Agenda G-12
Rules of Practice
and Procedure
September 1979

REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report contains the following recommendations:

1. That the proposed amendments to the Federal Rules of Civil Procedure, together with the notes thereto, set out in Appendix A, be approved by the Judicial Conference and that they be transmitted to the Supreme Court for consideration and adoption.

2. That the Report of the Advisory Committee transmitting the proposed amendments, also set out in Appendix A, be submitted to the Supreme Court together with the proposed amendments.

3. That the Judicial Conference suggest to the Supreme Court that the Advisory Committee's Report also be transmitted to the Congress.

Informational Item

The Advisory Committee on Bankruptcy Rules has formulated guidelines in the form of rules for the use of bankruptcy courts in applying the existing Bankruptcy Rules to cases commenced under the new Bankruptcy Code. These guidelines, set out in Appendix B, have been circulated to all district courts and bankruptcy courts with the suggestion that they be adopted as local bankruptcy rules pending the promulgation of binding amendments to the Bankruptcy Rules.

Judge Walter R. Mansfield, Chairman of the Civil Rules Advisory Committee, attended the meeting of the Standing Committee and stated that the proposed amendments were designed primarily to enable the district courts to control abuses in the discovery process which, in recent years, have been the subject of considerable public criticism. He also stated that the proposed amendments had been twice circulated to the bench and bar for comment, that public hearings had been held in Washington, D. C. and Los Angeles, California, and that the Advisory Committee had fully considered the many comments received.

The Standing Committee carefully reviewed each of the proposed amendments and made a few technical and clarifying changes thereto. The Committee also decided to delete from the recommended amendments a proposed new Rule 37(h) which would have provided as follows:

> (h) Additional sanctions against the United States. In an appropriate case the court may, in addition to other sanctions provided by these rules or by law, after opportunity for hearing, notify the Attorney General of the United States and other appropriate heads of offices or agencies thereof in writing, that the United States, through its officers or attorneys, has failed to participate in good faith in discovery.

The Committee believes that a judge of a district court already has the authority to notify the Attorney General, or any other government official, of conduct by a government representative which the judge considers improper. With the concurrence of Judge Mansfield the Committee added the following paragraph to the Advisory Committee note on Rule 37:

> Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys' fees, incurred by other parties as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. §2412), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

The proposed amendments to the Federal Rules of Civil Procedure, together with the notes thereto, set out in Appendix A to this report, have been unanimously approved by the Standing Committee. We recommend that they be transmitted to the Supreme Court for consideration and adoption.

We further recommend that the report of the Advisory Committee transmitting the proposed amendments, also set out in Appendix A, be submitted to the Supreme Court together with the proposed amendments. If the proposed amendments are approved by the Supreme Court, we suggest that the Advisory Committee's report also be transmitted to the Congress.

Bankruptcy Rules

A new Advisory Committee on Bankruptcy Rules has been appointed by the Chief Justice to consider amendments to the Rules of Bankruptcy Procedure required by the new Bankruptcy Code, which becomes effective on October 1, 1979. Judge Ruggero J. Aldisert of the Third Circuit is Chairman of the new Committee which comprises a group of district judges, bankruptcy judges, law professors and members of the bankruptcy bar. The Bankruptcy Rules Committee met on June 14th and 15, and again on July 11th and 12th, to plan the task of amending the bankruptcy rules and to consider interim rules or guidelines for the application of existing bankruptcy rules to bankruptcy cases commenced under the new Code.

A transition provision in the Bankruptcy Code, Public Law 95-598, Sec. 405(d) provides as follows:

> The rules prescribed under Sec. 2075 of Title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by Section 248 of this Act.

The application of the existing bankruptcy rules to cases arising under the new Bankruptcy Code has been the subject of much concern among bankruptcy judges and others, particularly as they relate to business bankruptcy cases and the conduct of the first meeting of creditors. There are now separate rules governing procedures in Chapters X, XI, and XII of the Bankruptcy Act, whereas the new Code combines in one chapter the provisions governing those types of business bankruptcies. The new Code also prohibits a bankruptcy judge from conducting the first meeting of creditors. Since amended rules cannot be drafted and made effective by October 1, 1979, the effective date of the new Code, the Advisory Committee on Bankruptcy Rules decided that it should issue interim rules or guidelines for applying the existing bankruptcy rules to cases arising under the new Code. Such interim rules or guidelines have been prepared by the Reporter to the Advisory Committee and

reviewed by that Committee. They are not binding on the bankruptcy courts, but the Advisory Committee has suggested that they might be adopted as local bankruptcy rules pending the promulgation of binding amendments to the bankruptcy rules.

These interim rules or guidelines have been widely circulated to the bench and bar generally, in the hope that they may serve to aid bankruptcy judges in the performance of their judicial duties and avoid unnecessary litigation. They will also serve as an excellent vehicle to provide feedback to the Committee as it proceeds in its work to prepare permanent rules. In addition, they will serve to achieve a measure of nationwide uniformity in the application of the bankruptcy rules to cases filed under the new Code. The guidelines are set forth in Appendix B to this report.

Appellate Rules

The Advisory Committee on Appellate Rules has not met since the last session of the Judicial Conference. The Reporter to the Committee, Professor Kenneth Ripple, is preparing materials for the Advisory Committee's consideration,

concentrating on problems relating to the use of a printed record on appeal. A meeting of the Advisory Committee will be scheduled as soon as this material is available.

The amendments to the Appellate Rules, approved by the Conference last September, cleared the Supreme Court and were transmitted by the Chief Justice to Congress on April 30th. They became effective on August 1st.

Criminal Rules

The amendments to the Federal Rules of Criminal Procedure, approved by the Judicial Conference in September 1978, were also cleared by the Supreme Court and transmitted to the Congress by the Chief Justice on April 30th, 1979. The order of the Supreme Court approving the amended rules would have made them effective on August 1, 1979. Congress, however, has decided to postpone the effective date of several of the proposed amendments until December 1, 1980, thus giving the Congress an opportunity to consider those amendments during the second session of the 96th Congress. The rules affected by the postponement are rules 11(e)(6), 17(h), 32(f) and 44(c) and new rules 26.2 and 32.1. The effective date of the

amendment to Rule 410, Federal Rules of Evidence, has also been postponed until December 1, 1980.

In addition, the amendment to Rule 40, Federal Rules of Criminal Procedure, was amended by striking the words "in accordance with Rule 32.1(a)" from paragraph (d)(1) of the rule and by striking the words "in accordance with Rule 32.1 (a)(1)" from paragraph (d)(2) of the rule.

The Advisory Committee on the Federal Rules of Criminal Procedure is considering proposed amendments to the magistrates' rules because of the new jurisdiction in misdemeanor cases given to magistrates by the recent amendments to the Magistrates Act. The Advisory Committee is meeting again in September to consider amendments to such rules and will also consider other suggested amendments to the Federal Rules of Criminal Procedure.

Activities of the Standing Committee

At its last meeting the Standing Committee reviewed some of the suggestions and criticisms of the operation of the rules program of the Judicial Conference. The Committee was informed of a study being undertaken by Dean Roger Cramton of

the Cornell Law School at the request of and under the auspices of the Federal Judicial Center. In his annual report on the State of the Judiciary, presented at the mid-year meeting of the American Bar Association in February, the Chief Justice reviewed the rulemaking process and concluded by saying:

> Perhaps the time has now come to take another look at the entire rulemaking process. There is much to be said, pro and con, concerning the present involvement of the Supreme Court as a court. I will request the Federal Judicial Center and the Judicial Conference [to] study this problem in light of 40 years of experience. It may well be that no change is indicated but the subject is important enough to merit a fresh look. I would welcome the views of the Association.

The Standing Committee will examine such questions as (1) the "openness" of the rulemaking process, (2) a requirement of public hearings on all proposed amendments to the rules, (3) the conduct of special studies by the Federal Judicial Center of particular problems arising in the operation of the rules, and (4) the relationship between local rules of court and the general rules of practice and procedure prescribed by the Supreme Court.

The Committee [illegible] Secretary of the Committee to prepare [illegible] forth the current program of the Rules [illegible] procedures now followed by the Standing [illegible] Advisory Committees in their consideration [illegible] to the rules. The entire matter will be reviewed at an early date and a report and recommendation will be made to the Judicial Conference at a future session.

Service of Process by United States Marshals

H.R. 4272, 96th Congress, is a bill to amend 28 U.S.C. 569(b) to abolish service of process by United States marshals in private civil litigation. The bill provides in part:

> United States marshals shall execute all lawful writs, process, and orders ... except that service of process, including complaints, summonses, subpoenas, and like process, shall not be performed by the marshals on behalf of any party other than the United States, unless ordered by the court in extraordinary circumstances or expressly required by statute. (Emphasis added.)

A provision in the Department of Justice appropriations authorization bill for the fiscal year 1980, S. 1157, 96th Congress, contains a similar provision:

> Service of civil process, including complaints, summonses, subpoenas, and similar process, shall not be performed by the United States marshals on behalf of any party other than the United States, unless performed pursuant to
>
> (A) section 1915 of this title or any other express statutory provision, or
>
> (B) order issued by the court in extraordinary circumstances.

At the time of the Standing Committee meeting, S. 1157 had passed the Senate with the above-quoted amendment.

The Standing Committee invited a representative of the Department of Justice, Mr. Hugh Durham, to attend the Committee meeting and explain the purpose and intent of the legislation. Mr. Durham explained that the Department of Justice had recommended an amendment to 28 U.S.C. 1921, United States Marshals Fees, to permit the Attorney General to fix those fees of the United States Marshals which are now set by statute. A bill containing this proposal passed the Senate during the 95th Congress, but was not considered in the House. An earlier report of the General Accounting Office had criticized the Department for its failure to collect outstanding marshals' fees. Since the Department's proposal had not

received favorable action in the Congress, the Department felt that the next alternative would be to withdraw from the Marshals Service the duty of serving process in private civil litigation.

The Committee is concerned that the enactment of this legislative proposal would create chaotic conditions in many district courts. The Committee further believes that the amendment to Rule 4(c), herein recommended, permitting the service of process "by a person authorized to serve process in an action brought in the courts of general jurisdiction in the state in which the district court is held or in which service is made", would grant a measure of relief to the Marshals Service. These views were communicated to Mr. Durham with an indication that the Committee would support an amendment to 28 U.S.C. 1921 to permit the Attorney General to fix the fees to be charged by United States Marshals. The appropriate Committees of the Congress have also been advised of the problem.

Other Legislation

Two bills to amend the Rules Enabling Acts, H.R. 480 and H.R. 481, have recently been introduced in the 96th Congress.

Both bills would require an Act of Congress to make rules effective, rather than making them automatically effective unless Congress states otherwise. In addition, both bills would specify the manner in which the rules program should be administered. H.R. 481 would also remove the Supreme Court from the rulemaking process and authorize the Judicial Conference to prescribe rules of practice and procedure.

The Committee has these proposals under consideration and will report at a future session of the Conference.

Respectfully submitted,

Judge Roszel C. Thomsen,
Chairman
Judge Shirley M. Hufstedler
Judge Carl McGowan
Judge James S. Holden
Attorney General Griffin B. Bell
Professor Frank J. Remington
Professor Bernard J. Ward
Edward H. Hickey, Esquire
Francis N. Marshall, Esquire

August 2, 1979

Appendix A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

June 14, 1979

To: Judge Roszel C. Thomsen, Chairman, and
Members of the Committee on Rules
of Practice and Procedure

From: Walter R. Mansfield, Chairman, Advisory
Committee on Civil Rules

On June 6, 1979, Joseph F. Spaniol sent you a copy of our Committee's Final Draft of Proposed Amendments to the Federal Rules of Civil Procedure, dealing principally with discovery. Except for a few proposals unrelated to discovery, the Draft represents the end-product of our rather extensive review of the subject of discovery abuse. Judge Thomsen and Professor Ward are fully familiar with the nature and extent of our study.

In the course of our deliberations we considered but eventually withdrew various other proposals, some after they were submitted to yourselves and circulated to the bench and bar for comment. Since the Final Draft does not contain any comment or discussion with respect to these other proposals our Committee believes that it would be helpful to members of the Standing Committee to have this informal summary of the background of our final recommendations and the reasons for withdrawing or limiting some of the earlier proposals. That is the purpose of this memorandum. Of course, some members of the Advisory Committee may have relied on different reasons

or combinations of reasons from those relied upon by others for each position taken. However, we thought it would perhaps be useful to the Standing Committee to mention some of the reasons considered in reference to each specific rule, sometimes with brief attribution to commentators, in view of the excellent response we received from bar and bench.

By way of background, in March, 1978, our Committee submitted a Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure. The Preliminary Draft had an unusual background. It was in major part the response of the Advisory Committee to a study of the discovery rules that had been undertaken by a Special Committee for the Study of Discovery Abuse of the Section of Litigation of the American Bar Association [the ABA Special Committee]. In October, 1977, the ABA Special Committee published and circulated to the bench and bar its recommendations for amendments to Rules 5, 26, 28, 29, 30, 31, 33, 34, and 37 in a document entitled Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation American Bar Association [ABA Report].

The Advisory Committee considered the recommendations of the ABA Report at its meetings in December, 1977, and January, 1978, at the latter of which the recommendations were explained by the late Paul R. Connolly, Esq., of the ABA Special Committee. We concluded that the recommendations of the ABA Report were worthy of submission to the bench and bar for comment, with two exceptions:

(1) The ABA Report proposed to amend Rule 26(b)(1) [Scope of Discovery; In General] by eliminating the term "relevant to the subject matter" and substituting therefor "relevant to the issues raised by the claims or defenses of any party." The Advisory Committee proposed instead to eliminate

"subject matter," which had been criticized by the ABA Special Committee as encouraging "sweeping and abusive discovery," and to have Rule 26(b)(1) read "relevant to the claim or defense...." A Committee Note in the Preliminary Draft explained its disagreement with the ABA Special Committee and invited the views of the bench and bar.

(2) The ABA Report proposed to amend Rule 33(a) by limiting to 30 the number of questions that could be asked by written interrogatories without leave of court. The Advisory Committee proposed instead to amend Rule 33(a) to allow each district court to decide by local rule what, if any, limitations to impose on the number of questions. The Committee again noted its disagreement with the ABA Special Committee and invited the views of the bench and bar.

In addition to the proposed amendments suggested by the ABA Special Committee, the Advisory Committee proposed amendments to Rules 4, 32 and 45 that were unrelated to the concerns of the ABA Special Committee.

The Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure was circulated under date of March 31, 1978, with a request for responses not later than July 1, 1978. A substantial number of individuals and organizations asked for added time for comment, and the date was extended to November 30, 1978. Voluminous comments, reports and suggestions, some very extensive and thorough, were received from judges, bar associations, lawyers, professors of law and others. Public hearings were held for two days in Washington and Los Angeles in October and November, 1978, at which approximately 25 representatives, some appearing on behalf of bar associations or other groups, expressed their views with respect to the proposals. In the meantime the Advisory Committee

also had the benefit of an empirical analysis made by the Federal Judicial Center, entitled Judicial Controls and The Civil Litigative Process: Discovery, based on a detailed study of more than 3,000 cases selected in six federal district courts.

The Advisory Committee met in December, 1978, and January, 1979, to consider the public response. The result of its further deliberation was the complete withdrawal of a number of the amendments proposed in the Preliminary Draft. A Revised Draft was published and circulated in February, 1979. During the ensuing months more voluminous comments were received from bench and bar by members of the Advisory Committee and discussed at a meeting on May 31, 1979, resulting in a few further revisions that are reflected in the Final Draft. Neither the Revised Draft nor the Final Draft, however, explain the reasons for withdrawal of some of the amendments proposed in the original Preliminary Draft, since comments are usually deemed appropriate only when a rule is amended.

The amendments proposed in the Preliminary Draft that have been withdrawn and the reasons for withdrawal are as follows:

Rule 4(d)(8)

The Preliminary Draft proposed the addition of this rule authorizing service by mail, a change that had been suggested by the Director, United States Marshals Service. But the Committee qualified its approval by providing that service by mail would not support entry of a default judgment. A number of commentators were of the view that the qualification rendered the rule useless. It should be noted that service by mail is authorized by the terms of Rule 4(d)(7) in districts in which state law permits service by mail.

Rule 5(d)

The Preliminary Draft suggested that this rule be amended to exclude discovery materials from the requirement that all papers required to be served upon a party must be filed with the court. The amendment was in the interest of avoiding the cost of file copies and relieving clerks' offices of storage problems. Provision was made for filing of discovery materials upon order of the court. Otherwise, the materials were not to be filed unless they were actually used in the proceeding.

Critical comment following circulation of the Preliminary Draft was generally adverse. It was pointed out that unless the products of discovery were filed in multi-party litigation, those parties who did not attend a deposition would often have difficulty gaining access to a copy. Representatives of the press complained about the "unconscionable burden" of obliging them to secure a court order for access. Various organizations complained about the limitation on public access. Public interest lawyers argued that the lack of a file copy would increase their expense. It was objected that discovery materials form a part of the official record and should be on file with the court. The fear was expressed that the lack of records would impede research about discovery, that papers would be lost or destroyed, that their integrity would be impaired. At the January, 1979, meeting the Committee voted to withdraw the proposed amendment to Rule 5(d).

That action occasioned a most spirited objection to the Revised Draft. Twenty-six respondents, including eighteen chief judges speaking for their districts, wrote to request reconsideration and restoration of the amendment, mainly because of the cost and inconvenience of providing storage for documents

that were rarely used. Some districts had already adopted local rules dispensing with the requirement that discovery materials be filed.

At its May, 1979, meeting the Committee voted to propose the amendment to Rule 5(d) that appears in the Final Draft. It is not the amendment that was withdrawn. It does not dispense with the filing of discovery materials unless the court orders filing. It authorizes the court on motion of a party or on its own initiative to dispense with filing of the materials.

Rule 26(b)(1)

The Report of the ABA Special Committee recommended that the term "relevant to the issues raised by the claims or defenses of any party" be substituted for the present "relevant to the subject matter involved in the pending action." The Advisory Committee proposed in the Preliminary Draft that the rule be amended to read "relevant to the claim or defense" of any party.

Comments received in response to the Preliminary Draft were generally opposed to any change in Rule 26(b)(1). Many believe the present rule is working well. A number disputed the assumption that there was general abuse of discovery. Others believe that abuse is limited to big or complex cases, which represent a small percentage of all litigation and can be better managed through use of the Manual for Complex Litigation, which is specially designed to deal with discovery in such cases. It was thought that a change in language would lead to endless disputes and uncertainty about the meaning of the terms "issues" and "claims or defenses." It was objected that discovery could not be restricted to issues because one of the purposes of

discovery was to determine issues (e.g., in wrongful death, product liability and medical malpractice suits). Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to "shotgun" pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery. Some suggested that the better way of avoiding abuse of discovery would be to increase judicial supervision from the outset, fixing limits on the time and extent of discovery to be permitted according to the needs of each case.

Forty individuals or groups and five bar organizations opposed any change in Rule 26(b)(1); five individuals or groups and five bar organizations approved of the Committee's amendment to eliminate "subject matter;" eight individuals or groups and two bar associations approved of the substitution of "issues" for "subject matter." At the January, 1979, meeting the Advisory Committee voted to withdraw its proposed amendment to Rule 26(b)(1) on the ground that the Rule 26(f) discovery conference was the more appropriate method of dealing with the special classes of cases for which discovery abuses are likely.

With a very notable exception, comments on the February, 1979, Revised Draft, which referred to the Committee's action in withdrawing amendment of Rule 26(b)(1), have been generally favorable. The exception is the action taken by the ABA Special Committee, which had approved the Preliminary Draft. It did not approve the Revised Draft. Its extended Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure concludes:

> "... we respectfully urge the Advisory Committee not to transmit to the Committee on Rules of

> Practice and Procedure its revised proposals for amendments to the Federal Rules of Civil Procedure. Mindful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade, we urge the Advisory Committee to give further consideration and study to the amendments initially proposed and to other ways by which discovery abuse can be deterred and the expense of civil litigation can be reduced." The Special Committee, etc., Comments on Revised Proposed Amendments, p. 43 (1979).

The Report of the National Commission for Review of Antitrust Laws to the President and the Attorney General, which was issued on January 31, 1979, after the Advisory Committee had approved its Revised Draft to be circulated in February for comments, does recommend that Rule 26(b) be amended to narrow the scope of discovery, favoring the ABA Special Committee's proposal to add language limiting discovery to "issues" on the ground that this might lead judges to exercise stronger control over discovery from the outset. While not adverse to early issue definition for discovery purposes where the parties are unable to reach agreement, the Advisory Committee believes that this objective can best be achieved through its proposed Rule 26(f).

Our Committee's decision not to recommend an amendment to Rule 26(b)(1) does not close the door on continued consideration of whether some change in the rule may be devised that will be useful in minimizing discovery abuse. It simply means that we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit. We propose to seek a firmer basis for identifying and defining discovery abuse problems so that effective methods of treatment can be found.

Rule 30

The Preliminary Draft proposed a number of amendments to Rule 30 designed to authorize and regulate the taking of oral

depositions by electronic recording devices without the leave of court that is now required. There was substantial opposition to the authority thus given to a party to record a deposition electronically without either agreement of his opponent or leave of court.

Some attacked the premise that electronic recording is less expensive than stenographic, pointing to the costs involved in operating and monitoring recording equipment even when the recording is not eventually transcribed, to which must be added the cost of transcribing when a transcription is required. Others were unconvinced of the fidelity of electronic recording of depositions, emphasizing the increased number of errors resulting from transcription of mechanically recorded depositions, as compared with stenographic records, often because of difficulty in identifying voices (particularly when persons talk simultaneously or voices overlap), poor recording quality, background noise or acoustics. Others noted that use of a recording (including videotape) posed special problems for the court in ruling upon objections and could have a disruptive effect at trial. In addition it was suggested that recordings are more susceptible to intentional or inadvertent alteration or erasure than stenographic records. Some urged that the rule require that there be a transcription if the recording were to be offered to the court.

The Advisory Committee withdrew the proposal for amendment to provide for electronic recording of depositions as a matter of course. The Revised Draft authorizes electronic recording upon stipulation of the parties or leave of court.

Rule 33(a)

The Report of the ABA Special Committee proposed to amend Rule 33(a) by limiting the number of questions that

could be asked by written interrogatories to a party to thirty (30) unless the court permitted a larger number. Our Preliminary Draft expressed disapproval of that limitation. Instead, it proposed an amendment that would permit each district court to limit the number of questions by local rule.

There was virtually no support for either change in the responses received. Each of the 12 Committees of City and State Bars that responded opposed a change in Rule 33(a). Fifty-seven individuals and organizations opposed any change; 7 individuals and organizations favored the 30-question limitation; 6 individuals and organizations favored the Committee's proposal to permit local rules on limitations.

The constantly-echoed criticism was that a limitation on the number of questions was arbitrary, unreasonable and unnecessary. Many commentators stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor. It was frequently asserted that limitation of the number of questions would lead to routine requests for court orders enlarging the number. At its January, 1979, meeting the Committee voted to withdraw its proposed amendment to Rule 33(a).

Rule 37(e)

Our Preliminary Draft, following a proposal of the Report of the ABA Special Committee, proposed an additional subdivision to Rule 37 to authorize the court to impose upon counsel or a party "such sanctions as may be just" for abuse of discovery process. A number of commentators objected to the designedly broad language of the rule. Our Committee voted to modify the proposal by restricting additional sanctions to failure to participate in the framing of a discovery plan under Rule 26(f) or failure to obey an order entered thereunder.

In conclusion I recognize that the foregoing summary cannot possibly anticipate all questions that may be raised by you with respect to our Committee's final recommendations. Having been blessed with the presence of Judge Thomsen at our sessions and with Professor Ward as our Reporter, we are confident that they, as members of the Standing Committee on Rules, will be able to fill in any other gaps that we may have left unexplained. Needless to say we are at your command.

Respectfully submitted,

The Advisory Committee on
Federal Civil Rules

By _____
Chairman

Appendix B

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROSZEL C. THOMSEN
CHAIRMAN

JOSEPH F SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
WALTER R. MANSFIELD
CIVIL RULES
WALTER E. HOFFMAN
CRIMINAL RULES
ROBERT A. AINSWORTH, JR.
APPELLATE RULES
RUGGERO J. ALDISERT
BANKRUPTCY RULES

August 15, 1979

SUGGESTED INTERIM BANKRUPTCY RULES

The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States is pleased to distribute the enclosed guidelines, in the form of interim rules to guide bankruptcy courts. These temporary rules are designed to meet substantive and procedural changes mandated by the Act establishing a Uniform Law on the Subject of Bankruptcies, PL 95-598, 92 Stat 2549, approved November 6, 1978, which codified bankruptcy law under Title 11, United States Code. The new Bankruptcy Code is applicable to cases filed on or after October 1, 1979.

The Advisory Committee is now undertaking a complete revision of the bankruptcy rules in the light of the new code. This task is formidable. The drafting process will be deliberate and, of necessity, will take some time. So that the bench and bar may have some guidance pending the completion of this process, the committee requested its Reporters, Professors Lawrence P. King and Walter Taggart, to draft interim rules. Designed to assist the bench and bar in processing cases brought under the new code, the drafts seek to provide guidance in two discrete areas -- in applying existing bankruptcy rules where appropriate under the new code, and in filling gaps in present rules created by the new legislation. The committee examined, discussed, and modified several drafts prepared by the Reporters and are satisfied that the interim rules now being distributed do qualify as temporary guidelines until permanent rules are drafted and approved.

The bench and bar are cautioned that these suggestions have not been approved by the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, by the Supreme Court, or by the Congress. Thus, they will be binding in law only to the extent that they are adopted as local bankruptcy rules or are made applicable to a particular case by a bankruptcy judge in the exercise of the judicial function. The guidelines are issued, therefore, only as tentative suggestions of the Advisory Committee. Although we do not represent that these suggestions will reflect the ultimate recommendation of our committee, we are satisfied that they should be adopted as local rules until the committee's formal work is completed.

Recognizing that there would be a period of time before new rules could be promulgated, Congress provided that existing bankruptcy rules, to the extent they are not inconsistent with the new law, are to remain effective until they "are repealed or superseded" by new rules. The bench and bar must determine, on a case by case basis, whether an existing rule is consistent or inconsistent with the statute; that determination will not always be a simple one. The suggested interim rules, of course, are designed for areas affected by the new Bankruptcy Code and are not covered by existing rules.

The Committee encourages the adoption of these guidelines as local rules. Widespread adoption will provide a more uniform procedure for applying the Bankruptcy Code and at the same time supply a varied base of experience that should be helpful in the ongoing work of the Advisory Committee.

In emphasizing the preliminary nature of these guidelines, the committee earnestly solicits comments from the bench and bar concerning the usefulness of the draft suggestions. Comments will be gratefully received and may be addressed to:

The Advisory Committee on Bankruptcy Rules
Administrative Office of the United States
Courts
Washington, D.C. 20544

Respectfully submitted,

Ruggero J. Aldisert
U.S. Circuit Judge
Chairman

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

FORM

Rule 1001

Meaning of Words Applicable in Cases Filed under Title 11, United States Code; Definitions

(a) Meaning of Words. The following words and phrases used in the Federal Rules of Bankruptcy Procedure applicable in cases filed under title 11, United States Code on and after October 1, 1979 have the meaning herein indicated, unless they are inconsistent with the context:

(1) "Act" or "Bankruptcy Act" means "title 11, United States Code."

(2) "Adjudication" means "order for relief."

(3) "Bankrupt" means "debtor."

(4) "Bankruptcy" or "bankruptcy case" means Chapter 7, 9, 11 or 13 case as the context requires.

(5) "Chapter VIII, X, XI, or XII case" means "chapter 11 case."

(6) "Clerk of the district court" means "clerk of the bankruptcy court."

(7) "Court" means "bankruptcy court."

(8) "Referee," or "referee in bankruptcy" means "bankruptcy judge."

(b) Definitions. The definition of words and phrases in title 11, United States Code govern their use in these rules to the extent they are not inconsistent with the rules. In addition, the following words and phrases used in these rules have the meaning herein indicated unless they are inconsistent with the context:

(1) "Address" includes house or apartment number, street, post office box, state, and zip code.

(2) "Bankruptcy Code" or "Code" means title 11 of the United States Code.

(3) "Trustee" includes "debtor in posession."

Note

These rules make some of the Federal Rules of Bankruptcy Procedure, e.g., Bankruptcy Rules, Chapter XI Rules, applicable in cases filed under title 11 U.S.C. Additionally, § 405(d) of Pub. L. 95-598 provides for the continued applicability of the Bankruptcy Rules to the extent they are not inconsistent with the statute until new rules are promulgated pursuant to 28 U.S.C. § 2075. The substance of many of the rules is not inconsistent but the terminology or labels may not conform to that used in Pub. L. 95-598. This rule indicates the substitution or translation of certain terms that is necessary for these purposes.

Subdivision (b) defines "Bankruptcy Code" and "Code" for use in these rules in place of title 11 United States Code. Section 101 of Pub. L. 95-598 (as distinguished from § 101 of 11 U.S.C.), codifies the law of bankruptcy and enacts it as title 11, United States Code but it does not provide for a short title.

PART I

PETITION AND PROCEEDINGS RELATING THERETO AND ORDER FOR RELIEF

Rule 1002

Debtor's Petition

(a) Form. A debtor's petition commencing a voluntary case shall conform substantially to Form No. 1.

(b) Number of Copies.

(1) Chapter 7 (Liquidation) and 13 (Adjustment of Debts of an Individual with Regular Income) Cases. An original and 3 copies of a petition requesting relief under chapter 7 or chapter 13 of the Bankruptcy Code shall be filed with the court. The clerk of the bankruptcy court shall transmit one copy of a petition requesting relief under subchapter III of chapter 7 (Stockbroker Liquidation) to the Securities Investor Protection Corporation and one copy of a petition requesting relief under subchapter IV of chapter 7 (Commodity Broker Liquidation) to the Commodity Futures Trading Commission.

(2) Chapter 9 (Municipality) and 11 (Reorganization) Cases. An original and 6 copies of a petition requesting relief under chapter 9 or chapter 11 of the Code shall be filed with the court. The clerk of the bankruptcy court shall transmit 2

copies to the Securities and Exchange Commission, one copy to the District Director of Internal Revenue for the district in which the case is filed, one copy of a chapter 9 petition to the Secretary of State of the state in which the debtor is located, and one copy of a chapter 11 petition to the Secretary of the Treasury. If the petition requests relief under subchapter IV of chapter 11 of the Code, the clerk of the bankruptcy court shall also transmit one copy to the Interstate Commerce Commission and one copy to the Secretary of the Department of Transportation.

Note

This rule consolidates the provisions of Rules 103, 8-102, 9-3, 10-104, 11-6, 12-6, and 13-103 of the Federal Rules of Bankruptcy Procedure. Reference should also be made to Rule X-1002 which requires the clerk to transmit a copy of all petitions to the United States trustee if the petition is filed in a district specified in 28 U.S.C. § 581.

Pursuant to 11 U.S.C. §§ 301-304, all cases under title 11, whether voluntary (§ 301), joint (§ 302), involuntary (§ 303), or ancillary to a foreign proceeding (§ 304), are commenced by the filing of a petition with the bankruptcy court.

Rule 1003

Involuntary Petition

(a) Form and Number. An involuntary petition shall conform substantially to Form No. 9. The number and distribution of copies shall be as specified in Rule 1002.

(b) Transferor or Transferee of Claim. A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. A person who has transferred or acquired a claim for the purpose of commencing a chapter 7 Liquidation, or chapter 11 Reorganization case shall not be a qualified petitioner.

Note

Involuntary petitions may be filed only for relief under chapter 7, Liquidation, or 11, Reorganization, of the Bankruptcy Code. See 11 U.S.C. § 303(a). This rule is adapted from Rule 10-105 and Rule 104(d) of the Federal Rules of Bankruptcy Procedure.

The basic procedural steps that occur on and after the filing of an involuntary petition are described in these set of rules as well as those of the Federal Rules of Bankruptcy Procedure that remain applicable because not inconsistent with the Bankruptcy Code. For example, Rule 111 of

F.R.B.P., Service of Petition and Process, remains applicable particularly by use of Rule 1001 of these rules which makes the necessary translation of terms. Similarly, Rule 112 of F.R.B.P., Responsive Pleading or Motion, setting the time for filing an answer or motion remains applicable, as does Rule 121 which makes various rules in Part VII of F.R.B.P. applicable to the proceedings on a contested petition.

In these rules, reference should be made to Rule 1004, containing special provisions with respect to a partnership petition; Rule 1008, Examination of Debtor on Issue of Nonpayment of Debts; and Rule 1009, Hearing and Disposition of Petition. The Federal Rules of Bankruptcy Procedure and these rules together with statutory provisions in 11 U.S.C. § 303 provide the procedural structure concerning proceedings related to an involuntary petition, whether for liquidation under chapter 7 or reorganization under chapter 11 of the Code.

Rule 1004

Partnership Petition

(a) Voluntary Petition. A voluntary petition may be filed by all the general partners on behalf of the partnership.

(b) Involuntary Petition. Within 5 days after the filing of an involuntary petition, the petitioning partners or petitioning creditors shall send a copy of the petition by first-class mail postage prepaid to the last known address of, or deliver a copy to, each general partner who has not joined in the petition or who has not been served.

Note

This rule is adapted from Rule 105 and complements 11 U.S.C. §§ 301 and 303(b)(3). The type of service conforms with that contained in Rule 704(c), i.e., first-class mail rather than certified mail as specified in Rule 105.

Rule 1005

Caption of Petition

The caption of a petition commencing a case under the Bankruptcy Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the name of the debtor and all other names used by him within 6 years before the filing of the petition. If the petition is not filed by the debtor, the petitioners shall include all other names used by the debtor according to their best information.

Note

Arguably Rule 106 of the Federal Rules of Bankruptcy Procedure remains applicable but by rewriting it here the cross reference to Rule 904(b) is eliminated and it is made clear that the provisions apply to all cases under the Code, not only to liquidation cases.

In the title of the case, there should be included all other names used by the debtor, such as trade names, former married names, and maiden name. See also Form No. 1 and the Note following.

Rule 1006

Filing Fees

(a) General Requirement. Except as otherwise provided in subdivision (b), every petition shall be accompanied by the prescribed filing fees.

(b) Payment of Filing Fees in Installments.

(1) Application for Permission to Pay Filing Fees in Installments. *A voluntary petition filed by an individual* shall be accepted by the clerk of the bankruptcy court if accompanied by an application signed by the applicant for permission to pay the filing fee in installments. The application shall state that the applicant is unable to pay the filing fee except in installments, the proposed terms of the installment payments, and that the applicant has paid no money and transferred no property to his attorney for services in connection with the case. The application shall be filed in duplicate, one copy for the clerk and one for the bankruptcy judge.

(2) Action on Application. Prior to the meeting of creditors, the court after a hearing may make an order permitting the payment of the filing fees in installments to the clerk of the bankruptcy court and fixing the number of

installments and the amount and date of payment of each installment. The number of installments permitted shall not exceed 4, and the final installment shall be payable not later than 4 months after the filing of the petition. For cause shown, however, the court may extend the time for payment of any installment to a date not later than 6 months after the date of filing the petition.

Note

28 U.S.C. § 1930 specifies the filing fees to be paid for petitions under chapters 7, 9, 11 and 13 of title 11, United States Code. It also permits the payment in installments by individual debtors.

Subdivision (b) is adapted from Bankruptcy Rule 107.

Rule 1007

Chapter 11 Reorganization Case: Lists, Schedules and Statement of Affairs

(a) List of 10 Largest Creditors.

(1) Voluntary Case. Notwithstanding subdivision (d) of this rule, the debtor shall file with his petition a list containing the names and addresses of the 10 largest unsecured creditors, excluding insiders.

(2) Involuntary Case. The list required by paragraph (1) of this subdivision shall be filed by the debtor forthwith after entry of an order for relief under 11 U.S.C. § 303(h).

(b) List of Creditors and Equity Security Holders. The debtor shall file with the court (1) a list of the debtor's creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and address or place of business of each creditor and a statement whether the claim is disputed, contingent or unliquidated as to amount, and (2) a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

(c) Schedules and Statements Required. Unless the court orders otherwise, the debtor shall file with the court schedules of assets and liabilities, a statement of financial affairs, and a statement of his executory contracts, prepared by him in the manner prescribed by Forms No. 6 and either No. 7 or No. 8, whichever is appropriate.

(d) Time Limits. Except as otherwise provided herein, the schedules, statements and lists, if not previously filed in a pending liquidation case, shall be filed with the petition in a voluntary case or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter. The schedules, statements, and lists shall be filed by an involuntary debtor within 15 days after entry of the order for relief. Any extension of time for the filing of the schedules, statements and lists may be granted only on application, for cause shown and on notice to any committee, trustee, examiner or other party as the court may direct.

(e) Number of Copies. The number of copies of the schedules, statements and lists shall correspond to the number of copies of the petition required by these rules.

(f) Partnership and Partners. The general partners of a debtor partnership shall prepare and file the schedules

of the assets and liabilities, statement of financial affairs, and statement of executory contracts of the partnership.

(g) Interests Acquired or Arising After Petition. Bankruptcy Rule 108(e) applies in chapter 11, Reorganization cases except that the supplemental schedule need not be filed with respect to property or interests acquired after confirmation of a plan. Notwithstanding subdivision (j) of this rule, the supplemental schedule shall also be filed in chapter 7, Liquidation, and chapter 11, Reorganization cases with respect to property that becomes part of the estate pursuant to 11 U.S.C. § 541(a)(5)(B).

(h) List of Security Holders or Information in Possession of Another Entity. On cause shown, after notice and a hearing, the court may direct an entity other than the debtor or trustee, to disclose any list of security holders in its possession or under its control, indicating the names, addresses and securities held by any of them. The entity possessing this list may be required to produce the list, a true copy thereof, or permit the inspection or copying thereof, or otherwise disclose the information.

(i) Impounding of Lists. On cause shown the court may direct the impounding of the lists filed under this rule, in which event --

(1) the debtor, or the trustee, or any indenture trustee, creditor, equity security holder or committee appointed pursuant to 11 U.S.C. § 1102 or § 151102 shall be permitted their inspection or use on such terms as the court may prescribe; and

(2) on cause shown the court may refuse to permit inspection by any entity.

(j) Applicability of Rule. This rule applies in cases commenced under chapter 11, Reorganization, of the Bankruptcy Code except that only subdivisions (b), (h) and (i) apply in a case commenced by or against a railroad corporation and the lists required by subdivision (b) shall be filed within the time fixed by the court.

Note

This rule is an adaptation of Rules 108, 8-106, 10-108 and 11-11 of the Federal Rules of Bankruptcy Procedure.

Subdivision (a) is new and requires that a list of the 10 largest creditors be filed with the petition. The court or the United States trustee, pursuant to 11 U.S.C. § 1102 or § 151102, is required to appoint a committee of unsecured creditors as soon as practicable after the order for relief. That committee, generally, is to consist of the 7 largest unsecured creditors who are willing to serve. Thus, the court or the United States trustee needs the information to be supplied by the list provided for under this subdivision. See also Rule X-1002 which requires the clerk to send the United States trustee, in the pilot districts, a copy of the petition, lists, and schedules.

Subdivision (b) is derived from Rules 8-106 and 10-108, as are subdivisions (h) and (i). Equity security holders, as defined in § 101(15), (16) of the Code includes stockholders.

Subdivision (c) is derived from Rule 11-11 and is in conformity with 11 U.S.C. § 521. This subdivision indicates the forms that are to be followed for the requisite papers.

Subdivisions (d) and (e) specify the time periods for filing the papers required by the rule as well as the number of copies. They are derived, for the most part, from Rule 11-11; the provisions dealing with an involuntary case are derived from Rule 108. Under the Bankruptcy Code, a chapter 11 case may be commenced on an involuntary petition (§ 303(a)), whereas under the Act, a Chapter XI case could be commenced only on a voluntary petition. An application for an extension of time to file the schedules and statements is required to be made on notice to parties, as the court may direct, including a creditors' committee if one has been appointed under § 1102 or § 151102 of the Code and a trustee or examiner if one has been appointed pursuant to § 1104 or § 151104 of the Code. In a pilot district such notice should also be given to the United States trustee. See Rule X-1002. Although written notice is preferable, it is not required by the rule; in proper circumstances it may be by telephone or otherwise.

Subdivision (f) is derived from Rule 11-11.

Subdivision (g) incorporates Rule 108(e) for chapter 11 purposes. The final sentence is added to indicate the change made by 11 U.S.C. § 541(a)(5) and includes within the coverage of the supplemental schedule property acquired after the petition from a property settlement or divorce decree.

Subdivision (j) renders this rule applicable in chapter 11, Reorganization cases except for the limited applicability of subdivision (g) in chapter 7 cases. Rule 108 remains applicable in chapter 7, Liquidation cases; Rule 9-7 remains applicable in chapter 9, Municipality cases; Rule 13-107 remains applicable in chapter 13, Adjustment of Debts of an Individual with Regular Income cases.

Rule 1008

Examination of Debtor on Issue of Nonpayment of Debts in Involuntary Cases

Whenever a petition commencing an involuntary case under § 303 of the Bankruptcy Code alleges that the debtor is generally not paying his debts as they become due, and the debtor denies the allegation, the debtor shall appear in court at the trial, and prior thereto if ordered by the court, with his books, papers, and accounts, and submit to an examination as to all matters bearing on the allegation. If the debtor fails so to appear or submit to the examination, the court on motion may enter appropriate orders, including those specified in paragraphs (A), (B), and (C), of Rule 37(b)(2) of the Federal Rules of Civil Procedure. This examination does not preclude the procedures available under Bankruptcy Rules 121 and 205.

Note

This rule is adapted from Rule 114 which is inconsistent with 11 U.S.C. § 303(h) in that Rule 114 relates to acts of bankruptcy no longer applicable. The thrust of the rule, however, should continue with respect to the financial basis for an involuntary petition under 11 U.S.C. § 303(h). Since the provisions in 11 U.S.C. § 303 apply equally to chapter 7 and 11 cases, this rule may apply in both types of cases as well.

Rule 1009

Hearing and Disposition of Petition in Involuntary Cases

(a) Contested Petition. The court shall determine the issues of a contested petition at the earliest practicable time and order relief, dismiss the case, or enter other appropriate orders.

(b) Default. If no pleading or other defense to a petition is filed within the time provided by Bankruptcy Rule 112, the court shall on the next day, or as soon thereafter as practicable, order relief as specified in the petition or enter other appropriate orders.

(c) Order for Relief. An order for relief shall conform substantially to Form No. 11 and shall be entered in the docket of the bankruptcy court.

Note

This rule is adapted from Rule 115 (a) and (c) and applies in chapter 7 and 11 cases. Pursuant to 28 U.S.C. § 1480(b), the right of trial by jury under § 19a of the Bankruptcy Act has been abrogated and the availability of a trial by jury is subject to the discretion of the bankruptcy judge. Rule 9001 is an incorporation of Rule 38 of the Federal Rules of Civil Procedure and is made applicable to hearings on contested petitions.

Subdivision (e) of Rule 115 has not been carried over because its provisions are now covered by 11 U.S.C. § 303(i).

PART II

OFFICERS FOR ADMINISTERING THE ESTATE; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 2001

Appointment of Interim Trustee Before Order for Relief in a Chapter 7 Liquidation Case

(a) Appointment. After an involuntary petition for relief under chapter 7, Liquidation, of the Bankruptcy Code is filed and before relief is ordered, appointment of an interim trustee under § 303(g) of the Code may be made only on application of a party in interest. The application may be granted only after hearing on notice to the debtor and such other parties in interest as the court may designate, except that an interim trustee may be appointed without notice on a showing that irreparable loss to the estate would otherwise result. An application for appointment of an interim trustee without notice and an order of appointment made thereon shall state what irreparable loss would result if notice were required.

(b) Application for Appointment. An application for appointment of an interim trustee pursuant to § 303(g) of the Code shall state the specific facts showing the necessity for the appointment.

(c) Bond of Applicant. An interim trustee may not be appointed under subdivision (a) of this rule unless the applicant furnishes a bond in an amount with surety as the court shall approve, conditioned to indemnify the debtor for the costs, attorney's fee, expenses, and damages allowable under § 303(i) of the Code.

(d) Order of Appointment. An order appointing an interim trustee under this rule shall state why the appointment is necessary and shall specify his duties as provided in § 303(g) or § 15303 of the Code. A copy of the order shall forthwith be delivered to the debtor, or mailed to him at his last known address, and to other persons as the court may designate.

(e) Turnover and Report. After qualification of the trustee selected under § 702 of the Code, the interim trustee shall, unless otherwise ordered, (1) forthwith turn over to the trustee all the records and property of the estate in his possession or subject to his control as interim trustee and, (2) within 30 days thereafter file his final report and account.

Note

This rule is adapted from Rule 201. See also Rule 10-201. In conformity with title 11 of the United States Code, it substitutes "interim trustee" for "receiver." Subdivisions (a) and (e) of Rule 201 are not included because the provisions contained therein are found in detail in the statute, 11 U.S.C. §§ 303(g), 15303 or they are inconsistent with the statute, 11 U.S.C. §§ 701, 15701. Similarly, the provisions in Rule 201(d) with regard to a debtor's counterbond are not included because of their presence in 11 U.S.C. §§ 303(g) and 15303.

Subdivision (a) of this rule deals with a situation not covered by § 303(g) of the Code. When irreparable loss may result, the notice requirement is dispensed with but this should be the rare situation. Subdivision (d) requires that the order be delivered or mailed to the debtor forthwith so that as early a notification as is possible is given. The order would indicate the duties specified in § 303(g) or § 15303 as indicated in subdivision (e).

Reference should be made to Rule 218 for duties of any interim trustee appointed under this rule or § 303(g) of the Code with respect to, inter alia, keeping records and filing periodic reports with the court.

Rule 2002

Notices to Creditors, Equity Security Holders, and United States in Chapter 11 Reorganization Cases

(a) Applicability of Rule. This rule applies only in a case filed under chapter 11 of the Bankruptcy Code.

(b) Twenty-Day Notices to Parties in Interest. Except as provided in subdivisions (e) and (g) of this rule, the clerk of the bankruptcy court shall give all creditors, equity security holders and indenture trustees at least 20 days' notice by mail of (1) a meeting of creditors; (2) a proposed sale of property, other than in the ordinary course of business, including the time and place of any such sale, unless the court for cause shown shortens the time or orders a sale without notice; (3) the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (4) the hearing on the dismissal or conversion to another chapter of a case when notice is required by § 1112(b) of the Code; (5) the time fixed for filing objections to approval of the disclosure statement and the hearing to consider approval of the disclosure statement; (6) the time fixed for filing objections to confirmation of a plan; (7) the hearing to consider confirmation of a plan; (8) the time fixed to accept or reject a proposed modification of a plan when notice is required by

§ 1127(b) of the Code; (9) hearings on all applications 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 sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amounts requested. The clerk shall give all equity security holders of the appropriate class at least 20 days' notice of a meeting of equity security holders.

(c) Other Notices. Except as provided in subdivisions (e) and (g) of this rule, the clerk of the bankruptcy court shall give notice by mail to the debtor, all creditors, equity security holders and indenture trustees of (1) dismissal of the chapter 11 case; (2) except as to equity security holders, the time allowed for filing claims pursuant to Rule 3001; (3) the entry of an order directing that the chapter 11 case continue as a liquidation case under chapter 7 of the Code; (4) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to Rule 4001; (5) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4002; (6) the hearing on approval of a disclosure statement pursuant to Rule 3006; (7) the time fixed for accepting or

rejecting a plan pursuant to Rule 3006(c); and (8) entry of an order confirming a plan.

(d) Addresses of Notices. All notices to which a creditor, equity security holder, or indenture trustee is entitled under these rules shall be addressed to him as he or his authorized agent may direct in a request filed with the court; otherwise, to his address shown in the list or, if a different address is stated in a proof of claim duly filed, then at the address so stated.

(e) Notices to Committees. Copies of all notices required to be mailed under this rule shall be mailed to the committees appointed pursuant to the Code. Notwithstanding the foregoing subdivisions, the court may order that notices required by clauses (2), (3) and (9) of subdivision (b) be mailed only to the committee or to its authorized agent and to the creditors and equity security holders who file with the court a request that all notices under these clauses be mailed to them.

(f) Notices to the United States. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) if the debtor is a corporation, to the Securities and Exchange Commission at Washington, District of Columbia, and at such other place as it shall designate in

writing filed with the court; (2) to the District Director of Internal Revenue for the district in which the case is pending; (3) to the United States attorney for the district in which the case is pending whenever the lists or any other papers filed in the case (A) disclose a debt to the United States other than one for taxes and to the department, agency or instrumentality of the United States through which the debtor became indebted if disclosed by the filed papers, or (B) to the Secretary of the Treasury if the filed papers disclose a stock interest of the United States.

(g) Notice by Publication. If the court finds that notice to creditors and equity security holders by mail as provided in this rule is impracticable or that it is desirable to supplement such notice, the court may order publication thereof.

(h) Orders Designating Matter of Notices. Except as otherwise provided by these rules, the court may from time to time enter orders designating the matters in respect to which, the person to whom, and the form and manner in which notices shall be sent.

(i) Caption. The caption of every notice given under this rule shall comply with Rule 1005.

Note

This rule applies only in chapter 11 Reorganization cases. The notice rules for a liquidation case (Rule 203), and chapter 13 case (Rule 13-203) continue to be applicable.

The notices required by this rule are to be given by the clerk of the bankruptcy court. When publication of notices is required or desirable, reference should be made to Rule 909.

Notice of the order for relief, required to be given by 11 U.S.C. § 342 is contained in Form No. 12, the notice and order of the meeting of creditors.

Rule 2003

Meeting of Creditors or Equity Security Holders

(a) Date and Place. The court shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the court may set a later time for the meeting. The meeting may be held at a regular place for holding court or at any other place within the district convenient for the parties in interest.

(b) Order of Meeting.

(1) Meeting of Creditors. The clerk of the bankruptcy court shall preside at the meeting of creditors unless the creditors who may vote for a trustee under § 702(a) of the Bankruptcy Code and who hold a majority in amount of claims that vote shall designate a presiding officer. The business of the meeting shall include the examination of the debtor and, if appropriate, the election of a trustee or of a creditors' committee. When a trustee is elected the creditors shall recommend the amount of the trustee's bond to be fixed by the court.

(2) Meeting of Equity Security Holders. The clerk of the bankruptcy court shall preside at any meeting of equity security holders.

(3) Right to Vote. A creditor is entitled to vote at a meeting if he has filed a proof of claim at or before the meeting, unless objection is made to the claim or unless the proof of claim is insufficient on its face. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may temporarily allow it for that purpose in an amount that seems proper to the court.

(c) Record of Proceeding. Electronic sound recording equipment shall be used by the clerk of the bankruptcy court to record the meeting of creditors or equity security holders.

(d) Report to the Court. The clerk of the bankruptcy court shall transmit to the court the name and address of any person elected trustee or a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing of the dispute. Pending disposition of the dispute by the court, the interim trustee shall continue in office. If no application for the resolution of the election dispute is made to the court within 10 days after the date of the creditors' meeting, the interim trustee shall serve as trustee.

Note

Pursuant to 11 U.S.C. § 341(a) there is to be a meeting of creditors in a chapter 7, 11 or 13 case and under § 341(b), the court may order a meeting of equity security holders. A major change from prior law, however, is the prohibition in 11 U.S.C. § 341(c) against the judge's attendance at or presiding over the meeting.

The meeting is to be held between 20 and 40 days after the order for relief. In a voluntary case, the date of the order for relief is the date of the filing of the petition (11 U.S.C. § 301); in an involuntary case, it is the date of an actual order (11 U.S.C. § 303(i)).

This rule is applicable in chapter 7, 11 and 13 cases. Subdivision (b) provides that the clerk of the bankruptcy court will preside at the meeting but creditors may designate someone of their own choice to do so. In that event, the clerk will nevertheless remain to record the proceedings, take appearances, and the like. Use of the clerk is not contrary to the legislative policy of removing the judge from the meeting. The judge remains insulated from any information coming forth at the meeting and any information obtained by the clerk will not be relayed to the judge.

Since the judge must fix the bond of any trustee but cannot be present at the meeting, the rule allows the creditors to recommend the amount of the bond. They should be able to obtain relevant information concerning the extent of assets of the debtor at the meeting.

Subdivision (d) recognizes that the court must be informed immediately about the election or nonelection of a trustee in a chapter 7 case. Pursuant to Rule 2004, the judge is to officially inform the trustee of his election or appointment and as to how he is to qualify. This subdivision also takes note of the fact that there may be a disputed election but in no event may the presiding person resolve any dispute. For purposes of expediency, the results of the election should be obtained for each alternative presented by the dispute and reported to the court. Thus, when an interested party (not the presiding person) raises the dispute before the court, its resolution will determine the outcome and a new or adjourned meeting to conduct the election may not be necessary.

Rule 2004

Notice to Trustee of Selection

The clerk of the bankruptcy court shall immediately notify the trustee of his selection, how he may qualify and, if applicable, the penal sum of his bond. The trustee shall advise the court in writing of his acceptance or rejection of the office within 5 days after receipt of this notice.

Note

This rule is adapted from Rule 209(c). The remainder of that rule is inapplicable because its provisions are covered by 11 U.S.C. §§ 701-703, 321.

If the person selected as trustee accepts the office, he should also qualify within 5 days after his selection, as required by 11 U.S.C. § 322(a).

Rule 2005

Limitation on Appointment of Trustees and Examiners

(a) Limitation on Appointments. Appointments of trustees and examiners shall be made so that the annual aggregate compensation of any person shall not be disproportionate or excessive, giving proper regard to geographic constraints.

(b) Record to Be Kept. The clerk of the bankruptcy court shall maintain a public record listing fees paid from estates (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professional persons employed by trustees, and (2) to examiners and appraisers appointed by the court. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee paid. The record shall be maintained chronologically, shall be kept current and open to examination by the public without charge.

(c) Summary of Record. At the close of each annual period, the clerk of the bankruptcy court shall prepare a summary of the public record by individual or firm name, to reflect total fees paid during the preceding year.

Note

This rule is adapted from Rule 213. The first sentence of that rule is omitted because of the provisions in 28 U.S.C. §§ 604(f) and 586 creating panels of private trustees.

The rule is not applicable to standing trustees serving in chapter 13 cases. See 11 U.S.C. § 1302.

A basic purpose of the rule is to prevent what Congress has defined as "cronyism." Appointment, whether in a chapter 7 or 11 case, should not center among a small select group of individuals unless the circumstances are such that it would be objectively warranted. The public record of appointments to be kept by the clerk will provide a means for monitoring the appointment process.

Subdivision (b) provides a convenient source for public review of fees paid from debtors' estates in the bankruptcy courts. Thus, public recognition of appointments, fairly distributed and based on professional qualifications and expertise, will be promoted and notions of improper favor dispelled. This rule is in keeping with the findings of the Congressional subcommittees as set forth in the Report of the Committee on the Judiciary, No. 95-595, 95th Cong., 1st Sess. 89-99 (1977). These findings included the observations that there were frequent appointments of the same person, contacts developed between the bankruptcy bar and the courts, and an unusually close relationship between the bar and the judges developed over the years. A major purpose of the new statute is to dilute these practices and instill greater public confidence in the system. Rule 2005 complements that laudatory purpose.

Rule 2006

Employment of Professional Persons

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professional persons pursuant to § 327 or § 1103 of the Bankruptcy Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for such employment, the name of the person to be employed, the reasons for his selection, the professional services to be rendered, and to the best of the applicant's knowledge all of such person's connections with the debtor, the creditors, or any other party in interest, and their respective attorneys and accountants.

Note

This rule is adapted from the second sentence of Rule 215(a). The remainder of that rule is covered by 11 U.S.C. § 327.

PART III

CLAIMS AND DISTRIBUTION TO CREDITORS; PLAN OF REORGANIZATION

Rule 3001

Proof of Claim or Interest in Chapter 11 Reorganization Cases

(a) List of Creditors and Equity Security Holders. The list of creditors and equity security holders prepared and filed with the court pursuant to Rule 1007(b) shall constitute prima facie evidence of the validity and amount of claims of creditors which are not listed as disputed, contingent, or unliquidated as to amount, and of interests. Except as provided in subdivision (b)(3) of this rule with respect to claims, it shall not be necessary for the holder of such claim or interest to file a proof of claim or interest.

(b) Filing Proof of Claim.

(1) Who May File. Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (b)(3) of this rule.

(2) Who Must File. (A) Any creditor, including the United States, a state, or any subdivision thereof, whose claim is listed as disputed, contingent, or unliquidated as to amount, shall file a

proof of claim within the time prescribed by subdivision (b)(3) of this rule; any such creditor who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(B) Notwithstanding the foregoing, the court may, at any time, require the filing of a proof of claim within such time as it may fix. Any person required under this paragraph to file a proof of claim who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(3) Time for Filing. A proof of claim may be filed at any time prior to the approval of the disclosure statement unless a different time is fixed by the court on notice as provided in Rule 2002.

(4) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of such claim. It shall supersede any listing of that claim made pursuant to Rule 1007.

(5) Form and Place of Filing. A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rule 3002, shall be executed by the creditor or by his authorized agent. Subdivisions (b) and (c) of Bankruptcy Rule 302 apply in chapter 11 cases except that subdivision (c) shall not apply to claims founded on bonds or debentures.

(6) Filing by Indenture Trustee. An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee.

(c) Transfer of Claim. If a claim other than one founded on a bond or debenture has been assigned, a statement setting forth the terms of the assignment shall be filed with the court and a copy thereof delivered to the trustee or the debtor in possession.

(d) Objection to Allowance. An objection to the allowance of a claim shall be in writing. A copy of the objection and at least 10 days' notice or, if the claim is for taxes, at least 30 days' notice of a hearing thereon shall be mailed or delivered to the claimant, the debtor and the trustee, or debtor in possession. If an objection is joined

with a demand for relief of the kind specified in Bankruptcy Rule 701, the proceeding thereby becomes an adversary proceeding.

(e) Reconsideration of Claims. Bankruptcy Rule 307 applies in chapter 11 cases.

(f) Proof of Right to Record Status. For the purposes of Rules 3007 and 3009 and for the purpose of receiving notices, a person who is not the record holder of a security may show that he is nevertheless entitled to be treated as such holder of record by filing with the court proof thereof. An objection to such proof may be filed by any party in interest.

(g) Applicability of Rule. This rule applies only in a case filed under chapter 11 of the Bankruptcy Code.

Note

This rule applies in a Chapter 11, Reorganization case. It is adapted from Rule 10-401 and complements 11 U.S.C. § 1111(a). Subdivisions (d) and (e) of Rule 10-401 have been deleted because those provisions are covered by 11 U.S.C. §§ 704 and 502.

Rule 3002

Claim By Codebtor in Chapter 11, Reorganization Cases

(a) Filing of Claim. If a creditor has not filed his proof of claim pursuant to Rule 3001, a person who is or may be liable with the debtor to that creditor, or who has secured that creditor, may, during the time for filing claims prescribed by Rule 3001, execute and file a proof of claim pursuant to this rule in the name of the creditor, if known, or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 3001(b) and it shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(b) Filing of Acceptance; Substitution of Creditor. A person who has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in his own name but if the creditor files a proof of claim within the time permitted by Rule 3001 or files a notice with the court of his intention to act in his own behalf prior to confirmation, he shall be substituted for

such other person, with respect to that claim, for all purposes of the case under chapter 11 of title 11, United States Code.

Note

This rule is adapted from Rule 10-402.

Rule 3003

Withdrawal of 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 proof of claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, he may not withdraw the claim save on motion with notice to the trustee or debtor in possession, and on order of the court containing such terms and conditions as the court deems proper.

Note

This rule is derived from Rule 10-404.

Rule 3004

Filing of Claims by Debtor or Trustee

If a creditor fails to file his claim on or before the first date set for the meeting of creditors, the debtor or trustee may execute and file a proof of such claim in the name of the creditor. The court shall forthwith mail notice of such filing to the creditor and to the trustee. The creditor may nonetheless file a proof of claim pursuant to Bankruptcy Rule 302 or Rule 3001, which proof when filed shall supersede the proof filed by the debtor or trustee.

Note

This rule is adapted from Rule 303 but conforms with the changes made by 11 U.S.C. § 501(c). The rule is applicable in chapter 7, Liquidation, cases and chapter 11, Reorganization, cases. Rule 303, from which it is adapted, permits only the filing of tax and wage claims by the debtor. Section 501(c) of the Bankruptcy Code, however, permits the filing by the debtor or trustee on behalf of any creditor.

Rule 3005

Filing of Plan and Disclosure Statement

(a) When Debtor Retained in Possession. The debtor in possession may file a plan within 120 days after the date of the order for relief. If the debtor has not filed a plan within such time, or if the debtor has filed a plan that has not been accepted, as provided in § 1121(c)(3) of the Bankruptcy Code, within 180 days after the order for relief, a plan may be filed thereafter by the debtor, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee.

(b) When Trustee Appointed. The court shall fix a time within which the trustee shall file a plan or a report of the reasons why a plan cannot be formulated, or his recommendation that the case be converted to chapter 7 (Liquidation), or 13 (Adjustment of Debts of an Individual with Regular Income), or dismissed. A plan may also be filed by the debtor, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee before the conclusion of the hearing held pursuant to Rule 3006.

(c) Reduction or Enlargement of Time. On application of a party in interest and after notice and a hearing, the court, for cause shown, may reduce or extend the time periods referred to in subdivisions (a) and (b) of this rule.

(d) Identification of Plan. Every proposed plan and any modification thereof shall be dated and identified with the name of the person or persons submitting or filing it.

(e) Disclosure Statement. A disclosure statement containing such information as is adequate pursuant to § 1125 or § 1126(b) of the Code shall be filed with the plan or thereafter but not later than a time fixed by the court.

(f) Applicability of Rule. This rule applies only in a case filed under chapter 11 of the Code.

Note

This rule applies in chapter 11 cases only but includes a railroad reorganization case. In the latter instance subdivision (a) would be inapplicable because a trustee would always be appointed. The rule complements 11 U.S.C. § 1121, made applicable in railroad reorganization cases by 11 U.S.C. § 1161. It does not apply in chapter 9 cases; see 11 U.S.C. § 901, or in chapter 13 cases; see Rule 13-201 which remains applicable.

Some of the statutory provisions contained in § 1121 of the Code are repeated in the rule. This is done for the purpose of having a complete rule with respect to the matter of filing a plan.

Rule 3006

Approval of Disclosure Statement by Court

(a) Hearing on Disclosure Statement and Objections Thereto. After the filing of a disclosure statement as provided in Rule 3005(e), the court shall hold a hearing on at least 20 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in subdivision (e) of this rule, to consider such statement and any objections or modifications thereto. Objections to the disclosure statement shall be filed with the court and served on the debtor, the trustee, if any, a committee appointed under the Bankruptcy Code and such other entity as may be designated by the court, at any time prior to approval of the disclosure statement or by such earlier date as the court may fix.

(b) Approval of Disclosure Statement. The court shall rule on approval of the disclosure statement following the hearing provided for under subdivision (a) of this rule.

(c) Dates Fixed for Acceptance and Confirmation. On approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) Transmission and Notice to Creditors and Equity Security Holders. On approval of a disclosure statement, the clerk of the bankruptcy court shall mail to all creditors and equity security holders (1) the plan or a summary thereof approved by the court; (2) the disclosure statement approved by the court; (3) a summary of the opinion of the court, if any, approving the disclosure statement which summary shall be approved by the court; (4) notice of the date fixed, if any, for the hearing on confirmation; and (5) such other information as the court may direct. In addition, notice of the time within which acceptances and rejections of such plan may be filed and a form of ballot conforming substantially to Form No.25 shall be mailed to creditors and equity security holders entitled to vote on the plan. The court may direct that the opinion of the court be transmitted in place of or in addition to the summary thereof specified in clause (3) of this subdivision. In the event only summaries are transmitted, the plan and opinion of the court shall be provided on request without charge. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement is entered.

(e) Notice: By Whom Transmitted. The court may order the clerk of the bankruptcy court, the trustee, debtor in possession or proponent of a plan to transmit the notices or documents required by subdivision (a) or (d) of this rule. If a person other than the clerk is so ordered, the court may require use of ordinary envelopes under the direction and supervision of the court or may order use of penalty envelopes.

(f) Applicability of Rule. This rule applies in a case filed under chapter 9 (Adjustment of Debts of a Municipality), or chapter 11 (Reorganization), of the Bankruptcy Code.

Note

This rule is adapted from Rule 10-303 which deals with the approval of a Chapter X plan by the court. There is no requirement for plan approval in a chapter 11 case under title 11, United States Code but there is the requirement that a disclosure statement containing adequate financial information be approved by the court after notice and a hearing before votes on a plan are solicited. 11 U.S.C. § 1125(b).

Subdivision (a) of this rule provides for the hearing on the disclosure statement. Thus, a hearing would be required in all cases, whether it may be ex parte would depend on the circumstances of the case, but a mere absence of objections would not eliminate the need for a hearing. See 11 U.S.C. § 102(1).

No provision similar to Rule 10-303(f) is included. That subdivision together with Rule 10-304 prohibited solicitation of votes until after entry of an order approving the plan. 11 U.S.C. § 1126(b) explicitly provides that votes on a plan

may not be solicited until a disclosure statement, approved by the court, is transmitted. Pursuant to the change in rule-making power, a comparable provision in this rule is unnecessary. 28 U.S.C. § 2075.

It should be noted that, by construction, the singular includes the plural. Therefore, the phrase "plan or plans" or "disclosure statement or statements" has not been used although the possibility of multiple plans and statements is recognized.

Since 11 U.S.C. § 1125 is made applicable in both chapter 9 and railroad reorganization cases, 11 U.S.C. §§ 901, 1161, this rule applies to those types of cases as well.

Reference should also be made to 28 U.S.C. § 1930(b) pursuant to which the Judicial Conference may prescribe the same kind of fees at it may under 28 U.S.C. 1914(b). This may have some bearing on the costs of mailing.

Subdivision (e) is new. It permits the court to require a party other than the clerk of the bankruptcy court to bear the responsibility for transmitting the notices and documents specified in the rule. The alternatives and procedures are adapted from the Manual for Complex Litigation, ¶ 1.45, at p. 48 (as amended). As therein indicated, if the clerk is not used, "the court should require counsel to arrange for the reproduction of the notice after its approval by the court, to procure envelopes, affix postage on them in the proper amount, and mail them. These activities should be closely supervised by the court." Such supervision may, of course, be performed by the clerk of the bankruptcy court. The court may direct that penalty envelopes be used.

Rule 3007

Acceptance or Rejection of Plans

(a) Persons Entitled to Accept or Reject Plan; Time for Acceptance or Rejection. Any creditor whose claim is deemed allowed pursuant to § 502 of the Bankruptcy Code or has been allowed by the court and, subject to subdivision (b) of this rule, any creditor who is a security holder of record at the date the order approving the disclosure statement is entered whose claim has not been disallowed and any equity security holder of record at the date the order approving the disclosure statement is entered whose interest has not been disallowed, may accept or reject a plan within the time fixed by the court pursuant to Rule 3006. For cause shown and within such time, the court may permit a creditor or equity security holder to change or withdraw his acceptance or rejection. Notwithstanding objection to a claim or interest, the court may temporarily allow it to such extent as to the court seems proper for the purpose of accepting or rejecting a plan.

(b) Acceptances or Rejections Obtained Before Petition. Acceptances or rejections may be obtained before the filing of the petition and may be filed with the court on behalf of the holder of a claim or interest which is deemed

allowed pursuant to § 502 of the Code or allowed by the court or on behalf of a creditor who is a security holder of record at the date specified in the solicitation for the purposes of such solicitation and whose claim has not been disallowed, and on behalf of an equity security holder of record at the date specified in the solicitation for the purposes of such solicitation and whose interest has not been disallowed. A holder of a claim or interest who has accepted or rejected a plan before the commencement of a case under the Code, shall not be deemed to have accepted or rejected the plan if the court finds, after hearing on notice, that the plan was not generally transmitted to creditors and equity security holders or that an unreasonably short time was prescribed for creditors and equity security holders to accept or reject the plan.

(c) Form of Acceptance or Rejection. An acceptance or rejection shall be in writing, shall identify the plan or plans accepted or rejected, shall be signed by the creditor or equity security holder or his authorized agent, and shall substantially conform to Form No. 25. If more than one plan is transmitted pursuant to Rule 3006, an acceptance or rejection may be filed by each creditor or equity security holder for any number of such plans and if acceptances are

filed for more than one plan, the creditor or equity security holder may indicate his preferences among the plans so accepted.

(d) Acceptance or Rejection by Partially Secured Creditors. A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.

Note

Subdivision (a) is derived from Rule 10-305(a). It substitutes entry of the order approving the disclosure statement for the order approving a plan in conformity with the differences between Chapter X and chapter 11. But in keeping with the underlying theory, it continues to recognize that the lapse of time between the filing of the petition and entry of such order will normally be significant and during that interim bonds and equity interests can change ownership.

Subdivision (b) recognizes the former Chapter XI practice permitting a plan and acceptance to be filed with the petition, as does, e.g., 11 U.S.C. § 1126(b). However, because a plan under chapter 11 may treat shareholder interests, there should be some reference to a record date of ownership. In this instance the appropriate record date is that used in the prepetition solicitation materials because it is those acceptances or rejections which are being submitted to the court.

While 11 U.S.C. §1126(c),(d), and (e) prohibit use of an acceptance or rejection not procured in good faith, the added provision in subdivision (b) of the rule is somewhat more detailed. It would prohibit use of acceptances or rejections obtained prepetition when either only some but not all impaired creditors or equity security holders are solicited or when they are not given a reasonable opportunity to submit their acceptances or rejections. This provision together with 11 U.S.C. § 1126(e) gives the court the power to nullify abusive procedures that may be attempted.

Subdivisions (d) and (e) of Rule 10-305 are not continued since comparable provisions are contained in the statute; see 11 U.S.C. § 1126(c),(d),(e).

This rule applies in railroad reorganization cases because 11 U.S.C. § 1126 applies (see 11 U.S.C. § 1161) and in chapter 9 cases (see 11 U.S.C. § 901). It will apply, to a limited extent, in chapter 13 cases but only to the acceptance of a plan by a secured creditor. 11 U.S.C. § 1325(5)(A). Unsecured creditors do not have to accept a chapter 13 plan for it to be confirmed by the court.

It should be noted that while the singular "plan" is used throughout, by construction the plural is included.

Rule 3008

Confirmation of Plan

(a)(1) Objections to Confirmation. Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, if any, a committee appointed under the Bankruptcy Code and such other entity as may be designated by the court, at any time prior to confirmation or by such earlier date as the court may fix. An objection to confirmation is governed by Rule 914.

(2) Hearing on Confirmation. The court shall rule on confirmation of the plan after hearing on notice as provided in Rule 2002. If no objection is timely filed under this subdivision, the court may find, without hearing evidence, that the plan has been proposed in good faith and not by any means forbidden by law. If more than one plan has received the requisite number of acceptances, the court shall consider the preferences indicated by the creditors and equity security holders pursuant to Rule 3007(c) in determining which plan shall be confirmed.

(b) Order of Confirmation. The order of confirmation shall conform substantially to Form No. 26 and notice of entry of the order of confirmation shall be mailed promptly to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002.

Note

This rule is adapted from Rules 10-307, 11-38, and 13-213. It applies to cases filed under chapters 9, 11 and 13. Certain subdivisions of the earlier rules have not been included, such as, a subdivision revesting title in the debtor (11 U.S.C. § 541 does not transfer title out of the debtor as did § 70a of the Bankruptcy Act). See also 11 U.S.C. §§ 1141(b), 1327(b). Subdivision (b) of Rule 13-213 is not included because its provisions are contained in the statute; see 11 U.S.C. §§ 1322, 1325(b), 105.

7/2/79

Rule 3009

Distribution under Plan

After confirmation of a plan, distribution shall be made, in accordance with the provisions of the plan, to holders of stock, bonds, debentures, notes, and other securities of record at the date the order confirming the plan becomes final whose claims or equity security interests have not been disallowed and to other creditors whose claims have been allowed, and to indenture trustees who have filed claims pursuant to Rule 3001(b)(6) and which are allowed.

Note

This rule is derived from Rule 10-405(a). Subdivision (b) of that rule is covered by 11 U.S.C. § 1143.

Rule 3009, by its terms, will be applicable in chapter 9 and 11 cases, including railroad reorganizations, but not in chapter 13 cases.

Rule 3010

Consummation; Final Decree

(a) Orders in Aid of Consummation. The court may make such orders as may be necessary or useful in aid of consummation of a plan including fixing the time and manner for the deposit and distribution of the cash or other consideration under the plan, directing the debtor, trustee, mortgagees, indenture trustees, and other necessary parties to execute and deliver such instruments as may be necessary to effect a retention or transfer of property dealt with by the confirmed plan, and to perform other acts, including the satisfaction of liens.

(b) Final Decree. On consummation of the plan, the court shall enter a final decree which shall contain provisions (1) stating the effect of confirmation and consummation on the creditors and equity security holders of the debtor; (2) discharging the trustee, if any; (3) making such provisions by way of injunction or otherwise as may be equitable; and (4) closing the estate.

Note

This rule is derived from Rule 10-309 and 11 U.S.C. § 1142.

PART IV

THE DEBTOR: DUTIES AND BENEFITS

Rule 4001

Relief from Automatic Stay

(a) Final Hearing. The stay of any act against property of the estate under § 362(a) of the Bankruptcy Code expires 30 days after a final hearing is commenced pursuant to § 362(e)(2) of the Code unless within that time at or after the final hearing the court determines that the stay be continued.

(b) Ex Parte Relief from Stay. On the filing of a complaint seeking relief from a stay under § 362(a) of the Code, 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 and § 362(f) of the Code shall give written and oral notice thereof as soon as

possible to the trustee 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 the stay 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.

Note

This rule complements § 362 of the Code which sets forth the provisions regarding the automatic stay that arises on the filing of a petition. That section and this rule are applicable in chapter 7, 9, 11 and 13 cases.

Subdivision (a) of the rule fills a procedural void left by § 362 of the Code. Pursuant to § 362(e), the automatic stay is terminated 30 days after a request is made for relief unless the court continues the stay as a result of a final hearing or, pending final hearing, after a preliminary hearing. If a preliminary hearing is held, § 362(e) requires the final hearing to be commenced within 30 days after the preliminary hearing. Even though the expressed legislative intent is to require expeditious resolution of a secured party's request for relief, § 362 is silent as to the time within which the final hearing must be concluded. Subdivision (a) imposes a 30-day deadline on the court to resolve the dispute.

At the final hearing, the stay is to be terminated, modified, annulled, or conditioned for cause, which includes, inter alia, lack of adequate protection. 11 U.S.C. § 362(d). The burden of proof on the existence of adequate protection is on the party opposing relief from the stay. 11 U.S.C. § 362(g)(2). Adequate protection is exemplified in 11 U.S.C. § 361.

Subdivision (b) complements § 362(f) which permits ex parte relief from the stay when there will be irreparable damage. This subdivision sets forth the procedure to be followed when relief is sought under §362(f). It is derived from Bankruptcy Rule 601(d).

Rule 4002

Grant or Denial of Discharge

Bankruptcy Rule 404 applies in cases filed under chapter 7, Liquidation, of the Bankruptcy Code except that (1) the references to § 14c of the Act shall be read as references to § 727(a) of the Code and (2) notwithstanding subdivision (d) of Rule 404, the court, on application of the debtor, shall defer the entry of an order granting a discharge for 45 days and, on application within the 45-day period, the court may for cause further defer entry of the order to a date certain.

Note

Rule 404 sets forth the procedure for filing objections to discharge. The statutory references are changed to conform with the Code.

Subdivision (d) of Rule 404 requires that if no timely complaint objecting to a discharge is filed and certain other statutory tests are satisfied, the discharge shall be granted forthwith. Section 524(c) of the Code authorizes the debtor to enter into binding reaffirmation agreements prior to the entry of a discharge. Immediate entry of the discharge order after the time fixed for filing of a complaint objecting to discharge will inhibit the debtor's right to enter into reaffirmation agreements. The most common situation is when the same date is fixed for filing objections to a discharge and dischargeability complaints. Entry of the discharge forthwith may preclude the debtor from settling any dischargeability litigation by the execution of a reaffirmation agreement. For the foregoing reasons, immediate entry of a discharge order is inconsistent with § 524(c).

This rule accommodates the debtor's § 524(c) right by according the debtor the opportunity to secure automatically an additional 45 days to conclude his reaffirmation agreements. For cause, the court may grant a further extension. The length of any extension is within the discretion of the court.

Rule 4003

Determination of Dischargeability of a Debt; Judgment on Nondischargeable Debt; Jury Trial

Bankruptcy Rule 409(a) applies in cases filed under chapter 7, Liquidation, of the Bankruptcy Code except that the reference to § 17c(2) of the Act shall be read as a reference to § 523(c) of the Code.

Note

Subdivisions (b) and (c) of Rule 409 are unnecessary because of the expanded jurisdiction of the bankruptcy court and preservation of right to trial by jury where allowed by statute.

Rule 4004

Reaffirmation and Discharge Hearing

Within no more than 30 days after the entry of an order granting or denying a discharge and on at least 10 days' notice to the debtor and trustee, if one is appointed, the court shall hold a hearing as provided in § 524(d) of the Bankruptcy Code. Applications by the debtor for approval of reaffirmation agreements shall be filed before or at the hearing.

Note

Section 524(d) of title 11, U.S.C., requires that the court hold a hearing to inform an individual debtor concerning the grant or denial of his discharge and the law applicable to reaffirmation agreements. In addition, if the debtor seeks to reaffirm a consumer debt not secured by real property the court is to rule on approval of the reaffirmation agreement at the hearing.

The notice of the § 524(d) hearing may be combined with the notice of the meeting of creditors or entered as a separate order.

PART V

COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 5001

Prohibition on Ex Parte Contacts

Any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the bankruptcy judge concerning matters affecting a particular case or civil proceeding.

Note

This rule should be unnecessary because there should not be ex parte communications with a bankruptcy judge by any party in interest including a trustee or his attorney or the debtor or his attorney, in a chapter 7, 9, 11, or 13 case. Rule X-1006 has been included however, to offer guidance to the United States trustees appointed in the system newly created by Public Law 95-589. In order to avoid any misapprehension that might result from its omission, Rule 5001 is included to make clear that no party in interest, person representing a party in interest, or employee of a party in interest should have ex parte communications with a bankruptcy judge about the case. Of course, there is no reason why anyone who is not a party in interest should have such communications.

Contacts and relationships exist between the bankruptcy courts and the bar which are problems that the new law seeks to solve. The system should not only operate fairly but it must appear to operate fairly. H. Rep. No. 95-595, 95th Cong., 1st Sess. 95 et seq. (1977).

This rule and Rule X-1006 do not substitute for or limit any applicable canon of professional responsibility or judicial conduct. See, e.g., Canon 7, EC7-35, Disciplinary Rule 7-110(B) of the Code of Professional Responsibility: "Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he

presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party."; Canon 3A(4) of the Code of Judicial Conduct: "A judge should . . . neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.".

PART VI

COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6001

Proceeding to Avoid Indemnifying Lien or Transfer to Surety

Bankruptcy Rule 612 applies in cases under the Bankruptcy Code except that the reference to "a lien voidable under § 67a of the Act" shall be read as a reference to "a judicial lien voidable under § 547 of the Code."

Note

Bankruptcy Rule 612 would remain applicable but for the reference to the Act. Judicial liens, to which § 67a of the Act referred, are rendered voidable, if at all, by § 547 of the Code as preferences.

PART VII

ADVERSARY PROCEEDINGS

Rule 7001

Designation as Adversary Proceeding

A proceeding before a bankruptcy judge for legal, equitable, or declaratory relief which arises under non-bankruptcy law is an adversary proceeding governed by Part VII of the Bankruptcy Rules.

Note

This rule supplements the adversary proceeding rules of the Bankruptcy and Chapter Rules and is designed to make it clear that all actions within the expanded jurisdictional grant of 28 U.S.C. §1471 are adversary proceedings.

The adversary proceedings rules of the Bankruptcy and Chapter Rules, which are applicable to cases under the Code, make actions to recover money or property adversary proceedings. Although a very high percentage of the actions which will be brought under the new jurisdictional grant will be to recover money or property, there will be actions within the bankruptcy court's jurisdiction which are not actions to recover money or property. The most important examples are actions for specific performance and certain other equitable remedies and declaratory judgment actions. The all inclusive language of this rule subjects any possible action within the jurisdictional grant to procedures of Part VII of the Bankruptcy Rules.

Rule 7002

Pleading Jurisdiction

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. The jurisdictional allegation shall also contain a reference to the name, number, and chapter of the case under the Bankruptcy Code to which the adversary proceeding relates and the district and division where the case is pending.

Note

With one important exception, Bankruptcy Rule 708 makes Rule 8 of the Federal Rules of Civil Procedure applicable to adversary proceedings. The requirement of Rule 8(a)(2) that a complaint contain a jurisdictional allegation is the exception to the general incorporation of Rule 8. Because of the expanded jurisdiction of the bankruptcy courts, it is now appropriate to require that complaints initiating adversary proceedings contain an explicit allegation of the grounds of the bankruptcy court's jurisdiction. This rule supplements Bankruptcy Rule 708 by requiring that all complaints and similar pleadings contain an allegation of the bankruptcy court's jurisdiction.

The last sentence of the rule requires that all complaints and similar pleadings state the name, number, and chapter of the case under the Code to which the adversary proceeding relates. This requirement is designed to facilitate handling of the complaints by court personnel and to insure that litigants have a precise reference to the pending case under the Code.

Rule 7003

Caption of Pleadings

The caption of each pleading in an adversary proceeding shall conform substantially to Form No. 24, if the adversary proceeding is filed in the court where the case under the Bankruptcy Code is pending, or Form No. 25, if the adversary proceeding is filed in a court other than the court in which the case under the Bankruptcy Code is pending.

Note

Parties initiating adversary proceedings in the bankruptcy courts will sometimes be required or have the option of filing an adversary proceeding in a bankruptcy court other than the one in which the case under the Code is pending. In order to distinguish adversary proceedings which are in the bankruptcy court where the case is pending from those which are not, this rules requires that the caption of an adversary proceeding filed where the case is pending be slightly different from the caption used for adversary proceedings filed in other courts.

The forms are designed to be consistent with the plans of the Administrative Office of United States Courts to require that each adversary proceeding be docketed separately and assigned an adversary proceeding number. Therefore the caption will be completed by filing in the adversary proceeding number. The number of the case under the Code to which the adversary proceeding relates will not appear in the caption, however, Rule 7002 requires that the pertinent information relating to the case under the Code to which the adversary proceeding relates appear in the jurisdictional allegation of the complaint.

Rule 7004

Removal

(a) Application.

(1) Form and Content. A party desiring to remove any civil action or proceeding from a federal or a state court shall file in the bankruptcy court for the district and division within which such action is pending a verified application containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process and pleadings.

(2) Time for Filing by Defendant. The application for removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(3) Time for Filing by Any Party. If the civil action or proceeding stated by the initial pleading is not within the jurisdiction of the bankruptcy court when

initiated, an application for removal may be filed by a party within 30 days after the order for relief in the case under the Bankruptcy Code.

(b) Bond. Except where a trustee or debtor in possession in a case under the Bankruptcy Code or the United States is an applicant, each application for removal of a civil action or proceeding shall be accompanied by a bond with good and sufficient surety conditioned that the party will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the civil action or proceeding was not removable or was improperly removed.

(c) Notice. Promptly after the filing of the application and bond, when required, the party filing the removal application shall give written notice thereof to all adverse parties and shall file a copy of the application with the clerk of the court from which the civil action or proceeding was removed which shall effect the removal and the parties shall proceed no further in that court unless and until the case is remanded.

(d) Procedure After Removal.

(1) In all civil actions or proceedings removed to a bankruptcy court the bankruptcy court may issue

all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the case was removed or otherwise.

(2) The bankruptcy court may require the applicant to file with its clerk copies of all records and proceedings in the court from which the case was removed.

(e) Process After Removal. In all civil actions or proceedings removed to a bankruptcy court in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in the bankruptcy court. This subdivision shall not deprive any defendant on whom process is served after removal of his right to move to remand the case.

(f) Applicability of Part VII of the Rules of Bankruptcy Procedure. The rules of Part VII of the Bankruptcy Rules apply to a civil action or proceeding removed to a bankruptcy court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the

other defenses or objections available to him under the rules of Part VII of the Rules of Bankruptcy Procedure within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the application for removal, whichever period is longest.

(g) Time for Filing a Demand for Jury Trial. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury shall be accorded it, if his demand therefor is served within 10 days after the application for removal is filed if he is the applicant, or if he is not the applicant, within 10 days after service on him of the notice of filing the application. A party who, prior to removal, has made an express demand for trial by jury in accordance with federal or state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the bankruptcy court directs that they do so within a specified time if they desire to claim trial by jury. The bankruptcy court may make this direction on its own motion and shall do so as a matter

of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

(h) Record Supplied. Where a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in a bankruptcy court, and the clerk of such court, on demand, and the payment or tender of the legal fees, fails to deliver certified copies the bankruptcy court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial and judgment may be had in such bankruptcy court, and all such process awarded, as if certified copies had been filed in the bankruptcy court.

(i) Attachment or Sequestration; Securities. Whenever any civil action or proceeding is removed to a bankruptcy court, any attachment or sequestration of the goods or estate of the defendant in such action in the court from which the action was removed shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the court from which the civil action or proceeding was removed. All bonds, undertakings, or security given

by either party in a civil action or proceeding prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions, orders, and other proceedings had in civil action or proceeding prior to its removal shall remain in full force and effect until dissolved or modified by the bankruptcy court.

(j) Remand. If at any time before final judgment it appears that the civil action or proceeding was removed improvidently or without jurisdiction, the bankruptcy court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the court from which the civil action or proceeding was removed and that court may thereupon proceed with the case.

(k) Definitions. For the purpose of this rule the word "state" includes the District of Columbia and the words "state court" include the Superior Court of the District of Columbia.

Note

Section 1478 of Title 28 authorizes the removal from a state court or a federal court, other than the United States Tax Court, to the bankruptcy court of any civil action or proceeding, other than a suit by a government unit to enforce its police or regulatory power. This rule specifies the procedure for and after removal.

The subdivisions of this rule conform substantially to the sections of the Judicial Code pertaining to removal to the district courts, 28 U.S.C. §§1446-1451, and Rule 81(c) of the Federal Rules of Civil Procedure. Appropriate changes have been made to adapt the language of these sections and the rule to removal to the bankruptcy courts.

Subdivision (a)(1) is derived from 28 U.S.C. §1446(a). Although §1446(a) applies only to defendants, this subdivision applies to any party because removal to a bankruptcy court under 28 U.S.C. §1478 may be properly effectuated by a plaintiff or a defendant.

The word applications is substituted for petition because petition is used in the Bankruptcy Rules to refer to the document initiating a case. In addition, the reference to the court from which the action may be removed is expanded to include federal courts because 28 U.S.C. §1478 authorizes removal from all federal courts except the Tax Court.

Subdivisions (a)(2) and (a)(3) are derived from paragraphs one and two of 28 U.S.C. §1446(b). Timely exercise of the right to remove is as important in the bankruptcy context as it is when the removal is from a state court to a district court. If an action is within the bankruptcy court's jurisdiction when filed, only a defendant may remove. For example, if a trustee elects to sue in the district court or a state court, he has made an election to proceed in that forum and removal is inappropriate.

Both a plaintiff and defendant may remove an action which becomes removable after it is initiated. For example, if a corporation is a plaintiff in an action and that corporation later becomes a debtor under Chapter 7 or 11 of the Code, either the trustee or debtor in possession may remove or the defendant may remove. The thirty-day period for the filing of the removal petition runs from the order for relief in the case. In voluntary cases this date is the date of the petition, but in involuntary cases the date is when the order for relief is entered under §303(h) of the Code.

Subdivision (b): with one exception, this subdivision is the same as 28 U.S.C. §1446(d). The exemption from the bond requirement is enlarged to include a trustee or debtor in possession. Bankruptcy Rule 805 gives the appellate court discretion to require a trustee to post a bond. Complete exemption from the bond requirement for removal is appropriate because of the limited resources which may be

available at the beginning of a case and the very small probability that an action will be improperly removed.

Recovery on the bond is permitted only where the removal was improper. If the removal is proper but the bankruptcy court orders the action remanded on equitable grounds, 28 U.S.C. §1478(b), there is no recovery on the bond.

Subdivision (c) requires that notice of the filing of the application for removal be given to adverse parties. The notice requirements of this subdivision are the same as those found in 28 U.S.C. §1446(e). The injunction aspect of this subdivision differs from §1446(e) in that the subdivision enjoins the parties from further proceeding but the statute enjoins the court from which the case is removed from taking further action. In light of the Congressional policy reflected in §405(a)(1)(A) of P.L. 95-598 it is inappropriate to provide in a local rule that another court is enjoined from acting. Moreover, there is no reason to believe that other courts will not heed the statutory mandate of 28 U.S.C. §1478 when actions are removed to the bankruptcy courts.

Subdivisions (d) and (e), with appropriate changes to conform them to the bankruptcy context, are the same as 28 U.S.C. §1447(a) and (b) and 28 U.S.C. §1448, respectively.

Subdivisions (f) and (g) are taken from Rule 81(c) of the Federal Rules of Civil Procedure. Again, the subdivisions differ from Rule 81(c) only to the extent necessary to conform the language of Rule 81(c) to the bankruptcy context.

Subdivision (h) is derived from 28 U.S.C. §1449 and subdivision (i) is derived from 28 U.S.C. §1450.

Subdivision (j) is derived from 28 U.S.C. §1447(c). Removal is improvident under this subdivision when a court finds there are equitable grounds within 28 U.S.C. §1478(b) justifying remand.

Subdivision (k) is derived from 28 U.S.C. §1451.

No subdivision of this rule is comparable to 28 U.S.C. §1447(c). Under §1447(c) remand orders are not appealable. Section 1478(b) specifically provides that remand orders of bankruptcy judges are not appealable and, therefore, there is no need for this rule to cover that subject.

PART VIII

APPEAL TO DISTRICT COURT OR THREE-JUDGE PANEL

Rule 8001

Applicability of Part VIII of Bankruptcy Rules to Appeals to Three-Judge Panel

The rules in Part VIII of the Federal Rules of Bankruptcy Procedure apply to appeals to panels of three bankruptcy judges designated pursuant to 28 U.S.C. § 160.

Note

This rule makes Part VIII of the Federal Rules of Bankruptcy Procedure applicable when an appeal is taken to a panel of three bankruptcy judges. Such panels may be established by the circuit council in accordance with 28 U.S.C. § 160.

Rule 8002

Meaning of Words in Part VIII of the Federal Rules of Bankruptcy Procedure Applicable in Chapter 7, 9, 11 and 13 Cases; Definition

(a) Meaning of Words. The following words and phrases used in Part VIII of the Federal Rules of Bankruptcy Procedure made applicable in cases filed under the Bankruptcy Code on or after October 1, 1979, have the meanings herein indicated, unless they are inconsistent with the context:

(1) "District court" or "court" means "appellate court."

(2) "Clerk of the district court" means "clerk of the appellate court."

(b) Definition. The words "appellate court" in these rules mean the "district court sitting as an appellate court" or, when appropriate, "a panel of three bankruptcy judges designated under 28 U.S.C. §160."

Note

The meanings of certain of the words and phrases of the Part VIII rules set forth in this rule and rule 1001 conform the rules in Part VIII of the Federal Rules of Bankruptcy Procedure to the Code's changes in the bankruptcy and appellate court systems.

Subdivision (b) defines "appellate court" to mean the district court sitting as an appellate court or a panel of three bankruptcy judges designated under 28 U.S.C. §160.

Appeals directly to the courts of appeals pursuant to 28 U.S.C. §1293(b) are governed by 28 U.S.C. §2107, which requires the notice of appeal to be filed within 30 days, and the Federal Rules of Appellate Procedure.

The clerk of the district court is the clerk of the appellate court when an appeal is to the district court. This rule assumes that within those circuits which elect to use panels of three bankruptcy judges, one or more clerks of the bankruptcy or district courts or the clerk of the court of appeals will be designated a clerk or clerks for the three-judge panels.

Courts of appeals are not included within the definition of appellate court because appeals by agreement directly to the courts of appeals under 28 U.S.C. §1293(b) are governed by the Federal Rules of Appellate Procedure.

Rule 8003

Filing

The filing of the notice of appeal and other papers with the bankruptcy judge as required by Rules 801, 802, 806, and 808 of the Federal Rules of Bankruptcy Procedure shall be made by filing them with the clerk of the bankruptcy court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk of the Bankruptcy Court.

Note

This rule accommodates the Rules of Part VIII to the creation of the office of clerk of the Bankruptcy Court.

There is, however, no need to specifically adapt the rules of Part VIII to assign ministerial tasks to the clerk of the bankruptcy court, for example transmitting the record to the clerk of the appellate court, because the bankruptcy judges have that power under Rule 506.

Rule 8004

Leave to Appeal: Interlocutory Orders

(a) Application for Leave to Appeal. Leave to appeal under 28 U.S.C. §1334(b) or §1482(b) shall be sought by filing an application for leave with the clerk of the court to which the appeal is addressed within the time provided by Rule 802 for filing a notice of appeal, with proof of service by the applicant in accordance with Rule 804. A notice of appeal need not be filed.

(b) Content of Application; Answer. The application shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the applicant leave to appeal should be granted; and a copy of the order, decree or judgment complained of and of any opinion or memorandum relating thereto. Within 10 days after service of the application an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

(c) Leave to Appeal Granted; Filing of Record. If leave to appeal is granted, the record shall be designated and transmitted and the appeal docketed in accordance with

Rules 806 and 807. The time fixed by those rules for designating and transmitting the record and docketing the appeal shall run from the date of the order granting leave to appeal. A notice of appeal need not be filed.

(d) Appeal Improperly Taken Regarded as an Application for Leave to Appeal. If a timely notice of appeal is filed where the proper mode of proceeding is by an application for leave to appeal under this rule, the notice of appeal shall be deemed a timely and proper application for leave to appeal. The appellate court may enter an order either granting or denying leave to appeal or directing that an application for leave to appeal be filed. Unless the appellate court fixes another time in its order directing that an application for leave to appeal be filed, the application shall be filed within 10 days of entry of the appellate court's order.

Note

Subdivisions (a), (b) and (c) are derived from Rule 6 of the Federal Rules of Appellate Procedure. Provision for a permissive appeal procedure is necessitated by 28 U.S.C. §1334(b) and §1482(b) which authorize the district courts and three-judge panels of bankruptcy judges designated under 28 U.S.C. §160 to grant leave to appeal from interlocutory orders. The request for leave to appeal is denominated as an application rather than a petition, the denomination used in the Appellate Rules, because petition is used in the Bankruptcy Rules only to refer to the document initiating a case under the Code.

Subdivision (d) is similar to 28 U.S.C. §2103 which authorizes the Supreme Court to regard improper appeals as petitions for certiorari.

Rule 8005

Copies of Papers When Appeal Taken to a Panel of Three Bankruptcy Judges

When an appeal is to a panel of three bankruptcy judges, an original and three copies of all papers shall be filed, but the panel by order may require that additional copies be furnished.

Note

This rule is designed to expedite the consideration of appeals by panels of three bankruptcy judges.

Rule 8006

Finality of Bankruptcy Judge's Judgment or Order

Unless a notice of appeal is filed as prescribed by Rules 801 and 802 of the Bankruptcy Rules or Rules 3 and 4 of the Federal Rules of Appellate Procedure, the judgment or order of the bankruptcy judge shall become final.

Note

This rule adapts Rule 803 to make it consistent with 28 U.S.C. §1293(b).

Rule 8007

Effect of Appeal by Agreement to the Court of Appeals

The filing of a direct appeal by agreement in the court of appeals under 28 U.S.C. §1293(b) shall have the effect of a stipulation of dismissal of any appeal to another appellate court from the same order, judgment or decree. The appeal shall thereafter be dismissed in accordance with Rule 802(b).

Note

Two appeals from the same order, judgment, or decree may not be prosecuted simultaneously before the district court or a three judge panel of bankruptcy judges and the court of appeals. The rule recognizes that because the time for the filing of a notice of appeal is 30 days in the court of appeals counsel who originally file an appeal to the district court or three judge appellate panel may thereafter obtain the agreement of the necessary parties to appeal directly to the court of appeals. The rule provides for the automatic dismissal of the original appeal on the filing of the notice of appeal to the court of appeals.

PART IX

GENERAL PROVISIONS

Rule 9001

Jury Trial

(a) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the case or proceeding and not later than 10 days after the service of the last pleading directed to such issue. The demand may be indorsed on a pleading of the party.

(b) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(c) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 509 constitutes a waiver by him of trial by jury. a

demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(d) Applicability of Certain of the Federal Rules of Civil Procedure. Rules 47-51 of the Federal Rules of Civil Procedure apply when a jury trial is conducted.

Note

This rule is adapted from Rule 38 of the Federal Rules of Civil Procedure and governs all requests for jury trials. The rule replaces the provisions of Rule 115(b), which are inconsistent with section 1480(b) of the Judicial Code. Whether a party is entitled to a jury trial is determined by 28 U.S.C. §1480.

PART X

UNITED STATES TRUSTEE

Rule X-1001

Applicability of Rules

(a) Part X Rules. The rules in Part X apply to cases under the Bankruptcy Code filed in or transferred to the districts specified in § 1501 of the Code.

(b) Inapplicability of Rules. Rules 2003 and 2004 do not apply in cases under the Bankruptcy Code filed in or transferred to the districts specified in § 1501 of the Code.

Note

Section 1501 of the Code lists the judicial or "pilot" districts in which United States trustees are to be appointed by the Attorney General pursuant to 28 U.S.C. § 581.

The rules in Part X are for use in those districts in connection with the duties and responsibilities of the United States trustees.

The rules are set out in a separate part to facilitate their repeal in the event the United States trustee system is not continued by Congress beyond 1984. See Pub. L. 95-598, § 408(c).

Pursuant to 28 U.S.C. § 586, the United States trustees are under the general supervision of the Attorney General who will probably promulgate rules or directives governing their conduct which, however, must not be inconsistent with the Bankruptcy Rules to be enacted by Congress. The Attorney General's rules or directives when enacted or issued, must also be referred to in the pilot districts.

Subdivision (b) indicates the rules that are not applicable in the pilot districts. Rules X-1003 and X-1004 substitute for Rules 2003 and 2004.

Rule X-1002

Petitions, Lists of Creditors, Schedules and Statements

The clerk of the bankruptcy court shall promptly transmit to the United States trustee one copy of the petition commencing a case under the Bankruptcy Code and one copy of the lists of creditors and the schedule of assets and liabilities and statement of financial affairs, if any, and any amendments thereto. Notice of a hearing for an extension of time to file schedules, statements and lists under Rule 1007(d) shall be given the United States trustee.

Note

Rule X-1002 requires that a copy of the petition commencing a case under the Bankruptcy Code, whether it is a case under chapter 7, 9, 11, or 13, is to be sent to the United States trustee. 11 U.S.C. §§ 301-303 provide that petitions are to be filed with the bankruptcy court. Nevertheless, the United States trustee should be apprised of the commencement of every case and this is most easily accomplished by providing that office with a copy of the petition. The number of copies required by Rule 1002 to be filed will accommodate Rule X-1002.

The clerk is also to transmit a copy of the lists of creditors and any schedules and statements that are filed. Rule 1007(a) and (b) require a list of the 10 largest creditors and a list of all creditors to be filed. These lists should be transmitted to the United States trustee.

The clerk should transmit the papers specified in this rule forthwith on their filing because the United States trustee requires the information to perform his duties, e.g., appointment of an interim trustee, 11 U.S.C. § 15701, and appointment of a committee of unsecured creditors, 11 U.S.C. § 151102.

Rule X-1003

Meetings of Creditors or Equity Security Holders

(a) Date and Place. The United States trustee shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later time for the meeting. The meeting may be held at a regular place for holding court or at any other place within the district convenient for the parties in interest.

(b) Order of Meeting.

(1) Meeting of Creditors. The United States trustee or his designee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor and, if appropriate, the election of a trustee or of a creditors' committee.

(2) Meeting of Equity Security Holders. If ordered by the court, the United States trustee shall fix a date for a meeting of equity security holders. The United States trustee or his designee shall preside at any such meeting.

(3) Right to Vote. A creditor is entitled to vote at a meeting if he has filed a proof of claim at or before the meeting, unless objection is made or unless the proof of claim is insufficient on its face. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may temporarily allow it for that purpose in an amount as to the court seems proper.

(c) Record of Proceeding. Electronic sound recording equipment shall be used by the clerk of the bankruptcy court or the United States trustee to record the meeting of creditors or equity security holders.

(d) Report to the Court. The United States trustee shall transmit to the court the name and address of any person elected trustee or a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing of the dispute. Pending disposition of the dispute by the court, the interim trustee shall continue in office. If no application for the resolution of the election dispute is made to the court within 10 days after the date of the creditors meeting, the interim trustee shall serve as trustee.

(e) Special Meetings. The United States trustee may call a special meeting of creditors on application or on his own initiative.

(f) Final Meeting. The United States trustee may call a final meeting of creditors in every case in which the net proceeds realized exceed $250. The clerk of the bankruptcy court shall mail a summary of the trustee's final account to the creditors with the notice of the meeting, together with a statement of the amount of the claims allowed. The trustee or his designee shall attend the final meeting and shall, if requested, report on the administration of the estate.

Note

This rule imposes on the United States trustee the duty to fix the date for the meeting of creditors required by 11 U.S.C. § 341(a) and, if ordered by the court pursuant to 11 U.S.C. § 341(b), the meeting of equity security holders. Although the United States trustee is to call the meeting, that is, to fix the date, a duty that is parallel to the one imposed on the court by Rule 2003(a), the clerk of the bankruptcy court transmits the notice of the meeting, as prescribed by Rule 2002(a).

As indicated in the rule there is flexibility with regard to the location of the meeting; a courtroom may be made available and that would be an appropriate location. It would be desirable for the meeting to be held in close proximity to a bankruptcy judge should any question or dispute requiring immediate resolution arise.

Pursuant to 11 U.S.C. §§ 702 and 705, creditors may elect a trustee and a committee in a chapter 7 case. Subdivision (b) of this rule provides that the United States trustee or his designee will preside over any election that is held under those sections. While Rule X-1003 is applicable to cases under chapter 11 and chapter 13, trustees and committees are not elected thereunder.

Subdivision (d) recognizes that the court should be informed immediately about the election or nonelection of a trustee in a chapter 7 case. This subdivision also takes note of the fact that there may be a disputed election, but in no event may the United States trustee or his designee resolve the dispute. For purposes of expediency, the results of the election could be obtained for each alternative presented by the dispute and reported to the court. Thus, when an interested party (not the United States trustee) raises the dispute before the court, its resolution will determine the outcome and a new or adjourned meeting to conduct the election may not be necessary.

Rule X-1004

Notification to Trustee of Selection

The United States trustee shall immediately notify the trustee of his selection, how he may qualify and, if applicable, the penal sum of his bond. The trustee shall advise the court in writing of his acceptance or rejection of the office within 5 days after receipt of this notice.

Note

See 11 U.S.C. §§ 322, 701(b), 702, 703(a), 15322, 15701 and 15703.

If the person selected as trustee accepts the office, he should qualify within 5 days after his selection, as required by 11 U.S.C. § 322(a).

Rule X-1005

Right to Be Heard; Filing Papers

(a) Right to Be Heard. The United States trustee may raise and appear and be heard on any issue relating to his responsibilities in a case under the Bankruptcy Code.

(b) Filing of Papers. The court or the United States trustee may require a party in interest to file with the United States trustee a copy of any paper filed with the court if the court or the United States trustee deems it necessary in the interest of effective administration.

Note

Subdivision (a) gives the United States trustee standing to be heard. That office should have the opportunity, for example, to object to actions proposed to be taken by a chapter 7 trustee, or to support any such action. The Code is silent as to the United States trustee's standing. This subdivision gives effect to Congressional intent, i.e., that the United States trustee shall have an active role in cases under title 11, United States Code.

Subdivision (b) enables the United States trustee to be kept aware and current of the developments in a case.

8/1/79

Rule X-1006

Prohibition on Ex Parte Contacts

The United States trustee, his assistants, and agents shall refrain from ex parte meetings and communications with the bankruptcy judge concerning matters affecting a particular case or civil proceeding. This rule does not preclude communication with a bankruptcy judge for the purpose of discussing general problems of administration and improvement of bankruptcy administration, including operation of the United States trustee system.

Note

This rule should be unnecessary because there should not be ex parte communications with a bankruptcy judge by a trustee in a chapter 7, 11 or 13 case or by any other person. Since the United States trustee is new, however, the rule offers guidance as to the proper conduct of that office. See H. Rep. No. 95-595, 95th Cong., 1st Sess. 95 et seq. (1977). Contacts and relationships exist between the bankruptcy courts and the bar which are problems that the new law seeks to solve. The system should not only operate fairly but it must appear to operate fairly.

Communication with respect to the judicial and administrative system is expressly not prohibited. It may be particularly necessary during the transition period for the court and the United States trustee to cooperatively seek ways to improve the administration of cases under the Code.

See also Rule 5001 which imposes the same prohibitions on a party in interest, anyone representing a party in interest, or employee of a party in interest.

This rule and Rule 5001 do not substitute for or limit any applicable canon of professional responsibility or judicial conduct. See Note to Rule 5001.

PART XIII.
CHAPTER 13 RULE

Rule 13001

Supplement to Chapter 13 Statement

(a) Schedule of Exempt Property. The original and each copy of the Chapter 13 Statement shall be accompanied by a statement, prepared in the manner prescribed by Schedule B-4 of Form No. 6, of the exemption law which would be selected and the property which would be claimed as exempt if the debtor's estate were liquidated under chapter 7 of the Bankruptcy Code.

(b) Debtor Engaged in Business. The original and each copy of the Chapter 13 Statement of a debtor engaged in business shall be accompanied by a statement of financial affairs for a debtor engaged in business prepared in the manner prescribed by Form No. 8.

Note

Official Form No. 13-5, Chapter XIII Statement, is consistent with the Code and applicable to cases under chapter 13; however, the substantive changes contained in chapter 13 of the Code create the need for information in addition to that contained in a completed chapter 13 Statement.

Section 1325(a)(4) of the Code authorizes confirmation of a chapter 13 plan only if the distributions under the chapter 13 plan are equal to or greater than the distributions which would be available if the estate of the debtor were liquidated under chapter 7. Therefore, the court must know what exemption law the debtor would select and the property he would claim as exempt if there were a chapter 7

liquidation. Completion of the Schedule B-4 of Form No. 6 is a convenient way of providing the court with this necessary information, and, therefore, subdivision (a) requires that the Chapter 13 Statement be accompanied by a completed Schedule B-4.

Subdivision (b) requires a debtor engaged in business to complete and file the chapter 7 statement of affairs of a debtor engaged in business. The information provided in the statement of affairs is necessary to the court and the parties in a chapter 13 case.

Under both subdivisions, the supplemental information must be filed with the Chapter 13 Statement. Rule 13-107 governs the time within which the Chapter 13 Statement must be filed.