneys, accountants, and other agents employed under subdivision (b) of this rule, whether incurred before or after the filing of the petition, shall be allowed in the event of confirmation as an expense of administration to the extent deemed reasonable and necessary by the court, and may be allowed when there is no confirmation. Such expense incurred by the committee shall not be disallowed because of a change in the committee's composition, provided a majority of the committee when it incurred the expense continues as members of the elected committee. An application by an attorney, accountant, or other agent for compensation or reimbursement of expenses or an application by a committee for reimbursement of expenses paid as compensation, shall be governed by Bankruptcy Rule 219. Expenses deemed reasonable and necessary by the

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court incurred by the committee other than for compensation of an attorney, accountant, or other agent or incurred by any elected member of the committee in connection with services performed as a member after the filing of the petition, may also be allowed as an expense of administration after hearing upon such notice to such persons as the court may direct, whether or not a plan is confirmed. No member of the committee may be compensated for services rendered by him in the case.

ADVISORY COMMITTEE'S NOTE

This rule is derived from §§ 338, 339, and 44b of the Act, and Bankruptcy Rule 214. Subdivision (c) provides for compensation of those employed by ~~an elected~~ a selected committee if a plan is confirmed and permits the court, in the exercise of its discretion, to award such compensation as an expense of administration if confirmation is denied. This provision is new. Also new is the provision permitting elected members of the committee to be reimbursed for their expenses incurred while serving on the committee, after election and the filing of the petition, if those expenses are found by the court to have been both reasonable and necessary. Such reimbursement is similarly discretionary with the court.

The last sentence of the rule would not permit an elected member of the committee to be compensated for services including compensation for acting as the attorney for the committee while remaining as a member of the committee.

Rule 11-30. Duty of Trustee, Receiver, or Debtor in Possession to Keep Records, Make Reports, and Furnish Information

Bankruptcy Rule 218, ~~other than clause~~

(1) ~~(5) thereof,~~ applies in Chapter XI cases, except that the written report of the financial condition of the estate shall be made by the trustee, receiver, or debtor in possession within a month after ~~qualification~~ the filing of a petition commencing a Chapter XI case and every month thereafter, and shall include a statement of the operation of the business for the preceding month and, if payments are made to employees, the amounts of deductions for withholding and social security taxes and the place where such amounts are deposited.

ADVISORY COMMITTEE'S NOTE

~~Clause (5) of Bankruptcy Rule 218 refers to final reports and accounts which are unnecessary in Chapter XI cases.~~

and, (2) the court may excuse the filing of a final report and account by the trustee or receiver, and a debtor in possession need not file a final report and account unless ordered to do so by the court.

The final report and account required by clause (5) of Bankruptcy Rule 218 may incorporate earlier-filed interim detailed statements of receipts and disbursements if it contains such a detailed statement for the period following the last interim statement incorporated by reference.

Rule 11-31. Compensation for Services ~~Rendered~~ and Reimbursement of Expenses ~~Incurred in a Chapter XI or Superseded Case~~

Bankruptcy Rule 219 applies in Chapter XI cases.

Reasonable compensation for services beneficial to the estate and reimbursement of necessary expenses may be allowed to the attorney for the debtor and debtor in possession whether or not a plan is confirmed.

Rule 11-32. Examination of Debtor's Transactions with His Attorney

Bankruptcy Rule 220 applies in Chapter XI cases.

Rule 11-33. Claims

(a) Form and Content of Proof of Claim; Evidentiary Effect. Bankruptcy Rule 301 applies in Chapter XI cases.

(b) Filing Proof of Claim.

(1) Manner and Place of Filing. Bankruptcy Rule 302 (a), (b), (c), and (d)

ADVISORY COMMITTEE'S NOTE

Under this rule, the provisions of Bankruptcy Rule 219 would apply to compensation sought for services in the Chapter XI case and any case superseded thereby. The second sentence is to clarify the practice of permitting compensation, where a Chapter XI case is converted to bankruptcy, to the attorney for the debtor for services which had benefitted the estate. See In re Knickerbocker Leather & Novelty Co., 158 F. Supp. 236 (S.D.N.Y. 1958), aff'd sub nom. Haar v. Oseland, 265 F.2d 218

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(2d Cir. 1959); Matter of Styles Express, Inc., No. 62B 922 (S.D.N.Y. 1971)(permitting compensation); Robinson, Wolas, & Hagen v. Gardner, 433 F. 2d 1104 (9th Cir. 1970)(disallowing compensation).

apply in Chapter XI cases. When the petition is filed pursuant to Rule 11–7, all claims filed in the pending bankruptcy case shall be deemed filed in the Chapter XI case.

(2) Time for Filing. A claim, including an amendment thereof, must be filed before confirmation of the plan except as follows:

(A) if scheduled by the debtor as undisputed, not contingent, and liquidated as to amount, a claim or an amendment to a claim may be filed within 30 days after the date of mailing notice of confirmation to creditors but in such event shall not be allowed for an amount in excess of that set forth in the schedule; and

(B) a claim arising from the rejection of an executory contract of the debtor, and a post-petition claim allowed to be filed under paragraph (3) of this subdivision, may be filed within such time as the court may direct.

(C) Bankruptcy Rule 302(e)(3) applies in Chapter XI cases.

(3) Post-Petition Tax Claims. Notwithstanding paragraph (2) of this subdivision, the court may, at any time while a case is pending, permit the filing of a proof of claim for the following:

(A) Claims for taxes owing to the United States, a state, or any subdivision thereof, at the time of the filing of the petition under Rule 11–6 or 11–7 which had not been assessed prior to the date of confirmation of the plan, but which are assessed within one year after the date of the filing of the petition.

(B) Claims for taxes owing to the

United States, a state, or any subdivision thereof, after the filing of the petition under Rule 11-6 or 11-7 and which are assessed while the case is pending.

(c) Filing of Tax and Wage Claims by Debtor. Bankruptcy Rule 303 applies in Chapter XI cases.

(d) Claim by Codebtor. A person who is or may be liable with the debtor, or who has secured a creditor of the debtor, may, if the creditor fails to file his proof of claim on or before the first date set for the first meeting of creditors, execute and file a proof of claim pursuant to this rule, including an acceptance of the plan or any modification thereof, in the name of the creditor, if known, or if unknown, in his own name. No distribution shall be made ~~up~~on the claim except ~~up~~on satisfactory proof that the original debt will be diminished by the amount of ~~the~~ distribution. The creditor may nonetheless file a proof of claim pursuant to subdivisions (a) and (b) of this rule and, at any time before the court determines that the plan or any modification thereof has been accepted by the number and amount of creditors required for confirmation, an acceptance or revocation of the acceptance by such person, if any, of the plan, or any modification thereof. Such proof of claim and such revocation of acceptance shall supersede the proof of claim and the acceptance filed pursuant to the first sentence of this subdivision. In the event the creditor files a claim and does not

file a revocation of acceptance, the acceptance filed by the codebtor shall be deemed made on the creditor's behalf.

(e) Objections to and Allowance of Claims; Valuation of Security. Bankruptcy Rule 306 applies in Chapter XI cases.

(f) Reconsideration of Claims. Bankruptcy Rule 307 applies in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

Subdivision (b)(2) of this rule is derived from § 355 of the Act. It also clears up an ambiguity not answered by the statute respecting the status of amendments to proofs of claim. Under this rule an amendment must be filed within the same time as the original proof of claim and it is not possible to obtain an extension of time based upon the amending process.

Subdivision (b)(3) is based upon § 397 of the Act. Express inclusion in these subparagraphs of taxes owing to a subdivision of a state incorporates the interpretation placed on § 271 which like § 397 refers to taxes owing to the United States "or any state." *Berryhill* v. *Gerstel*, 196 F. 2d 304 (5th Cir. 1952); *Seafour Investment Co.* v. *King County*, 66 Wash. 2d 644, 404 P. 2d 760 (1965), *appeal dismissed and cert. denied*, 385 U.S. 1 (1966).

Under § 357(6) of the Act, the plan may contain provisions for payment of debts incurred after the filing of the petition with priority over pre-petition claims; these types of debts would be entitled to priority in any event as expenses of administration.

Subdivision (d) is derived from § 57i of the Act and General Order 21(4). Section 57i is applicable to Chapter XI cases. See 9 Collier 20, n. 12a (1963). The subdivision of the Act and the general order, however, authorizes a filing procedure only by a person who has secured a creditor of the debtor by his "individual undertaking." The rule goes further by authorizing the same procedure to be followed when the person has secured a creditor of the debtor by pledging collateral or otherwise creating

A scheduled claim filed late may be allowed if it is scheduled in a liquidated amount. It would meet the test for such allowability under subdivision (b)(2)(A) unless the debtor indicates *on the schedules that* the claim is disputed or contingent.

a security interest in his own property, without assuming any personal obligation to the creditor. The rule assures a fair opportunity for a codebtor to exercise the right of filing in the name of the creditor (or in his own name if that of the creditor is unknown) by recognizing that he should not be required to wait until the last minute before the expiration of the period allowed for the filing of claims. In addition to filing the claim, the surety may also file an acceptance of the plan. The creditor, however, may within the time limits specified by these rules, file his own proof of claim and acceptance or revocation of the surety's acceptance if he so desires. If he fails to revoke the surety's acceptance, he will be deemed to have ratified it. If the claim is filed by both the creditor and codebtor only one distribution on it may be made. As required expressly by this rule, such distribution must diminish the claim.

Subdivision (a)(2)(C) incorporates the provision of the Bankruptcy Rule prescribing a time for the filing of a claim by a creditor who disgorges a voidable transfer after confirmation.

Rule 11-34. Withdrawal of Acceptance or Claim

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the creditor has accepted the plan or otherwise has participated significantly in the case, he may not withdraw the claim save ~~upo~~n application or motion with notice to the trustee, receiver, or debtor in possession, and ~~upo~~n order of the court containing such terms and conditions as the court deems proper. Unless the court directs otherwise, withdrawal of

ADVISORY COMMITTEE'S NOTE

a claim shall constitute withdrawal of any related acceptance.

Since 1938 it has generally been held that Rule 41 of the Federal Rules of Civil Procedure governs the withdrawal of a proof of claim. *In re Empire Coal Sales Corp.*, 45 F. Supp. 974, 976 (S.D.N.Y.) aff'd sub nom. *Kleid* v. *Ruthbell Coal Co.*, 131 F. 2d 372, 373 (2d Cir. 1942); *Kelso* v. *Maclaren*, 122 F. 2d 867, 870 (8th Cir. 1941); *In re Hills*, 35 F. Supp. 532, 533 (W.D. Wash. 1940). Accordingly, it was ruled in the cited cases that a proof of claim may be withdrawn only subject to approval by the court after an objection has been filed. This constitutes a restriction of the right of withdrawal as recognized by some though by no means all of the cases antedating the promulgation of the Federal Rules of Civil Procedure. See 3 Collier ¶ 57.12 (1961); Note, 20 Bost. U.L. Rev. 121 (1940).

The filing of a claim does not commence an adversary proceeding under these rules, but the filing of an objection to the claim initiates a contest that must be disposed of by the court. This rule recognizes the applicability of the considerations underlying Rule 41(a) of the Federal Rules of Civil Procedure to the withdrawal of a claim after it has been put in issue by an objection. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides for a bar to dismissal over the objection of a defendant who has pleaded a counterclaim prior to the service of the plaintiff's motion to dismiss. Although the applicability of this provision to the withdrawal of a claim was assumed in *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603, 608 (2d Cir. 1953), *Kleid* v. *Ruthbell Coal Co.*, *supra*, *Kelso* v. *Maclaren*, *supra*, *and In re Hills*, *supra*, this rule vests discretion in the court to grant, deny, or condition the request of a creditor to withdraw, without regard to whether the trustee, receiver, or debtor in possession has filed a merely defensive objection or a complaint seeking an affirmative recovery of money or property from the creditor.

A number of pre-1938 cases sustained denial of a creditor's request to withdraw his proof of claim on the ground that he had estopped himself or made an election of remedies. 2 Remington, *Bankruptcy* 186 (Henderson ed. 1956); *cf.* 3 Collier 201 (1961). Voting his claim in an election of a trustee in a bankruptcy case was an important factor in the denial of a request to withdraw in *Standard Varnish Works* v. *Haydock,* 143 Fed. 318, 319–20 (6th Cir. 1906), and *In re Cann,* 47 F. 2d 661, 662 (W.D. Pa. 1931), and voting on the plan in a Chapter XI case would appear to be of similar significance. It has frequently been recognized also that a creditor should not be allowed to withdraw his claim once he has accepted a dividend. *In re Friedman,* 1 Am. B.R. 510, 512 (Ref., S.D.N.Y. 1899); 3 Collier 205 (1964): *cf. In re O'Gara Coal Co.,* 12 F. 2d 426, 429 (7th Cir), cert. denied, 271 U.S. 683 (1926). It was held in *Industrial Credit Co.* v. *Hazen,* 222 F. 2d 225 (8th Cir. 1955), however, that although a claimant had participated in the first meeting of creditors and in the examination of witnesses, he was entitled under Rule 41(a)(1) of the Federal Rules of Civil Procedure to withdraw his claim as of right when he filed a notice of withdrawal before the trustee filed an objection under § 57g of the Act. While this rule incorporates the post–1938 case law referred to in the first paragraph of this note, it rejects the implication drawn in the *Hazen* case that Rule 41(a) of the Federal Rules of Civil Procedure supersedes the pre-1938 case law that vests discretion in the court to deny or restrict withdrawal of a claim by a creditor on the ground of estoppel or election of remedies. While purely formal or technical participation in a case by a creditor who has filed a claim should not deprive him of a right to withdraw his claim, a creditor who has accepted a dividend or who voted on the plan or otherwise participated actively in a case should be permitted to withdraw only with the approval of the court on terms deemed appropriate by it after notice to the debtor and the trustee, or receiver. 3 Collier 205–06 (1964).

Rule 11-35. Distributions; Undistributed Consideration; Unclaimed Funds

(a) ~~*Cash*~~ *Distributions.* Except as otherwise provided in the plan, Bankruptcy Rule 308 applies in Chapter XI cases to cash distributions made under a plan.

(b) *Undistributed Consideration.* Except as provided in subdivision (c) of this rule, or as otherwise ordered by the court, the disbursing agent shall return to the debtor or to such other person as may be designated by the court any money or other deposited consideration in his possession not distributed under the plan.

(c) *Unclaimed Funds.* Sixty days after any distribution, the disbursing agent shall stop payment on all checks then unpaid. Bankruptcy Rule 310 shall otherwise apply in Chapter XI cases.

Except as otherwise provided in the plan or ordered by the court, consideration other than cash distributed under the plan shall be issued in the name of the creditor entitled thereto and, if a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Bankruptcy Rule 910, such consideration shall be transmitted to such other person.

ADVISORY COMMITTEE'S NOTE

Subdivision (b) codifies existing practice, returning to the debtor any funds not needed to make payments under the plan. Pursuant to court order some or all of such funds may be returned to the debtor before distribution under the plan has been fully completed. If the debtor is not entitled to the surplus funds but some third party is, the rule permits return to that third party. ~~This subdivision deals only with surplus as distinguished from unclaimed funds. The latter is provided for in subdivision (c) of this rule.~~

This subdivision applies to surplus funds and any other undistributed consideration.

Insofar as subdivision (c) deals with the unclaimed money to be distributed under the plan or the Act, it is derived from § 66 of the Act. The provision of the Act that the unclaimed money so deposited shall not be subject to escheat under the laws of any state is a rule of substantive law not appropriate for inclusion in the rule.

Rule 11-36. Filing of Plan; Transmission to Creditors; Adjourned Meeting

(a) Filing of Plan; Number of Copies. The debtor may file a plan with his petition or thereafter, but not later than a time fixed by the court. The debtor, if required by the court, shall promptly furnish a sufficient number of copies of the plan to enable the court to transmit ~~copies to creditors~~ as provided in subdivision (b) of this rule.

(b) Transmittal of Plan to Creditors; Adjourned Meetings. If a plan is filed prior to mailing of notice of the first meeting of creditors, a copy of the plan shall accompany the notice. If the debtor has not filed a plan prior to the first date set for the first meeting of creditors, the court, at the first meeting or thereafter, shall fix a time for filing a plan. If a plan is not filed prior to the mailing of notice of the first meeting of creditors, the court, at the first meeting, shall adjourn the meeting to a date certain. When a plan is filed, a copy thereof and notice of a subsequent adjourned meeting date shall be mailed to ~~creditors~~ the persons specified in Rule 11-24(a) at least 10 days prior to such date. The court may adjourn a first meeting of creditors from time to time to dates certain.

ADVISORY COMMITTEE'S NOTE

The time for filing a plan follows § 323 of the Act. It may be filed with the Chapter XI petition or after the petition has been filed; however, if the court has fixed a time for filing the plan, it must be filed within that time. The court may fix such time at the first meeting, at any adjourned first meeting, or at any time.

Copies of the plan are to be transmitted to creditors either with the notice of the first meeting of creditors, or with notice of any adjourned date if the plan is not filed in sufficient time for it to be sent with the first notice. To enable the court to transmit the copies, the debtor should furnish the number necessary if so required by the court.

When a plan is not filed in time for it to accompany the notice of the first meeting that meeting must at some point be adjourned to enable creditors to receive copies of the plan. That original first meeting, however, may be held on the first date set to conduct such other business as may be appropriate.

Rule 11-37. Acceptance or Rejection of Plans

(a) Time for Acceptance or Rejection. At any time prior to the conclusion of the first meeting of creditors, each creditor filing a claim may file with the court his acceptance of the plan. A creditor who files a claim but who fails to file an acceptance within the time prescribed, shall be deemed to have rejected the plan. Acceptances may be obtained before or after the filing of the petition and may be filed with the court on behalf of the accepting creditor.

(b) Form of Acceptance. An acceptance of a plan shall be in writing, shall identify the plan accepted, and shall be signed by the creditor.

(c) Temporary Allowance. Notwithstanding objection to a claim the court may temporarily allow it to such extent as to the court seems proper for the purpose of accepting a plan.

ADVISORY COMMITTEE'S NOTE

Section 362 of the Act requires a plan to be accepted in writing filed with the court by the requisite number of creditors before the conclusion of the first meeting. Since acceptances are required, there is no need to file a formal rejection; failure to file an acceptance by a credi-

tor who filed a claim will be tantamount to a rejection. The debtor or creditors may obtain acceptances before the filing of the petition which may be filed with the court on behalf of the accepting creditor.

A creditor whose claim is partially secured is entitled to accept or reject a plan to the extent his claim is unsecured. Valuation of secured claims for this purpose is provided for in Rule 11-33.

For the filing of an acceptance by an agent, attorney in fact or proxy, see Rule 11-63(4) which incorporates Bankruptcy Rule 910(c).

Rule 11-38. Deposit; Confirmation of Plan; Evidence of Title

(a) Deposit. At the first meeting of creditors, after a plan has been accepted and before confirmation, the court shall (~~A~~) designate as disbursing agent the trustee or receiver, if any, otherwise the debtor in possession or a person specially appointed, to distribute, subject to the control of the court, the consideration, if any, to be deposited by the debtor; and (~~B~~) fix a time before confirmation within which the debtor shall deposit with the disbursing agent, or in such place ~~as shall be designated by and subject to the order of the court~~, the money necessary to pay all priority debts and costs of administration unless such claimants have waived such deposit or consented to provisions in the plan otherwise dealing with their claims, and the money or other consideration which under the plan is to be distributed to other creditors at the time of confirmation.

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and on such terms as the court may approve,

(b) Waiver. Any person who has waived his right to share in the distribution of the deposit or in payments under the plan shall

file with the court, prior to confirmation of the plan, a statement setting forth the waiver and any agreement with respect thereto made with the debtor, his attorney, or any other person.

(c) Objections to Confirmation. Objections to confirmation of the plan shall be filed and served ~~upon~~ the debtor, and the creditors' committee, if any, at any time prior to confirmation or by such earlier date as the court may fix. An objection to confirmation on the ground that the debtor committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt is governed by Part VII of the Bankruptcy Rules. Any other objection is governed by Bankruptcy Rule 914.

(d) Hearing on Confirmation. The court shall rule on confirmation of the plan after hearing ~~upon~~ notice ~~to the debtor and to all creditors in the manner~~ as provided in Rule 11-24. The hearing may be held at any time after the conclusion of the first meeting of creditors. If no objection is timely filed under subdivision (c) of this rule, the court may find, without taking proof, that the debtor has not committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt and that the plan has been proposed and its acceptance procured in good faith, and not by any means, promises, or acts forbidden by law.

(e) Order of Confirmation. The order of confirmation shall conform substantially to Official Form No. 11-F18. Notice of entry

of the order of confirmation and a copy of the provisions of the order dealing with the discharge of the debtor shall be mailed to the debtor and to all creditors within 30 days after entry of the order.

(f) Evidence of Title. A certified copy of the plan and of the order confirming the plan shall constitute conclusive evidence of the revesting of title to all property in the debtor or the vesting of title in such other person as may be provided in the plan or in the order confirming the plan.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is derived from § 337 of the Act and retains the possibility of appointing a person other than the debtor in possession as disbursing agent where there is no receiver or trustee. If there is a receiver or trustee he shall act as the disbursing agent. A person other than a receiver, trustee, or debtor in possession may receive no more compensation than that allowed by the Act to a custodial receiver.

Subdivision (d) departs from §§ 337(3) and 362 of the Act and former Official Forms Nos. 50 and 52 by eliminating the requirement for a formal application for confirmation where all affected creditors have not accepted the plan and by requiring a hearing prior to confirmation even though all affected creditors have accepted the plan. The issues at such hearing may include all issues relating to confirmation under §§ 361, 362, and 366 and also any issue as to whether a creditor is affected by the plan under § 308.

The hearing on confirmation may occur immediately upon the conclusion of the first creditors' meeting. Objections to confirmation may be filed by creditors but they must be in writing and filed within a time fixed by the court, if any. If the court does not fix such a time they may be filed at any time prior to confirmation. The

The language in clause (2) permitting a deposit in such place and on such terms as the court may approve is new and is intended to facilitate escrow arrangements and return of the deposit to the financier if, for example, consummation of confirmation is unduly delayed. The court can, of course, disapprove any such arrangement.

contested matter initiated by an objection to confirmation is governed by Bankruptcy Rule 914 unless it is of the type requiring an adversary proceeding under Part VII of the Bankruptcy Rules.

Official Form No. 11-F18 provides an appropriate form for confirmation which may be used either where all affected creditors have accepted the plan or where less than all have accepted the plan. Official Form No. 11-F19 may be used to comply with subdivision (d) to give creditors notice of the entry of the order of confirmation and of the discharge provisions contained in the order.

Subdivision (b) is adapted from General Order 41. It will provide the court and other creditors with any information regarding outside agreements underlying a waiver of the right to share in the distribution or to obtain priority payments. The remainder of General Order 41, referring to the debtor's obligation to file an affidavit, is not incorporated in this rule. The substance of that part, however, may be found in the rule on examination, 11-26 and the rules on compensation, Rules 11-31 and 11-32.

Subdivision (c) requires objections to be served on the debtor and any creditors' committee. The committee to which it refers is a creditors' committee elected pursuant to Rule 11-29. The court may require objections to be served on other parties if the circumstances warrant such service.

Subdivision (d) requires notice to all creditors of the hearing on confirmation but not of any hearing on objections if such hearing is separate. The notice of the hearing on confirmation is essentially a continuing notice, that is, once given, the date and hearing may be adjourned from time to time.

In making the findings specified under subdivision (d), however, the court may require the debtor to file an affidavit similar to General Order 41 or otherwise inquire into such matters. For such inquiry, it should also be noted that the debtor is required to attend the hearing on confirmation and testify if so directed. See Rule 11-45.

Rule 11-39. Modification of Plan Before Confirmation

At any time prior to the acceptance of a plan by the requisite majority of creditors,

the debtor may file a modification thereof. After a plan has been so accepted and before its confirmation the debtor may file a modification of the plan only with leave of court. The debtor may also submit with the proposed modification written acceptances thereof by creditors. If the court finds that the proposed modification does not materially and adversely affect the interest of any creditor who has not in writing accepted it, the modification shall be deemed accepted by all creditors who have previously accepted the plan. Otherwise, the court shall enter an order that the plan as modified shall be deemed to have been accepted by any creditor who accepted the plan and who fails to file with the court within such reasonable time as shall be fixed in the order a written rejection of the modification. Notice of such order, accompanied by a copy of the proposed modification, shall be given to creditors and other parties in interest at least 10 days before the time fixed in such order for filing rejections of the modification. The debtor shall, if required by the court, furnish a sufficient number of copies of the proposed modification to enable the court to transmit a copy with each such notice.

ADVISORY COMMITTEE'S NOTE

This rule revises the procedure now covered by §§ 363 and 364 of the Act. The standard for determining whether a proposed modification affects the interest of a creditor who has not in writing accepted it is prescribed in § 308 of the Act. Official Form No. 11–F17 provides

a form of order fixing a time for rejecting the proposed modification, combined with a notice thereof.

Rule 11–37 authorizes the debtor to obtain acceptances of a proposed plan from his creditors before or after the filing of his petition. Rule 11–36 authorizes the debtor to file a plan with the petition but he is not required to do so. There is no set time limit for filing a plan unless the court fixes a date. That procedure allows the debtor to submit modified plans without employing the practice for modification prescribed in this rule. Before a plan has been accepted by the requisite number of creditors, the debtor may file a proposed modification as a matter of right. After it has been accepted but before confirmation leave of court is necessary to file a modification. It should also be noted that express rejections in Chapter XI cases are only necessary in respect to modification of plans. The plan itself is deemed rejected by any creditor who filed a claim and did not accept the plan in writing.

Under § 364 of the Act, a creditor may include, in his original acceptance of a plan, a rejection of any modification that may subsequently be proposed. This would be a routine, form rejection not directed to any specific modification that has already been proposed. This rule effects a change of that statutory provision. Pursuant to this rule, such routine rejection would not be effective. If and when a modification is proposed, that modification must be specifically rejected by any creditor who has previously accepted the plan and a failure to so reject will constitute an acceptance of the modification.

Rule 11–40. Modification of Plan After Confirmation Where Court Has Retained Jurisdiction

At any time during the period of a confirmed plan providing for extension and before payment in full of deferred installments or delivery of negotiable promissory

notes, if any, to the creditors, where the court has retained jurisdiction pursuant to the Act, the debtor may file an application with leave of court to modify the terms of the plan by changing the time of payment or reducing the amount of payment, or both. The application shall set forth the reason for the proposed modification, and shall be accompanied by a list of names and addresses of all creditors who have extended credit to the debtor since the plan was confirmed. If the court permits the application to be filed, it shall call a meeting of creditors including those who extended credit after confirmation of the plan, and other parties in interest, and a copy of the proposed modification shall accompany the notice of such meeting. The court, at such meeting, shall confirm the plan as modified if it is accepted in the manner required for confirmation of the original plan by the creditors who are provided for in the plan and are affected by such modification.

ADVISORY COMMITTEE'S NOTE

This rule incorporates the modification procedure now specified in § 387 of the Act. Creditors who extended credit after the filing of the petition and before confirmation are treated as administration expense claimants and their claims would have been fully paid or provided for in full in the plan.

Rule 11–41. Revocation of Confirmation

Any party in interest may, at any time within six months after a plan has been

confirmed, ~~file a complaint~~ pursuant to the Act to revoke the confirmation as procured by fraud. ~~When such complaint is filed~~, the court shall reopen the case if necessary and conduct a hearing on notice to all parties in interest. ~~The procedure shall be governed by Part VII of the Bankruptcy Rules~~. If the confirmation is revoked—

(1) The court may dispose of the case pursuant to Rule 11–42(b); or

(2) The court may receive proposals to modify the plan. Thereafter, the procedure for modification and for confirmation of a plan as modified shall follow Rules 11–38 and 11–39, except that acceptance of the plan shall not be required by any creditor who has participated in the fraud and such creditor shall not be counted in determining the number and amount of the claims of creditors whose acceptance is required. If a modified plan is not confirmed, the court shall dispose of the case pursuant to Rule 11–42(b).

make a motion

motion is made

The circumstances constituting the alleged fraud shall be stated with particularity.

at least 10 days'

ADVISORY COMMITTEE'S NOTE

This rule is a revision of the procedure contained in § 386 of the Act. While paragraph (1) makes no significant change in § 386(1), paragraph (2) gives the same protection to the innocent debtor and innocent creditors where modification is made to correct fraud for which they are not responsible as they now have in instances of modification before confirmation under Rules 11–38 and 11–39.

Section 386 of the Act apparently permits the court to grant relief contained in paragraphs (1), (2), and (3) thereof where the debtor participated in or had knowl-

edge of the fraud. This rule reaches that result more definitely; even though there has been such participation or knowledge, it may well be in the interest of creditors to go forward with a plan as modified rather than having the case converted to bankruptcy.

The notice of the hearing on the motion to revoke confirmation is to be given by the court.

Rule 11–42. Dismissal or Conversion to Bankruptcy Prior to or After Confirmation of Plan

(a) Voluntary Dismissal or Conversion to Bankruptcy. The debtor may file an application or motion to dismiss the case or to convert it to bankruptcy at any time prior to confirmation or, where the court has retained jurisdiction, after confirmation. On ~~Upon~~ the filing of such application or motion, the court shall—

(1) if the petition was filed pursuant to Rule 11–7, enter an order directing that the bankruptcy case proceed; or

(2) if the petition was filed pursuant to Rule 11–6, enter an order adjudicating the debtor a bankrupt if he so requests, or, if he requests dismissal, enter an order after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate.

(b) Dismissal or Conversion to Bankruptcy for Want of Prosecution, Denial or Revocation of Confirmation, Default, or Termination of Plan. The court shall enter an order, after hearing on such notice as it may direct dismissing the case, or adjudicating the debtor a bankrupt if he has not been previously so adjudged, or directing that the bankruptcy case proceed, which-

ever may be in the best interest of the estate—

(1) for want of prosecution; or

(2) for failure to comply with an order made under Rule 11-20(d) for indemnification; or

(3) if confirmation of a plan is denied; or

(4) if confirmation is revoked for fraud and a modified plan is not confirmed pursuant to Rule 11-41; or

(5) where the court has retained jurisdiction after confirmation of a plan:

(A) ~~If~~ if the debtor defaults in any of the terms of the plan; or

(B) if a plan terminates by reason of the happening of a condition specified therein.

The court may reopen the case, if necessary, for the purpose of entering an order under this subdivision.

(c) Notice of Dismissal ~~to Creditors.~~ Promptly after entry of an order of dismissal under this rule, notice thereof shall be given ~~by the court to creditors in the manner~~ as provided in Rule 11-24.

(d) Effect of Dismissal. Unless the order specifies to the contrary, dismissal of a case under this rule on the ground of fraud is with prejudice, and a dismissal on any other ground is without prejudice. A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to his property.

(e) Consent to Adjudication. Notwithstanding the foregoing, no adjudication shall be entered under this rule against a wage earner or farmer without his written consent.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is derived in part from §§ 377 and 386 of the Act. A debtor who has filed his petition in a pending bankruptcy case may at any time before confirmation or, if the court has retained jurisdiction, after confirmation, voluntarily cause the bankruptcy case to proceed. The application may be ex parte. If the debtor seeks dismissal of the case, a hearing is required on notice to creditors, and the court may either adjudicate him a bankrupt if he had filed an original Chapter XI petition, or dismiss the case whichever is in the interest of the debtor and the creditors. The debtor may also convert the Chapter XI case to bankruptcy voluntarily under this subdivision if the Chapter XI petition was an original petition.

Under *subdivision (b)*, for all the causes listed whether occurring before or after confirmation (if the court retained jurisdiction) the court may dismiss the case, adjudicate the debtor a bankrupt if he has not been previously adjudged, or direct the bankruptcy case to proceed whichever is in the interest of the debtor and creditors. Thus the court may, if the petition was filed in a pending bankruptcy case, adjudge the debtor a bankrupt or permit adjudication to follow the normal route if there had been an involuntary petition but no adjudication prior to the filing of the Chapter XI petition. This rule was not intended to preclude the possibility of confirmation of a revised plan in the same case after confirmation of a plan earlier proposed has been denied.

The provision in *subdivision (c)* for notice of dismissal is for the purpose of notifying creditors that no discharge has been granted and to correct their assumption to the contrary so that they can take whatever steps to

Among the causes listed is "want of prosecution" which includes failure to file schedules and statements, failure to propose a plan, withdrawal or abandonment of a plan, or failure to make any deposit required by the plan, all of which are now specified in § 376 of the Act.

protect their claims as may be appropriate and necessary before the statutes of limitation have run.

Subdivision (d) is new. The first sentence gives discretion to the court to determine whether dismissal should bar future relief under the Act, but when it makes no specific reference one way or the other in the order, unless the dismissal was for fraud, a dismissal is without prejudice.

For discussion of this point see Advisory Committee's Note to subdivision (c) of Bankruptcy Rule 120. The second sentence prescribes the evidentiary effect of a certified copy of the order of dismissal.

Subdivision (e) is derived from § 379 of the Act.

Note should be taken that secured creditors should receive the notices provided for in Rule 11–24, which includes notices under this rule.

Rule 11–43. Confirmation as Discharge

(a) Statement of Discharge. The order confirming a plan shall contain provisions substantially similar to Official Form No. 11–F18 stating the effect of confirmation on the further enforcement of claims against the debtor.

(b) Registration in Other Districts. An order confirming a plan that has become final may be registered in any other district by filing in the office of the clerk of the district court of that district a certified copy of the order and when so registered shall have the same effect as an order of the court of the district where registered and may be enforced in like manner.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is derived from § 371 of the Act and renders uniform the practice of providing expressly in the order confirming the plan for the discharge of the debtor. With this express statement, the order will then contain the essential features of § 14f of the Act, and

this part of the order can be mailed to creditors pursuant to Rule 11-38 and § 14h of the Act.

Subdivision (b) is derived from § 14g of the Act and provides the same registration procedure for a Chapter XI debtor as for a bankrupt. Registration may facilitate the enforcement of the order of discharge in a district other than that in which it was entered. See 2 Moore, Federal Practice ¶ 1.04 [2] (2d ed. 1967). Because of the extraterritorial service of process authorized by Bankruptcy Rule 704, however, registration of the order of discharge is not necessary under these rules to enable a discharged debtor to obtain relief against a creditor proceeding in any district in the United States in disregard of the injunctive provision contained in the order.

Rule 11-44. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any ~~action~~ court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

(b) Duration of Stay. Except as it may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision ~~(e)~~ (d), (e), or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bank- deemed annulled under subdivision (c) of this rule or may be

ruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, a stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the schedules and who has not filed his claim by that time.

(d) Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(e) Ex Parte Relief from Stay. Upon the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or

damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee, receiver, or debtor in possession and to the debtor and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(f) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

ADVISORY COMMITTEE'S NOTE

This rule supplements and reinforces the policy of §§ 11a, 311 and 314 of the Act. Section 11a provides in terms for a mandatory stay of all actions founded on dischargeable claims which are pending against the debtor when the petition is filed, and § 314 authorizes the stay of pending actions and of the commencement of actions whether or not founded on dischargeable claims. Section 314 also authorizes the stay of any act or proceeding to

enforce any lien on the property of the debtor. The term "lien" is used in this rule to indicate a consensual security interest in personal or real property, a lien obtained by judicial proceedings, a statutory lien, or any other variety of charge against property securing an obligation. The authority conferred by § 314 with respect to staying enforcement of liens is discretionary; nonetheless § 311 gives the court exclusive jurisdiction of the debtor and its property wherever located and this jurisdictional grant includes granting stays and injunctions. See 8 Collier ¶ 3.02 (1963). The relief from a stay obtainable under subdivision (c) or (d) of the rule could appropriately include permission to reclaim collateral.

Subdivision (a) provides that the petition shall operate as a stay of any action, or the enforcement of any judgment, or any act or proceeding to enforce a lien on property of the debtor or any proceeding commenced for the liquidation or rehabilitation of the debtor. This conforms Chapter XI cases with Chapter X cases by including those matters within §§ 113, 116, and 148, such as a pending bankruptcy proceeding, mortgage foreclosure, equity receivership, and the like. Thus, the procedure would be the same, representing a change from § 325 of the Act.

The reference to a stay of other proceedings against the debtor is to signify the inclusion of a pending arbitration proceeding within the scope of the automatic stay.

As provided in subdivision (b), the stay provided by this rule continues generally during the pendency of the case unless the case is converted to bankruptcy In the latter event the stay provisions of Bankruptcy Rules 401 and 601 would become applicable.

A creditor who is subject to the stay of this rule may obtain relief therefrom in appropriate cases by filing a complaint in the court pursuant to subdivision (d). The adversary proceeding thereby commenced is governed by Part VII of the Bankruptcy Rules subject to the requirement of subdivision (d) that the trial date be set for the earliest possible time and given precedence over all other matters not of the same character.

Note should be taken of Rule 11-24 which includes secured creditors as those to whom notice of the first meeting of creditors is transmitted. That notice informs

all creditors of the stay against lien enforcement provided for in this rule.

Rule 11–45. Duties of Debtor

Bankruptcy Rule 402 applies in Chapter XI cases and, in addition to the duties specified therein, the debtor shall attend at the hearing on confirmation of a plan and, if called as a witness, testify with respect to issues raised.

ADVISORY COMMITTEE'S NOTE

In addition to the duties imposed on a debtor by Bankruptcy Rule 402, this rule requires the debtor to attend the hearing ~~on objections to~~ on confirmation of a plan and, if called as a witness, to testify at such hearing.

For example he may be requested to testify with respect to the matters which were required by affidavit pursuant to General Order 41. See also Rule 11-38 and Accompanying Note.

Rule 11–46. Apprehension and Removal of Debtor to Compel Attendance for Examination

Bankruptcy Rule 206 applies in Chapter XI cases to a debtor and, if the debtor is a partnership, to the general partners and any other person in control of the partnership and, if the debtor is a corporation, to any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control.

Rule 11–47. Exemptions

Bankruptcy Rule 403(a) applies in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

In Chapter XI cases, ~~the matter of exemptions is rela-~~

~~tively unimportant and~~ an elaborate procedure for claiming and contesting exemptions is not necessary. Exempt property is not usually set apart to the debtor as it is to the bankrupt in a bankruptcy case. Accordingly, only subdivision (a) of Bankruptcy Rule 403 is made applicable in Chapter XI cases. Since no time limitations are imposed in this rule or in the bankruptcy rule, the debtor is not estopped from claiming exemptions under Bankruptcy Rule 403 if the Chapter XI case is later converted to bankruptcy, nor are creditors or the trustee prevented from objecting to the claim if there had been no litigation of the issue in the Chapter XI case.

Rule 11–48. Determination of Dischargeability of a Debt; Judgment on Nondischargeable Debt; Jury Trial

Bankruptcy Rule 409 applies in Chapter XI cases except that the court may but need not make an order fixing a time for filing a complaint under § 17c(2) of the Act. If such an order is made, at least 30 days' notice of the time so fixed shall be given to all creditors in the manner provided in Rule 11–24. The court may for cause, ~~u~~pon its own initiative or ~~u~~pon application of any party in interest, extend the time so fixed under this rule. If such an order is not made, a complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of § 17a of the Act may be filed at any time.

ADVISORY COMMITTEE'S NOTE

Due to the nature of a Chapter XI case, it is not always feasible to require the filing of complaints to determine the dischargeability of debts under § 17c(2) of the Act within 30 and 90 days after the first date set for the first

meeting of creditors. Normally it would be more desirable to wait until a plan is confirmed or at least until it appears that confirmation is likely. In any event, there is no need to require the court to fix an early time for the filing of the complaint. Such time may be fixed by the court as it deems in the best interest of the administration of the estate. Where the court does fix a time, the period for giving notice of that time is the same as in Bankruptcy Rule 409.

If the Chapter XI petition is filed in a pending bankruptcy case, and the time for filing complaints had been fixed in the bankruptcy case, the automatic stay of administration of the bankruptcy case pursuant to Rule 11-7 would render the date ineffective and a new one could be fixed by the court in the Chapter XI case.

Pursuant to Bankruptcy Rule 409 and § 17c(1) of the Act, the debtor can file a complaint to determine the dischargeability of a debt at any time even if the court does not fix a date. If no time is fixed by the court, a complaint by debtor or creditor can be filed even after confirmation and if necessary, pursuant to § 17c(4), a state court action commenced after confirmation can be stayed. This stay would be applicable if the debtor files his complaint in the bankruptcy court.

Rule 11-49. Duty of Trustee, Receiver, or Debtor in Possession to Give Notice of Chapter XI Case

Bankruptcy Rule 602 applies in Chapter XI cases.

Rule 11-50. Burden of Proof as to Validity of Post-Petition Transfer

Bankruptcy Rule 603 applies in Chapter XI cases.

Rule 11-51. Accounting by Prior Custodian of Property of the Estate

Bankruptcy Rule 604 applies in Chapter XI cases.

Rule 11-52. Money of the Estate; Deposit and Disbursement

Bankruptcy Rule 605 (b) and (c) apply in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of Bankruptcy Rule 605 is inapplicable in Chapter XI cases because it concerns collecting the property of the estate and converting it to money; these parts of a trustee's functions are applicable only where the estate is being liquidated.

Rule 11-53. Rejection of Executory Contracts

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other persons as the court may direct.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 313(1) of the Act. As provided in § 357(2) of the Act, the plan may also include provisions for the rejection of executory contracts of the debtor, and § 353 provides that if an executory contract is rejected by the plan or pursuant to permission given by the court any person injured by such rejection shall be deemed a creditor.

Chapters X, XII, and XIII of the Act contain substantially identical provisions for rejection of executory contracts with permission of the court (§§ 116(1), 413(1), and 613(1)) or by provisions in the plan (§§ 216(4), 461(4), and 646(6)) and for the claims of those injured by the rejection (§§ 202, 458 and 642). In view of these provisions in Chapter X it has long been recognized that so much of § 70b of the Act as fixes a time for the trustee to assume or reject executory contracts within 60 days after adjudication or within 30 days after his qualification, whichever is later, and provides that any contract not assumed or rejected within that time shall be deemed to be rejected, is inapplicable in Chapter X proceedings. *Texas Importing Co. v. Banco Popular de Puerto Rico*, 360 F. 2d 582 (5th Cir. 1966);

Title Insurance & Guaranty Co. v. *Hart*, 160 F. 2d 961 (9th Cir.) cert. denied 332 U.S. 761 (1947); *In re M & S Amusement Enterprises Inc.*, 122 F. Supp. 364 (D. Del. 1954); *In re Childs Co.*, 64 F. Supp. 282 (S.D.N.Y. 1944). As was said in *Texas Importing Co.* v. *Banco Popular de Puerto Rico, supra*, at p. 584, these provisions in Chapter X "clearly indicate Congress intended that before an executory contract should be rejected, a judicial hearing and inquiry, at which interested parties might be heard, should be held, and that an executory contract could be rejected only with permission of the court. . . ." See also *B.J.M. Realty Corp.* v. *Ruggieri*, 326 F. 2d 281 (2d Cir. 1963) and *B.J.M. Realty Corp.* v. *Ruggieri*, 338 F. 2d 653 (2d Cir. 1964), holding that a lessor waived his option to terminate a lease by accepting rental payments for four months following the filing of a Chapter XI petition by the lessee, so that the lease could thereafter be affirmed, and *Floro Realty & Investment Co.* v. *Steem Electric Corp.*, 128 F. 2d 338 (8th Cir. 1942), holding that where the lessor exercises his option to cancel a lease four months after the lessee files a Chapter X petition all liability for future rent is terminated.

It has also been recognized that, under the pertinent provisions of Chapters X and XI, the other party to an executory contract has no provable claim until his contract is rejected so that, if there has been no rejection with permission of the court prior to confirmation of a plan, "he may insist that his contract be either rejected or assumed under the plan and may apply to the . . . court to protect his interest at the confirmation hearing or before." *In re Greenpoint Metallic Bed Corp.* v. *Wise Shoe Stores, Inc.*, 111 F. 2d 287, 290 (2d Cir.), cert. denied 311 U.S. 654 (1940). See also *Philadelphia Co.* v. *Dipple*, 312 U.S. 168, 174 (1941).

Rule 11-54. Appraisal and Sale of Property; Compensation and Eligibility of Appraisers and Auctioneers

1 *(a) Appraiser: Appointment and Duties.*

The court may appoint one or more competent and disinterested appraisers who shall prepare and file with the court an appraisal of the property of the debtor. The court may prescribe how such appraisal shall be made.

(b) Sale of Property. The court may, on such notice as it may direct and for cause shown, authorize the trustee, receiver, or debtor in possession to lease or sell any real or personal property of the debtor, on such terms and conditions as the court may approve.

(c) Compensation and Eligibility of Auctioneers and Appraisers. Bankruptcy Rule 606(c) applies in Chapter XI cases to any appraiser or auctioneer appointed by the court.

ADVISORY COMMITTEE'S NOTE

This rule is derived from §§ 333 and 313(2) of the Act, and incorporates Bankruptcy Rule 606(c) whenever the court appoints an appraiser or auctioneer.

Because the ~~norm~~ ~~in~~ Chapter XI cases is different from bankruptcy cases, the thrust of the Chapter XI rule is not to require an appraisal but merely to permit one on application. In bankruptcy, there would be an appraisal unless the court determines it to be unnecessary. See Bankruptcy Rule 606(a).

Subdivision (b) also recognizes a difference between the two types of cases. In bankruptcy the property will be sold; in a Chapter XI case a sale, other than in the ordinary course of business, would be exceptional. This subdivision follows § 313(2) of the Act permitting flexibility in the method and form of the sale but the court could, in prescribing such matters, refer to Bankruptcy Rule 606(b).

An application for the appointment of an appraiser

may be made by any party in interest or the appointment may be made by the court on its own initiative.

Rule 11-55. Abandonment of Property

After hearing on such notice as the court may direct and on approval by the court the trustee, receiver, or debtor in possession may abandon any property.

Rule 11-56. Redemption of Property From Lien or Sale

Bankruptcy Rule 609 applies in Chapter XI cases.

Rule 11-57. Prosecution and Defense of Proceedings by Trustee, Receiver, or Debtor in Possession

Bankruptcy Rule 610 applies in Chapter XI cases.

Rule 11-58. Preservation of Voidable Transfer

Bankruptcy Rule 611 applies in Chapter XI cases.

Rule 11-59. Proceeding to Avoid Indemnifying Lien or Transfer to Surety

Bankruptcy Rule 612 applies in Chapter XI cases.

Rule 11-60. Courts of Bankruptcy; Officers and Personnel; Their Duties

Part V of the Bankruptcy Rules applies in Chapter XI cases.

ADVISORY COMMITTEE'S NOTE

While confirmation of a plan has the effect of discharging the debtor from his liabilities under § 371 of the Act, a provision in the rules for an index of confirmation orders is not necessary, nor is it necessary to provide for the issuance of certificates of discharge. Accordingly, the provisions in Rule 507(c) with respect to an index and certificate of discharge are inapplicable to Chapter XI cases.

Rule 11-61. Adversary Proceedings

(a) Adversary Proceedings. Part VII of the Bankruptcy Rules governs any proceeding instituted by a party before a bankruptcy judge in a Chapter XI case to (1) recover money or property other than a proceeding under Rule 11-32 or Rule 11-51, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) obtain an injunction, (5) obtain relief from a stay as provided in Rule 11-44, (6) object to confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt, ~~(7) revoke the confirmation of a plan,~~ or ~~(8)~~ 7 determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

(b) Reference in Bankruptcy Rules. As applied in Chapter XI cases, the reference in Rule 741 to "a complaint objecting to the

bankrupt's discharge" shall be read to include also a reference to "a complaint objecting to the confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt."

ADVISORY COMMITTEE'S NOTE

Part VII of the Bankruptcy Rules (Rules 701 to 782 inclusive) are incorporated to govern the procedural aspects of most of the litigation within the jurisdiction of the court in Chapter XI cases. Subdivision (a) of this rule substitutes an expanded definition of adversary proceedings in Chapter XI cases for that contained in Bankruptcy Rule 701. Rule 11-2 indicates other substitutions and translations of terms necessary for this purpose.

Rule 11-62. Appeal to District Court

Part VIII of the Bankruptcy Rules applies in Chapter XI cases, except that ~~Rule 802(c) thereof shall read as follows~~ :

"*(c) Extension of Time for Appeal* The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property, or is not a judgment

: (1) Rule 802(c) thereof shall read as follows:

or the issuance of any certificate of indebtedness

or order under Rule 11-38 confirming a plan, or is not a judgment or order under Rule 11-42 dismissing a Chapter XI case, or converting a Chapter XI case to bankruptcy."

ADVISORY COMMITTEE'S NOTE

Under Bankruptcy Rule 802(c) the time to appeal an order authorizing a sale of any property may not be extended unless a request therefor is filed within the regular appeal time. The same policy of establishing finality of referees' orders applies to orders confirming a plan, or dismissing or converting a Chapter XI case in order for subsequent events to occur without fear of disruption.

authorizing the issuance of certificates of indebtedness,

f

(2) The following shall be added to Rule 805 thereof:

"Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

Rule 11-63. General Provisions

Part IX of the Bankruptcy Rules applies in Chapter XI cases, except that:

2 (1) The references to various rules in Rule 906(b) shall also include a reference to Chapter XI Rule 11-33(b)(2).

3 (2) The references to various rules in Rule 906(c) shall also include references to Chapter XI Rules 11-24(a), 11-25(a)(1), and 11-33(b)(2).

4 (3) The exception in Rule 910(c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance of a plan" and the reference to Official Forms in that rule shall include a reference to Official Form No. 11-F16.

5 (4) The reference in Rule 913(b) to "a dischargeable debt" shall be read as "a debt which is or will be provided for by the plan."

(1) The definitions of words and phrases in §§ 306 and 307 of the Act govern their use in the Chapter XI Rules to the extent they are not inconsistent therewith.

Paragraph (2) of this rule is in accord with case law effectuating a sale pending appeal to a good faith purchaser in the absence of the appellant obtaining a stay of the order approving the sale.

(5) The reference to Rule 203(a) ~~in Rule 919(a)~~ shall be read as a reference to Chapter XI Rule 11-24(a).

(6) The reference to Rule 102 ~~in Rule 922(b)~~ shall be read as a reference to Chapter XI Rule 11-5.

(7) The reference in Rule 924 to the time allowed by § 15 of the Act for the filing of a complaint to revoke a discharge shall be read to include also a reference to the time allowed by § 386 of the Act for the ~~filing of a complaint~~ making of a motion to revoke the confirmation of a plan.

in Rule 919(a)

in Rule 922(b)

making of a motion

ADVISORY COMMITTEE'S NOTE

With the changes, substitutions, and translations indicated in this rule and by Rule 11-2, Part IX of the Bankruptcy Rules (Rules 901-928 inclusive) applies in Chapter XI cases.

OFFICIAL CHAPTER XI FORMS

[*Note: These official forms shall be observed and used, with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909.*]

FORM 11-F1

ORIGINAL PETITION UNDER CHAPTER XI

United States District Court
for the District of _____

In re)
)
)
Debtor [include here all names used by debtor within last 6 years]) Bankruptcy No.
)

ORIGINAL PETITION UNDER CHAPTER XI

1. Petitioner's post-office address is _____.

2. Petitioner has resided [*or* has had his domicile *or* has had his principal place of business *or* if a partnership, or corporation, has had its principal assets] within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

3. No ~~bankruptcy case~~ other case under the Bankruptcy Act initiated on a petition by or against petitioner is now pending.

4. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter

XI of the ~~Bankruptcy~~ Act.

5. Petitioner is insolvent [*or* unable to pay his debts as they mature].

6. A copy of petitioner's proposed plan, ~~dated~~ ——————, is attached [*or* petitioner intends to file a plan pursuant to Chapter XI of the Act].

Wherefore petitioner prays for relief in accordance with Chapter XI of the Act.

Signed: ,

Attorney for Petitioner.

Address: ,

[*Petitioner signs if not represented by attorney.*]

,

Petitioner.

State of)
) ~~ss.~~
County of)

I, , the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

,

Petitioner.

Subscribed and sworn to before me on

.

,

[*Official character*]

[*Unless the petition is accompanied by a list of all the debtor's creditors and their*

7. [If petitioner is a corporation] Exhibit "A" is attached to and made part of this petition.

Double space add:)) ss.)

.

addresses, the petition must be accompanied by a schedule of his property, a statement of his affairs, and a statement of executory contracts, pursuant to Rule 11-11. These statements shall be submitted on official forms and verified under oath.]

See attachment

ADVISORY COMMITTEE'S NOTE

This form is a revision of former Official Form No. 48. Numerous changes have been made in the interest of eliminating unnecessary words and reducing the number of formal entries to be made by the petitioner.

Rule 11-9 requires the caption in which the name of the debtor is given to include all the names used by him within 6 years before the filing of the petition.

The recitals in paragraph 2 of the form, which establish the venue for the case, include the possibilities that are appropriate for most petitioners. Other factual bases for choice of venue under Rule 11-13(a) may be shown by minor adaptations of the form.

Attachment of a proposed plan to the petition is optional. See Rule 11-36.

Reference to the schedules and statements which are not part of the petition, are stricken from the body of the form, but a note at the foot of the form calls the petitioner's attention to the necessity of filing these papers as provided in Rule 11-11.

Blanks for the signature and address of the petitioner's attorney are added in conformity with Bankruptcy Rule 911(a) made applicable by Rule 11-63. Only the original need be signed and verified, but the copies should be conformed to the original. See Bankruptcy Rule 911(c). Verification of a petition on behalf of a corporation by an officer or agent, or of a petition on behalf of a partnership by a member or agent, shall conform to Official Form No. 4 or 5 of the Bankruptcy Forms, whichever is appropriate.

Exhibit "A" to be attached to the petition of a corporate debtor is for the purpose of supplying the Securities and Exchange Commission with the information it requires at the beginning stages of a Chapter XI case. See Rule 11-6 for requirement that a copy of a corporate petition be mailed to the SEC.

Attachment for Page 73

EXHIBIT "A"

[If petitioner is a corporation, this Exhibit A shall be completed and attached to the petition pursuant to paragraph 7 thereof.]

[Caption, other than designation, as in Form No. 11-F1.]

FOR COURT USE ONLY

Date Petition Filed

Case Number

Bankruptcy Judge

1. Petitioner s employer's identification number is . . . .

2. If any of petitioner's securities are registered under section 12 of the Securities and Exchange Act of 1934, SEC file number is . . . . . .

3. The following financial data is the latest available information and refers to petitioners condition on . . . . . .

a. Total assets: $ . . . . . .

b. Liabilities:

	Approximate number of holders
Secured debt, excluding that listed below $	. . . . .

Debt securities held by more than 100 holders: $ . . . . . .

Secured $ . . . . . .

Unsecured $ . . . . . .

Other liabilities, excluding contingent or unliquidated claims $ . . . . . .

Number of shares of common stock . . . . . .

Comments, if any: . . . . . .

. . . . . .

. . . . . .

4. Brief description of petitioner's business: . . . . . .

. . . . . .

. . . . . .

5. The name of any person who directly or indirectly owns, controls, or holds, with power to vote, 25% or more of the voting securities of petitioner is . . . . . .

6. The names of all corporations 25% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by petitioner are

. . . . . .

. . . . . .

. . . . . .

FORM NO. 11-F2

CHAPTER XI PETITION IN PENDING ~~BANKRUPTCY~~ CASE

[Caption, as in

CHAPTER XI PETITION IN PENDING BANKRUPTCY CASE

1. Petitioner's post-office address is

2. Petitioner is the bankrupt in Bankruptcy Case No. , pending in this court.

3. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XI of the Bankruptcy Act.

4. Petitioner is insolvent [*or* unable to pay his debts as they mature].

5. A copy of petitioner's proposed plan, ~~dated~~ is attached [*or* petitioner intends to file a plan pursuant to Chapter XI of the Act.]

Wherefore, petitioner prays for relief in accordance with Chapter XI of the Act.

Signed:

Attorney for Petitioner.

Address:

[*Petitioner signs if not represented by attorney.*]

Petitioner.

State of
County of ~~ss.~~

or debtor

6. [If petitioner is a corporation] Exhibit "A" is attached to and made part of this petition.

Double space add:)) ss.)

I, _____, the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

_____,

Petitioner.

Subscribed and sworn to before me on

_____,

_____

[*Official character*]

[*Unless the schedules and statements have already been filed in the bankruptcy case they must be filed with this petition or within 15 days thereafter as provided in Rule 11-11. These statements shall be on official forms and verified under oath.*]

ADVISORY COMMITTEE'S NOTE

This form is new. Save as indicated below it conforms to Official Form No. 11-F1 and the Note to that form should be consulted.

This petition contains no allegations as to venue, which will already have been made in the petition initiating the pending bankruptcy case. If venue is improper, Bankruptcy Rule 116(b) or Chapter XI Rule 11-13(b)(2) will apply.

Paragraph 2 of this form requires identification of the pending bankruptcy case.

The note at the foot of the form calls the petitioner's attention to the necessity of filing the statements and the schedules if they were not filed in the bankruptcy case, as provided in Rule 11-11.

Attachment of a proposed plan to the petition is optional.

EXHIBIT "A"
[Exhibit "A" as in Form No. 11-F1.]

Exhibit "A" may be found as an attachment to Form No. 11-F1 and is intended to supply the Securities and Exchange Commission with necessary information about a corporate debtor. See Rules 11-7 and 11-6 for requirement that a copy of a corporate petition be mailed to the SEC.

FORM NO. 11-F3

VERIFICATION ON BEHALF OF A CORPORATION

[*Form No. 4 of the Bankruptcy Forms is applicable and should be used.*]

ADVISORY COMMITTEE'S NOTE

Rule 11-12 requires all petitions to be verified. Bankruptcy Form No. 4 is to be used for the verification on behalf of a corporation. It may be adapted for use in connection with other papers required by these rules to be verified. See Note to Bankruptcy Rule 911.

FORM NO. 11-F4

VERIFICATION ON BEHALF OF A PARTNERSHIP

[*Form No. 5 of the Bankruptcy Forms is applicable and should be used.*]

ADVISORY COMMITTEE'S NOTE

Rule 11-12 requires all petitions to be verified. This form is to be used for the verification on behalf of a partnership. It may be adapted for use in connection with other papers required by these rules to be verified. See the Note to Bankruptcy Rule 911.

FORM NO. 11-F5

SCHEDULES

[*Form No. 6 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 6 should be changed to "debtor".*]

ADVISORY COMMITTEE'S NOTE

This form is a revision of the Official Forms for schedules A and B accompanying Official Form No. 1. It is

intended for use by the debtor who is required to prepare a schedule of property and list of creditors to accompany a petition filed under the Act. See Rule 11-11.

The number of schedules for property has been reduced from 6 to 4 and the number of schedules of debts from 5 to 3 in the interest of simplification. No significant change in the information required to be disclosed is intended by this reduction. Numerous changes of format have been made to permit easier adaptability for individual cases, and columnar headings and categories of claims and property have been revised to make them more comprehensive and clear.

Ledger or voucher references and identification of places where debts were contracted or incurred are no longer required to be entered on the schedules of his debts. To eliminate an overlap of Schedule A-2 with Schedule B-1, which has required inclusion of information as to encumbrances on real property of the estate, the headings in the latter schedule have been revised to make clear that all statements regarding secured claims are to be entered in Schedule A-2. Liabilities on notes and bills heretofore supposed to be entered on Schedules A-4 and A-5 are to be included in Schedule A-3 or, if the creditor is entitled to priority or is secured, on Schedule A-1 or A-2, as the case may be. Elimination of Schedules A-4 and A-5 will effect little or no change in practice.

Schedule B-3, on which choses in action belonging to the estate have heretofore been scheduled, has been merged into Schedule B-2 for personal property, thereby eliminating a needless classification. The space provided in Schedule B-4 for "Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge" has been eliminated, and such property should be included as real property on Schedule B-1 or as personal property on Schedule B-2. Information as to fees paid counsel in contemplation of the filing of a petition heretofore also required to be included in Schedule B-4, is to be obtained by questions included in the Statement of Affairs.

The official forms for the schedules have heretofore required a signature on each of the 11 schedules (A–1 to A–5 and B–1 to B–6) and an oath to accompany the Schedule of Debts as well as another to accompany the Schedule of Property. Schedules are required to be executed and filed in the same number as the petition they accompany. Rule 11–11(a). A single oath for all the schedules requiring no more than one signature by the debtor for the original has been substituted for the multiple subscription requirements heretofore imposed. The oath requires a specification of a number of sheets included in the schedules and an acknowledgment that the affiant has read them. The copies should be conformed to the original as provided in Bankruptcy Rule 911(c). Separate forms of oath are provided for individuals, corporations, and partnerships.

FORM NO. 11–F6

STATEMENT OF AFFAIRS FOR DEBTOR NOT ENGAGED IN BUSINESS

[Form No. 7 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 7 should be changed to "debtor".]

ADVISORY COMMITTEE'S NOTE

This Statement of Affairs is a revision of Official Form No. 2. Most of the changes are intended to make the requests for information more specific and certain in their references. Thus, the debtor is required to give his social security number to facilitate his identification, particularly by the Internal Revenue Service and other agencies which maintain records by reference to this number. Information as to other names used in the last 6 years serves a similar purpose.

Inquiry as to most transactions and developments affecting the financial condition of the debtor is limited to the year preceding the filing of the petition, and the

time span covered by the question regarding general assignments and other modes of general settlement with creditors (formerly #7c, renumbered as #8b) has been reduced from 2 years to one year. The scope of examination at the first meeting or at any other meeting is in no way restricted, of course, by the scope of the inquiries in the Statement of Affairs.

New questions have been added concerning tax refunds (#3), property in the hands of trustees, bailees, and other third persons (#9), repossessions and returns of property by the debtor (#13), losses covered by insurance (#14), and payments or transfers to attorneys (#15). The questions asked in this last paragraph seek information relevant to the examination authorized to be conducted by the court pursuant to Rule 11–32. The reference to sums paid to counsel heretofore included in Schedule B–4 is deleted by this series of proposals.

The question regarding transfers (formerly #10a, now #12a & b) has literally required the debtor to disclose every payment as well as exchange of property during the preceding year. The question has been revised to develop information only as to (1) gifts that exceed the bounds of ordinary and usual presents to family members and charitable contributions, and (2) transfers of realty or tangible personalty. The range of inquiry covers the year before the filing of the petition as before, but no accounting is required by the question as to payments of cash and by check except when out-of-the-ordinary gifts are effected in this way.

Inquiry is made as to relevant writings in numerous instances. Schedule B–6 on which all books, papers, and writings, have heretofore been listed has been deleted.

The debtor is required to sign only the oath to the statement, but he must verify that he has read the statement as well as that it is true to the best of his knowledge, information, and belief. Only the original need be verified, but the copies must be conformed to the original. See Bankruptcy Rule 911(c). When the schedules and statement of affairs are filed simultaneously, as they

ordinarily will be (see Rule 11-11), the oaths may be combined, as provided in Bankruptcy Rule 909.

FORM NO. 11-F7

STATEMENT OF AFFAIRS FOR DEBTOR ENGAGED IN BUSINESS

[*Form No. 8 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 8 should be changed to "debtor".*]

ADVISORY COMMITTEE'S NOTE

This is a revision of Official Form No. 3. Most of the changes made in the form are identical or similar to those made in Official Form No. 2 and explained in the note accompanying the Statement of Affairs for a Debtor Not Engaged in Business.

The inquiry regarding tax returns here (#6a) extends back 3 years before the filing of the petition because of the possible relevance of the returns for all 3 years in determining the tax liability of a business debtor for the year in which the petition is filed.

The inclusion of the questions regarding suits, executions, and attachments (#12) cures a *casus omissus* in Official Form No. 3.

The question regarding loans repaid (#13) has been extended to cover payments on installment credit sales of goods and services. The purpose of this question is to develop information regarding possible preferences, and the Statement of Affairs in incomplete in this respect if it refers only to repayments of loans.

Information regarding business leases (#17) will be helpful in determining whether rental arrangements should be terminated or extended and whether the landlord may have a basis for asserting a lien or priority or may be liable for the return of a deposit to the estate.

The question regarding withdrawals (formerly #14,

renumbered #19) has been elaborated to get information from individual proprietors comparable to that heretofore sought from partnerships and corporate debtors. This information will supplement that obtained pursuant to the question regarding nonbusiness income (#5), payment of loan (#13), and other kinds of transfers in providing a picture of the disposition of assets during the year preceding the filing of the petition.

The question regarding the membership and management of a partnership or corporation (formerly #15, now #21) has been elaborated to develop information regarding significant changes during the year prior to the filing of the petition. Such information is likely to be of considerable assistance in discovering the reasons for the stringent financial condition of the debtor and in determining the disposition of its assets during the year preceeding the filing of the petition.

The debtor is required to sign only the oath to the statement, but he must verify that he has read the statement as well as that it is true to the best of his knowledge, information, and belief. When the schedules and statement of affairs are filed simultaneously, as they ordinarily will be (see Rule 11-11), the oaths may be combined, as provided in Bankruptcy Rule 909. Only the original need be signed and verified, but the copies must be conformed to the original. See Bankruptcy Rule 911(c). Bankruptcy Rules 909 and 911 are made applicable in Chapter XI cases by Rule 11-63.

FORM NO. 11-F8

ORDER APPOINTING RECEIVER OR DISBURSING AGENT AND FIXING THE AMOUNT OF HIS BOND

[*Caption, other than designation, as in Form No. 11-F1.*]

ORDER APPOINTING RECEIVER [or ~~OR~~ DISBURSING AGENT AND]

FIXING THE AMOUNT OF HIS BOND

1. , of* is hereby appointed receiver of the estate [*or* disbursing agent for the estate] of the above-named debtor.

2. The amount of the bond of the receiver [*or* disbursing agent] is fixed at $.

Dated: .

, *Bankruptcy Judge.*

*State post-office address.

Ital.

ADVISORY COMMITTEE'S NOTE

This form is a revision of Official Form No. 20. With respect to the appointment of the disbursing agent, this form is new.

FORM NO. 11-F9

NOTICE TO RECEIVER OR DISBURSING AGENT OF HIS APPOINTMENT

[*Caption, other than designation, as in Form No. 11-F1.*]

NOTICE TO RECEIVER ~~OR~~ DISBURSING AGENT OF HIS APPOINTMENT

To , of* .

You are hereby notified of your appointment as receiver of the estate [*or* disbursing agent for the estate] of the above-named debtor. The amount of your bond has been

*State post-office address.

]

[or

Ital.

fixed at $.

[*The following paragraph is applicable to receiver only*]

You are required to notify the undersigned forthwith of your acceptance of rejection of the office of receiver.

Dated:

Bankruptcy Judge.

ADVISORY COMMITTEE'S NOTE

This form is a revision of Official Form No. 22. It is to be used in giving the notice to a receiver required by Rule 11-18(c). While there is no requirement that a disbursing agent be notified of his appointment, this form is adapted for such use.

FORM NO. 11-F10

BOND OF RECEIVER OR DISBURSING AGENT

[*Caption, other than designation, as in Form No. 11-F1.*]

BOND OF RECEIVER [~~OR~~ DISBURSING AGENT] [or]

We,

of* , as principal, and

of* , as surety, bind ourselves to the United States in the sum of $ for the faithful performance by the undersigned principal of his official duties as receiver [*or* disbursing agent] [for the estate] [~~of the estate~~ of the above-named debtor.

Dated:

*State post-office address. [Ital.]

Advisory Committee's Note

This form is a simplification of former Official Form No. 23. It may be used in an individual case under Rule 11-20, or, by modification of the caption, the reference in the bond to the debtor, and, where necessary, the reference to the principal, it may be adapted for use in a series of cases when a blanket bond is given. Unless otherwise provided by local rule, the completed bond is to be filed with the referee in accordance with Rule 11-20.

FORM NO. 11-F11

ORDER APPROVING RECEIVER'S OR DISBURSING AGENT'S BOND

[*Caption, other than designation, as in Form No. 11-F1.*]

ORDER APPROVING RECEIVER'S [OR DISBURSING AGENT'S] BOND

The bond filed by ______ of* ______ as receiver, [*or* disbursing agent,] ~~of the estate~~ of the above-named debtor is hereby approved.

for the estate

of the estate

Dated: ______

______,
Bankruptcy Judge.

*State post-office address.

Ital.

Advisory Committee's Note

Rule 11-20(a) authorizes the court to approve other security than a bond but recordation of an order approv-

ing other security would not come within the scope of § 21g. A copy of the petition may be recorded pursuant to § 21g, however.

FORM NO. 11-F12

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

[*Caption, other than designation, as in Form No. 11-F1.*]

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

I hereby certify that the above-named debtor continues in possession of his [its] estate as debtor in possession, no trustee in bankruptcy or receiver having been appointed or qualified.

Dated: _____.

_____,

Bankruptcy Judge.

ADVISORY COMMITTEE'S NOTE

Under Rule 11-18 (a) and (b) the trustee in bankruptcy continues in charge of the debtor's estate if the Chapter XI petition is filed in a pending bankruptcy case after such trustee has qualified; otherwise, the debtor is to continue in possession except that, for cause, the court may appoint a receiver. Where the debtor continues in possession, there need be no formal order to that effect. Accordingly, where evidence is required this certificate may be used pursuant to Rule 11-20(c). A copy of this certificate is not, however, within the purview of § 21g of the Act for purposes of recordation and in such cases a copy of the petition itself should be recorded.

FORM NO. 11-F13

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

[*Caption, other than designation, as in Form No. 11-F1.*]

ORDER FOR FIRST MEETING OF CREDITORS AND FIXING TIME FOR FILING COMPLAINT TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY.

To the debtor, his creditors, and other parties in interest:

_____

of* _____, having filed a petition on _____ stating that he desires to effect a plan under Chapter XI of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at _____, on _____, at ____ o'clock __.m.;

2. The debtor shall appear in person [*or, if the debtor is a partnership,* by a general partner, *or, if the debtor is a corporation,* by its president or other executive officer] before the court at that time and place for the purpose of being examined;

~~3. [*If appropriate*] _____ is fixed as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c(2) of the Act.~~

*State post-office address.

Ital.

3 4. The hearing on confirmation of the plan shall be held at a date to be later fixed [*or* at a date to be fixed at the first meeting *or* at on at or immediately following the conclusion of the first meeting].

4 5. Creditors may file written objections to confirmation at any time prior to confirmation [*or* is fixed as the last day for the filing of objections to confirmation, *or* objections to confirmation may be filed by a date to be later fixed.]

You are further notified that:

meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims and acceptances of the plan, nominate a standby trustee, elect a committee of creditors, examine the debtor as permitted by the court, and transact such other business as may properly come before the meeting.

The filing of the petition by the debtor above named operates as a stay of the commencement or continuation of any action against the debtor, of the enforcement of any judgment against him, of any act or the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor, and of any court proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, as provided by Rule 11-44.

In order to have his claim allowed so that he may share in any distribution under a confirmed plan, a creditor must file a claim, whether or not he is included in the schedule of creditors filed by the debtor. Claims which are not filed before confirmation of the plan will not be allowed except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

[*If appropriate*]

of* has been appointed receiver of the estate of the above-named debtor.

Dated:

Bankruptcy Judge.

*State post-office address.

Ital.

ADVISORY COMMITTEE'S NOTE

Insofar as this form embodies an order, it is new. Insofar as it embodies a notice, it revises former Official Form No. 49.

As provided in Rules 11–36 and 11–37, acceptances may be obtained by the debtor before or after the filing of the petition and may be filed by him with the court on behalf of the accepting creditor. A copy of the plan, if any, filed by the debtor should be attached to this combined order and notice.

The inclusion in the official form of information regarding the effect of the Chapter XI petition as a stay, ~~the time for filing a complaint to determine the dischargeability of debts~~, the time to file objections to confirmation, and the necessity of the filing of claims is new. It should be helpful to creditors and reduce the

number of inquiries directed at referees' offices by recipients of the notice of the first meeting.

In unusual cases when the court fixes, at an early time, the date by which complaints to determine the dischargeability of debts must be filed, the date so fixed can be added to this form.

FORM NO. 11-F14

PROOF OF CLAIM

[Form No. 15 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 15 should be changed to "debtor".]

ADVISORY COMMITTEE'S NOTE

This form combines the functions of Official Form Nos. 28, 29, 30 and 31. It may be used by any claimant, including a wage earner for whom short forms have been specially provided (Forms No. 11-F15 and 11-F15A), or by an agent or attorney for any claimant. Such a combined form is commonly used in practice.

In order to facilitate confirmation of the plan and distribution to creditors, paragraph 9 also requires that any written security agreement (if not included in the writing upon which the claim is founded, which is required by paragraph 4 to be attached) be attached to the proof of claim or that the reasons why it cannot be attached be set forth. Paragraph 9 further requires an indication of the date and the office or offices in which notice of the security interest has been filed or recorded. The information so required will expedite determination of the validity and perfection of security interests. Satisfactory evidence of perfection, which is to accompany the proof of claim, would include a duplicate of an instrument filed or recorded together with an indication of the date or dates when and the office or offices where filed or recorded, a duplicate of a certificate of title when a security interest is perfected by notation on such a ceritficate, a statement that pledged property has been in the possession of the secured party since a specified

date, or a statement of the reasons why no action was necessary for perfection.

Paragraph 10, requiring explicitness as to whether the claim is filed as a general, priority, or secured claim, will also facilitate administration and minimize troublesome litigation over the question whether a proof of claim was intended as a waiver of security. See *e.g., United States, National Bank* v. *Chase National Bank*, 331 U.S. 28, 35–36 (1947); 3 Collier ¶ 57.07 [3.1] (1961).

FORM NO. 11–F15

PROOF OF CLAIM FOR WAGES, SALARY, OR COMMISSIONS

[Form No. 16 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 16 should be changed to "debtor".]

ADVISORY COMMITTEE'S NOTE

This form is new. It is an adaptation of Official Form No. 11–F14 for the use of claimants for personal earnings in Chapter XI cases. Its limited purpose permits elimination of recitals that are appropriate for other classes of claimants. Most claimants using the form will be entitled to priority under § 64a(2) of the Act. The claim as filed includes an amount not entitled to priority because, for example, not earned within the 3-month period immediately preceding the filing of the petition, reference to payroll records will ordinarily permit determination of the amount of the priority, if any, to which the claimant is entitled. If such records are unavailable, the claimant may be required to supply additional information as a condition to allowance of the claim with priority.

FORM NO. 11-F15A

PROOF OF MULTIPLE CLAIMS FOR WAGES, SALARY, OR COMMISSIONS

[*Form No. 16A of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 16A should be changed to "debtor."*]

FORM NO. 11-F16

POWER OF ATTORNEY

[*Caption, other than designation, as in Form No. 11-F1.*]

POWER OF ATTORNEY

To _____ of* _____,
and _____ of* _____:

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to receive distributions and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: _____.

Signed: _____

By: _____

[*If appropriate*] as _____

Address: _____

_____

[*If executed by an individual*] Acknowledged before me on _____.

[*If executed on behalf of a partnership*]

*State post-office address.

Ital.

Acknowledged before me on _____,
by _____, who says that he
is a member of the partnership named above
and is authorized to execute this power of
attorney in its behalf.

[*If executed on behalf of a corporation*]
Acknowledged before me on _____,
by _____, who says that he
is _____ of the corporation
named above and is authorized to execute
this power of attorney in its behalf.

_____,

_____

[*Official character*]

ADVISORY COMMITTEE'S NOTE

Bankruptcy Rule 910(c), made applicable by Rule 11-63, requires a power of attorney to be prepared substantially in conformity with this form, but it may grant either more or less authority in accordance with the language used.

While a power of attorney may of course be executed in favor of an attorney at law who is also retained as such to represent the creditor executing the form, the power of attorney does not purport to confer the right to act as an attorney at law. The corollary is that one not an attorney may act under a power of attorney within the limitations prescribed in the form.

While Bankruptcy Rule 910(c) as modified by Rule 11-63(3) does not require a written power of attorney for the purpose of filing a proof of claim or voting on a plan, Official Form No. 11-15 requires a partner, corporate officer or other agent filing a proof of claim to state that he is authorized to file the claim. The power contained in this form is broad enough to include authority to vote for a creditors' committee and in the nomination of a trustee.

The statement respecting authority required in the acknowledgement accompanying a power of attorney executed on behalf of a partnership or corporation is in lieu of the requirement of General Order 21(5) heretofore existing that such an instrument be accompanied by an oath that the person executing is a member of the partnership or a duly authorized officer of the corporation.

FORM NO. 11-F17

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN PRIOR TO CONFIRMATION, COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 11-F1.*]

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN PRIOR TO CONFIRMATION, COMBINED WITH NOTICE THEREOF

To the debtor, his creditors and other parties in interest:

The debtor having filed a modification of his plan on _____, it is ordered, and notice is hereby given, that:

1. _____ is fixed as the last day for filing a written rejection of the modification.

2. A copy [*or* a summary] of the modification is attached hereto. Any creditor who has accepted the plan and who fails to file a written rejection of the modification within the time above specified shall be deemed to have accepted the plan as modified.

Dated: _____.

_____,
Bankruptcy Judge.

ADVISORY COMMITTEE'S NOTE

This form, which is new, combines the order and notice provided for by Rule 11-39 where the debtor proposes a modification of a plan prior to confirmation.

FORM NO. 11-F18

ORDER CONFIRMING PLAN

[*Caption, other than designation, as in Form No. 11-F1.*]

ORDER CONFIRMING PLAN

The debtor's plan filed on _____, [*if appropriate*, as modified by a modification filed on _____,] having been transmitted to creditors; and

The deposit required by Chapter XI of the Bankruptcy Act having been made; and

It having been determined after hearing on notice:

1. That the plan has been accepted in writing by the creditors whose acceptance is required by law [*or* by all creditors affected thereby]; and

2. That the plan has been proposed and its acceptance procured in good faith, and not by any means, promises, or acts forbidden by law [*and, if the plan is accepted by less than all affected creditors*, the provisions of Chapter XI of the Act have been complied with, the plan is for the best interests of the creditors and is feasible, the debtor has not been guilty of any of the acts

or failed to perform any of the duties which would be a bar to the discharge of a bankrupt];

It is ordered that:

A. The debtor's plan filed on , a copy of which is attached hereto, is confirmed.

B. Except as otherwise provided or permitted by the plan or this order:

(1) The above-named debtor is released from all dischargeable debts;

(2) Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Act;

(b) [unless heretofore or hereafter determined by order of this court to be nondischargeable,] debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) [unless heretofore or hereafter determined by order of this court to be nondischargeable,] debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on , the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such a demand;

[if the court has fixed a time for the filing of complaints under § 17c(2) of the Act pursuant to Rule 11-48]

[if the court has fixed a time for the filing of complaints under § 17c(2) of the Act pursuant to Rule 11-48]

(d) debts determined by this court to be discharged under § 17c(3) of the Act.

C. All creditors whose debts are discharged by this order and all creditors having claims of a type referred to in paragraph (B)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: _____.

_____,

Bankruptcy Judge.

ADVISORY COMMITTEE'S NOTE

This form combines and revises former Official Forms Nos. 51 and 52 to comply with Rule 11-43, and to take account of the 1970 amendments which added §§ 14f, 17b, and 17c and amended § 17a of the Act. Under § 371 confirmation of a plan operates to release the debtor from his dischargeable debts except as the plan or order confirming it may provide otherwise. This form thus includes the order of discharge. Notice of the order of confirmation and order of discharge is provided for on a separate form which is more easily transmitted to creditors. The court may, however, combine the two forms and provide for the notice in this form.

This form may be used whether a plan has been accepted by all affected creditors or less than all affected creditors.

FORM NO. 11-F19

NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE

[*Caption, other than designation, as in Form No. 11-F1.*]

NOTICE OF ORDER OF CONFIRMATION OF

PLAN AND DISCHARGE

To the debtor, his creditors, and other parties in interest:

Notice is hereby given of the entry of an order of this court on _____, confirming the debtor's plan dated _____, and providing further that:

A. Except as otherwise provided or permitted by the plan or such order:

(1) The above-named debtor is released from all dischargeable debts;

(2) Any judgment theretofore or thereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Bankruptcy Act;

(b) unless theretofore or thereafter determined by order of this court to be non-dischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

[if the court has fixed a time for the filing of complaints under § 17c(2) of the Act pursuant to Rule 11-48]

(c) unless theretofore or thereafter determined by order of this court to be non-dischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on _____, the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefore or has submitted to this court a signed statement of intention to make such a demand;

[if the court has fixed a time for the filing of complaints under § 17c(2) of the Act pursuant to Rule 11-48]

(d) debts determined by this court to be discharged under § 17c(3) of the Act.

B. All creditors whose debts are discharged by said order and all creditors having claims of a type referred to in paragraph (A)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: _____.

_____,

Bankruptcy Judge.

ADVISORY COMMITTEE'S NOTE

This form is new. It is to be used to notify creditors of the entry of the order of confirmation and is to be mailed within 30 days thereof pursuant to Rules 11–38 and 11–43. Additionally, the notice informs the creditors of the discharge provisions of § 14f of the Act, particularly those enjoining suits on discharged debts. While this form is separate from the confirmation order, Form No. 11–F18, the order and notice may be combined in one form if the court so desires.

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General Order in Bankruptcy No. 48 and Official Forms in Bankruptcy Nos. 48 to 52 inclusive, heretofore prescribed by the Supreme Court, should be abrogated.

PROPOSED AMENDMENT TO OFFICIAL BANKRUPTCY FORM NO. 7 (14)

14. Losses

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including dates, names, and places, and the amounts of money or value and general description of property lost.)

b. Was the loss covered in whole or part by insurance? (If so, give particulars.)

15. Payments or transfers to attorneys.

a. Have you consulted an attorney during the year immediately preceding or since the filing of the original petition herein? (Give date, name, and address.)

b. Have you during the year immediately preceding or since the filing of the original petition herein paid any money or transferred any property to the attorney or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other person on his behalf? (If so, give particulars, including amount and terms of obligation.)

Committee Note

The amendment restores language inadvertently omitted from the text of the form which was transmitted by the Judicial Conference to the Supreme Court and prescribed by the Court on April 24, 1973.