Agenda G-13
Rules
October 1972

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

Summary of Report

The annexed report recommends:

1. Approval of the proposed Bankruptcy Rules (Appendix A).

2. Approval of the proposed Chapter XIII Rules (Appendix B).

3. Approval of the proposed amendments and additions to the Federal Rules of Criminal Procedure (Appendix C).

4. Approval of deferring proposed amendments to Appellate Rules 9(d) and 10(b) until they can be considered by the reconstituted Advisory Committee on Appellate Rules.

5. Approval of cooperation by the committees with the Subcommittee on Criminal Laws and Procedures of the United States Senate in the procedural aspects of its work in the revision and recodification of title 18, U.S.C.

6. Approval of requesting the elimination from the next budget for the judiciary of the proviso limiting to $90,000 the funds available for the rules program.

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

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REPORT

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Standing Committee on Rules of Practice and Procedure met in Washington on October 6 and 7, 1972. All the members were present except Professor Wright, who was unavoidably prevented from attending. Mr. Foley, secretary of the committee, was also present. Judge Forman, chairman, and Professors Kennedy and Countryman, reporters, of the Advisory Committee on Bankruptcy Rules, and Professor Remington, reporter of the Advisory Committee on Criminal Rules, were present for parts of the meeting.

Civil Rules

The Advisory Committee on Civil Rules met on September 22 and 23, 1972. The committee gave extended consideration to Rule 23, relating to class actions, and directed its reporter to prepare alternative drafts of possible amendments to that rule for consideration at its next meeting.

Bankruptcy Rules

Ever since full rulemaking authority under the Bankruptcy Act was conferred upon the Supreme Court by Congress in 1964, the Advisory Committee on Bankruptcy Rules has been engaged in the

large task of preparing a comprehensive set of rules and official forms for ordinary bankruptcy proceedings as well as for proceedings under Section 77, Chapters IX, X, XI, XII and XIII of the Bankruptcy Act. Preliminary drafts of rules and forms in ordinary bankruptcy and in Chapter XIII proceedings were published to the bench and bar in March 1971 and in September 1971, respectively. The advisory committee made a number of modifications in the preliminary drafts in the light of comments and suggestions received from the bench and bar and has now submitted definitive drafts of the proposed rules and official forms under Chapters I to VII of the Bankruptcy Act (ordinary bankruptcy) and under Chapter XIII of the Bankruptcy Act. These rules and forms, together with Advisory Committee Notes which fully explain them, are annexed to this report as Appendices A and B, respectively.

It will be observed that the numerical designations of the proposed rules is such as to allow for the insertion, as Titles II, III, IV, V and VI, of rules to govern the procedure under section 77, railroad reorganizations; Chapter IX, local taxing agency compositions; Chapter X, corporate reorganizations; Chapter XI, Arrangements, and Chapter XII, Non-corporate Real Property Arrangements, respectively. While ordinary bankruptcy proceedings under Chapters I to VII and wage earners' cases under Chapter XIII make up the vast bulk of the bankruptcy business of the courts, proceedings under the other chapters are important. The advisory committee has approved preliminary drafts of rules under Chapters X and XI and these will be published to the bench and bar shortly. A draft of rules under Chapter XII is in process and plans are being made for the preparation of rules under Section 77 and Chapter IX, which will complete this monumental task which

was laid upon the Supreme Court by the Act of October 3, 1964, 28 U.S.C.§ 2075.

We have been informed that the statutory Commission on the Bankruptcy Laws of the United States, which is now engaged in the study and revision of the Bankruptcy laws, is devoting itself solely to the substantive aspects of the law upon the theory that our proposed bankruptcy and Chapter XIII rules will be adopted to take effect shortly and will fully cover the procedure. In the light of this fact it is quite a fortunate coincidence that our rules are now in final form ready for adoption.

Our committee has considered these draft rules and forms and approves them. We now submit them to the Conference for approval and transmittal to the Supreme Court with the recommendation that the Court adopt them, hopefully, to take effect on July 1, 1973.

Criminal Rules

The Advisory Committee on Criminal Rules on September 6 and 7,1972 gave further consideration at our request, made in the light of late comments received from the bar, to certain of the proposed amendments to the criminal rules which our committee had tentatively approved in March 1972. The advisory committee suggested a few minor amendments to certain of these rules and again transmitted them to our committee with their approval.

Our committee, accordingly, had before it at its recent meeting proposed amendments to Criminal Rules 4(a), 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), (c) and (e) and 43 and to Appellate Rules 9(b) and (d) and 10(b). In addition, we had before us a proposed perfecting amendment to Criminal Rule 50 and proposed new Criminal Rules 12.1, 12.2, 29.1 and 41.1.

Most of these rules represent the culmination of a number of years of work by the advisory committee with respect to proposals which were published to the bench and bar in January 1970 and April 1971. Our committee gave full consideration to these proposals, made a number of changes, mostly of a perfecting nature, and as thus amended approved the amendments to Criminal Rules 4(a), 9(a), 11, 12, 15, 16, 17(f), 20, 32(a),(c) and (e), 43 and 50, and the proposed new Criminal Rules 12.1, 12.2 and 29.1. The definitive approved draft of these proposals and the advisory committee's notes, which fully explain them, are annexed hereto as Appendix C.

Your committee recommends that the Judicial Conference approve them and transmit them to the Supreme Court with the recommendation that they be adopted by the Court.

Your committee does not recommend the approval at this time of the proposed new Criminal Rule 41.1 with respect to nontestimonial identification before and after arrest. The preliminary draft of this rule was published to the bench and bar in April 1971. It evoked wide criticism and serious questions were raised as to its constitutional validity. Your committee,

accordingly, believes that before a procedural rule on this subject is recommended to the Supreme Court our committees and the Conference should have the benefit of more experience with such procedure in the States and in the District of Columbia and of judicial consideration of the constitutional questions involved. Moreover, it appears to your committee that there is little need for procedure of this sort except with persons suspected of crimes of violence, so-called "street crimes", with which the federal courts have little occasion to deal except in the District of Columbia where under the recent judicial reorganization such crimes are tried in the local Superior Court rather than in the United States District Court. It well may be, therefore, that the Superior Court of the District of Columbia could establish such procedure under its own rule-making power, thus meeting the need in the District.

Proposed amendments to Appellate Rules 9(d) and 10(b) came to our committees from the Judicial Conference in October 1970 upon the suggestion of the Conference Committee on Administration of the Criminal Law. The suggestion was in substance to deny release on bail pending appeal to a defendant who has not made satisfactory arrangements with the court reporter for procuring a transcript of the testimony and who has not been granted leave to appeal in forma pauperis. The suggestion further was that such failure should also be ground for dismissal of the appeal. These proposals were published to the bench and bar in April 1971 and have evoked a substantial amount of critical comment. The principal criticism is that they would

operate unfairly in denying bail and threatening dismissal of the appeal to those "genteel poor" who, although not paupers, do not have sufficient cash or quick assets to defray the cost of a long transcript, while having no practical effect on the well-to-do defendant or the defendant who can take the pauper's oath. While recognizing that the delay in procuring transcripts is a very important factor in causing delay in the appellate process and the final disposition of criminal cases, we think this is a problem which may very well involve other aspects of the appellate procedure and that it should be considered, along with the many other ways in which the courts of appeals are presently seeking to meet the problem of delay, by the Advisory Committee on Appellate Rules when it is reconstituted by the Chief Justice. We, therefore, recommend that our committee be authorized to refer to the Advisory Committee on Appellate Rules, when reconstituted, the proposals which were included in the published preliminary draft amendments to Appellate Rules 9(d) and 10(b), together with the published suggested amendments to Appellate Rule 9(b).

Correlation of work of rules committees with Senate Subcommittee on Criminal Laws and Procedures

The Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate is presently engaged in the preparation of a revision of the federal criminal code, Title 18, U.S.C., for the general purpose of implementing the recommendations of the National Commission on Reform of the Federal Criminal Laws. In this connection the subcommittee,

of which Senator John L. McClellan is chairman, recognizing that Title 18 presently includes a large number of procedural provisions which are not included in the Federal Rules of Criminal Procedure, desires that such of these provisions as are not obsolete, as well as any new procedures which may be required to implement any changes proposed in the substantive law, be incorporated into the federal rules and thus subjected directly to the rule-making authority of the Supreme Court. In order to synchronize this process, the subcommittee proposes that its draft bill include two titles, Title I, the revised federal criminal code of substantive law, and Title II, the proposed amendments and additions to the Federal Rules of Criminal Procedure, including those amendments transferring the presently useful procedural provisions of Title 18. Although these rules amendments would be accomplished by statute, it is proposed to make it clear in the statute that their enactment in this way will not in any way derogate from the rulemaking power of the Supreme Court or affect its authority to deal with all the rules, including these amendments, by way of further amendment or modification.

The Senate subcommittee desires to work as closely as possible with the Judicial Conference and its committees in this area. It accordingly asks the cooperation of our committees in determining which of the procedural provisions of Title 18 are currently useful and should be transferred to the Federal Rules of Criminal Procedure. It also seeks our assistance in determining the form in which such transferred provisions and any new provisions proposed by the subcommittee should be incorporated into the federal rules and generally in correlating the

work of our committees with the procedural aspects of the work of the Senate subcommittee. Copies of a letter from Senator McClellan to the chairman of your committee, dated July 26,1972, and of the reply thereto, dated August 3, 1972, are annexed hereto as Appendix D.

Since the schedule of the Senate subcommittee involves the preparation of a preliminary draft of a bill this month or next month and of a more definitive bill early in 1973 in the first session of the next Congress, there will obviously not be time for our committees to follow our normal procedure, if effective cooperation is to be given as requested. For example, there would not be time to publish our drafts to the bench and bar or to submit them to the Judicial Conference for approval. On the other hand, the Senate subcommittee plans to hold hearings on its bill at which any objections to proposed rules changes could be voiced and the same procedure would, doubtless, be followed in the House of Representatives if the bill passes the Senate.

The Advisory Committee on Criminal Rules and our committee have each given full consideration to this proposal and we recommend that it be approved by the Conference and that our two committees be authorized to cooperate with the Subcommittee on Criminal Laws and Procedures of the United States Senate, as it has requested, with respect to the amendments and additions to the Federal Rules of Criminal Procedure which the subcommittee proposes to include in Title II in its bill to revise the federal criminal code.

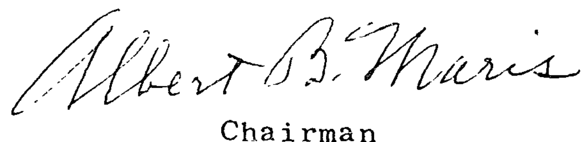
Appropriation Proviso

From the inception of the rules study program, the funds required to carry on the program have come from the funds appropriated to the Administrative Office and for travel of judges and referees, subject to the following express proviso included in the Appropriations Act:

> "*Provided*, That not to exceed $90,000 of the appropriation contained in this title shall be available for the study of rules of practice and procedure."

There has been no increase in this limitation over the twelve years of the program in spite of the tremendous increase in costs of all kinds, salaries, travel, printing, etc. In spite of this, the program has been carried on with what we believe have been distinguished results. There have, however, been great handicaps resulting from inability to schedule committee meetings for lack of available travel money, pitifully inadequate compensation of reporters and frequent delays in publishing preliminary drafts. Your committee knows of no other program which is subjected to such a financial straitjacket. We think that the public value of the program has been amply demonstrated and that it would be appropriate in the next budget to request the Congress to delete this proviso from the judiciary appropriation and we so recommend.

On behalf of the Committee,



Chairman

October 9, 1972

TITLE I

~~PROPOSED~~ BANKRUPTCY RULES ~~AND OFFICIAL FORMS UNDER CHAPTERS I TO VII OF THE BANKRUPTCY ACT~~

Rule 1. Scope of Bankruptcy Rules and Forms; Short Title

1 The~~se~~ rules and forms in this Title I govern the proce-
2 dure ~~in bankruptcy cases, including related~~
3 ~~proceedings~~, in courts of bankruptcy in bankruptcy cases under
4 Chapters I–VII of the Bankruptcy Act. These rules may be known and cited as the Bankruptcy Rules. These forms may be known and cited as the Official Bankruptcy Forms.

Advisory Committee's Note

A "bankruptcy case," as defined in Rule 101, is one wherein a petition has been filed by or against a person seeking his adjudication as a bankrupt. The case includes all of the proceedings and matters which arise in connection with the case and of which the court of bankruptcy is given jurisdiction by ~~the~~ Chapters I–VII of the Bankruptcy Act. The~~se~~ rules and forms in this Title I ~~thus~~ do not apply to a case initiated or ordered to proceed under any of the debtor-relief chapters of the Act. The rules and forms in Title VII govern the procedure in Chapter XIII cases, and Titles II-VI are reserved for cases that are commenced or proceed under Chapters VIII-XII of the Act. These rules do not ~~(VIII–XIII). Nor do these rules~~ prescribe except incidentally the procedure for actions or "plenary proceedings" brought in state courts or federal district courts to determine controversies that arise in connection with a bankruptcy case.

"Courts of bankruptcy" are defined in § 1(10) of the Bankruptcy Act, 11 U.S.C. § 1(10), to "include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable." (References to the Bankruptcy Act hereinafter will be to the Act and will omit citations to Title 11 of the United States Code.) The courts of bankruptcy clearly include the district courts of Guam and the Virgin Islands. 1 Collier, *Bankruptcy* ¶ 1.10, at 71–72 n.22 (14th ed.rev. 1968), citing relevant statutory provisions. (Hereinafter citations to the Collier

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treatise will omit the title and reference to the edition but will include the date of the revision of the cited material.) It is problematical whether the District Court for the District of the Canal Zone is a bankruptcy court, but it appears that this court has not undertaken to act as a court of bankruptcy. 1 Collier, *supra* at 72.

PART I. PETITION AND PROCEEDINGS RELATING THERETO AND TO ADJUDICATION

Rule 101. Commencement of Bankruptcy Case

1 A bankruptcy case is commenced by filing
2 a petition with the court by or against a per-
3 son for the purpose of obtaining his adjudi-
4 cation as a bankrupt.

ADVISORY COMMITTEE'S NOTE

A proceeding initiated by a petition for an adjudication under the Bankruptcy Act is designated a "bankruptcy case" for the purpose of these rules. The term embraces all the controversies determinable by the court of bankruptcy and all the matters of administration arising during the pendency of the case. This usage of the word "case" conforms to that employed in many provisions of the Bankruptcy Act (hereinafter referred to as the Act). See, *e.g.*, §§ 22, 32, 39b, 40c, 42, and 59d. The word "proceeding" as used in these rules generally refers to a litigated matter arising within a case during the course of administration of an estate. See particularly Rule 703. The rule assumes the continuing applicability of the definition of "petition" in § 1(24) of the Act, but as used in these rules, the word refers to the document commencing a bankruptcy case. The place of filing a petition is more fully particularized in Rule 509.

Rule 102. Reference of Cases; Withdrawal of Reference and Assignment

1 *(a)* ~~*Original*~~ *Reference.* Upon the filing of
2 a petition the clerk shall refer the case forth-

3 with to a referee or, if a local rule so
4 provides, to more than one referee concur-
5 rently. Thereafter all proceedings in the case
6 shall be before the referee except as other-
7 wise provided by subdivision (b) of this rule,
8 by Rules 115(b) and 920, by § 2a(15) of the
9 Act when a complaint seeks an injunction to
10 restrain a court, by § 43c of the Act when
11 the office of the referee is vacant, and by the
12 provisions in the Act and the rules in Part
13 VIII governing appeals from judgments of
14 the referee.
15 *(b) Withdrawal of Reference and Assign-*
16 *ment.* The district judge may, at any time,
17 for the convenience of parties or other cause,
18 withdraw a case in whole or in part from a
19 referee and either act himself or assign the
20 case or part thereof to another referee in the
21 district.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). The first sentence of subdivision (a) of this rule is derived from § 22a of the Act but deletes the clause authorizing the judge or judges to modify the provision for automatic reference. The practice, which has become established in some districts under § 22a of the Act, of referring cases concurrently to two or more referees of the court is recognized as proper by this rule.

The second sentence of subdivision (a) is adapted from General Order 12(1). A district judge may act in a bankruptcy case only when he withdraws a case from the referee pursuant to subdivision (b); when the office of the referee becomes vacant as provided in § 43c of the Act; when jury trial before a judge is demanded pursuant to Rule 115(b); when the judge hears and determines issues under Rule 920 on a certification that contempt has

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been committed; when a complaint seeks injunctive relief against another court, which may be granted under § 2a(15) of the Act only by the judge, and when a judgment of the referee is being reviewed on appeal pursuant to §§ 2a(10) and 39c of the Act. The rules in Part VIII govern the procedure on review by the district judge of judgments of the referee. Sections 24a and b of the Act and the Federal Rules of Appellate Procedure govern the procedure on appeals to the courts of appeals, and § 24c of the Act and the Rules of the Supreme Court of the United States apply to review of judgments by that Court in bankruptcy cases. As pointed out in the Note to Rule 701, these rules do not govern [illegible] in the district courts of the United States or in the state courts.

Subdivision (b) consolidates the provisions for transfer of a case from one referee to another in § 22b of the Act and for withdrawal of a reference in § 43c of the Act. The withdrawal and reassignment may be on motion or on the court's own initiative. Cause for withdrawal of a reference includes the statutory grounds specified in § 43c, *viz.*, temporary absence or disqualification of the referee and the need for expediting the business of the court. As noted above, § 43c continues to govern the situations in which a referee's [illegible] *Press Printers & Publishers, Inc.*, 12 F.2d 660, 661-65 (3d Cir. 1926), cert. denied, 276 U.S. 633 (1928). If the reason for assignment or withdrawal ceases to be operative, the case or proceeding may be reassigned to the same referee. In districts having more than one judge the authority conferred by this rule ~~will~~ should be exercised according to the rules and orders of the court as provided by 28 U.S.C. § 137.

Subdivision (b) governs only the assignment of a case or proceeding to a referee [illegible] territorial jurisdiction of the court. *Cf.* [illegible] & *Construction Co.*, 117 F. [illegible] (S.D.N.Y. [illegible]). The transfer of a case [illegible]

Rule 116 and the transfer of an adversary proceeding to another district is governed by Rule 782. Section 43c of the Act governs the assignment of a referee from without the district.

Rule 103. Voluntary Petition

1 A voluntary petition shall conform sub-
2 stantially to Official Form No. 1. ~~It~~ shall be
3 filed ~~in triplicate~~, unless ~~additional~~ copies
4 ~~are~~ required by local rule.

An original and 2 copies of the petition

a different number of

is

ADVISORY COMMITTEE'S NOTE

Official Form No. 1 (Petition for Voluntary Bankruptcy) has been simplified and shortened but retains the essential features of the official form for a debtor's petition promulgated under former § 30 of the Act. Although no copy of a voluntary petition is required to be served on any adverse party, the rule continues the requirement of § 59c of the Act that the petition be filed in triplicate.

Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c). The petition must be filed with the clerk as provided in Rule 509(a). As provided in Rules 401 and 601, the filing of the petition acts as a stay of certain acts and proceedings against the bankrupt and his property.

Rule 104. Involuntary Petition

1 (a) [illegible] An involuntary
2 petition shall conform substantially to
3 Official Form No. 9. ~~It~~ shall be filed ~~in tripli-~~
4 ~~cate~~, unless additional copies are required by
5 local rule.

An original and 2 copies of the petition

6 *(b) Participation in Act of Bankruptcy.* A
7 creditor may not file or join in a petition al-
8 leging the commission of an act of bank-
9 ruptcy other than the sixth act, if he
10 consented to participated in, or secured the
11 commission of the act alleged. Notwithstand-
12 ing the foregoing if a creditor, without in-

13 ducing it, participated in any general as-
14 signment, receivership, or other mode of
15 adjustment or settlement of the affairs of
16 the debtor and did not consent in writing
17 thereto, or if he did so consent but without
18 knowledge of facts which would constitute
19 commission of the first, second, or third act
20 of bankruptcy or which would be a bar to
21 the discharge of the debtor in bankruptcy, he
22 may nevertheless act as a petitioning credi-
23 tor and may allege any act of bankruptcy in-
24 cluding such assignment or receivership.

25 *(c) Particularity of Allegations.* The facts
26 constituting an act of bankruptcy shall be al-
27 leged with sufficient particularity to identify
28 the transaction or occurrence.

29 *(d) Transferor or Transferee of Claim.* A
30 person who has transferred or acquired a
31 claim for the purpose of commencing a bank-
32 ruptcy case shall not be a qualified peti-
33 tioner. A petitioning creditor who is a trans-
34 feror or transferee of a claim, whether
35 transferred unconditionally, for security, or
36 otherwise, shall annex to ~~each of the tripli-~~
37 ~~cate petitions~~ [the original and each of the 2 copies of the petition] a copy of all documents evi-
38 dencing the transfer, and a signed statement
39 setting forth the consideration for and terms
40 of the transfer and that the claim was not
41 transferred for the purpose of commencing a
42 bankruptcy case.

43 *(e) Joinder of Petitioners After Filing.*
44 Creditors other than the original petitioners
45 may join in an involuntary petition at any
46 time before its dismissal. If the answer to an
47 involuntary petition filed by one or 2 credi-

48 tors avers the existence of 12 or more credi-
49 tors, the alleged bankrupt shall file with the
50 answer a list of all his creditors with their
51 addresses, a brief statement of the nature of
52 their claims, and the amounts thereof. If it
53 appears that there are 12 or more creditors
54 as counted under § 59e of the Act, the court
55 shall thereupon afford a reasonable opportu-
56 nity for other creditors to join in the petition
57 before a hearing is held thereon.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Official Form No. 9 (Creditors' Petition for Bankruptcy), prescribed for use by creditors as petitioners to have a debtor adjudged an involuntary bankrupt, is a revision of the official form for an involuntary petition promulgated under former § 30 of the Bankruptcy Act. A petition by fewer than all the general partners to have a partnership adjudged bankrupt is governed by Rule 105(b). The requirement of § 59c of the Act that the petition be filed in triplicate is continued, although under the bankruptcy docket and case reporting system in effect since January 1, 1963, the clerk of the United States district court typically sends to the referee all copies of the original petition and schedules. AOUSC Bulletin No. 506, dated Oct. 17, 1962, at p. 6. One copy of the petition is served on the bankrupt pursuant to Rule 111, another is retained by the referee as part of the record of the case, and the third copy, together with the schedules and the statement of affairs, is for the trustee. If, as in some districts where there is a geographical separation of the clerk's and referee's offices, the judges require the clerk to retain a copy of the petition and schedules, the rule recognizes the validity of a variant local rule requiring an additional copy.

Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c). The petition must be filed with the clerk as provided in Rule 509(a). As provided in Rules 401 and 601, the filing of the petition acts as a stay of certain acts and proceedings against the bankrupt and his property.

Subdivision (b) is substantially a statement of the case law on the effect of participation by a petitioner in an act of bankruptcy, as supplemented by § 59h of the Act.

See 3 Collier ¶ 59.39 (1964); MacLachlan, *Bankruptcy* § 60 (1956); Anno., 6 A.L.R.3d 476 (1966). The provision in the second sentence relieving a petitioner from the disqualification otherwise imposed by participation in an adjustment or settlement when such participation was without knowledge of the commission of one of the first three acts of bankruptcy may go beyond existing law, but it is supported by the rationale of the cases. See, *e.g.*, *In re Thomas*, 211 F.Supp. 187, 191 (D.Colo. 1962), aff'd sub nom. *Thomas v. Youngstown Sheet & Tube Co.*, 327 F.2d 667 (10th Cir.), cert.denied, 379 U.S. 827 (1964); *Dinerman v. Bowley & Travers, Inc.*, 301 F.2d 464, 467 (2d Cir. 1962); *In re Curtis*, 94 Fed. 630, 632 (7th Cir. 1899).

Subdivision (c) is a statement of case law. See 1 Collier ¶¶ 3.106, 3.207 (1961); MacLachlan, *Bankruptcy* § 59 (1956). Compare Rule 9(b) of the Federal Rules of Civil Procedure, requiring particularity in all averments of fraud, discussed in 2 Moore, *Federal Practice* ¶ 9.03 (2d ed. 1948). The amenability of the allegations of a petition respecting the commission of an act of bankruptcy to an amendment that will relate back to the date of the filing of the petition is governed by the case law construing Rule 15(c) of the Federal Rules of Civil Procedure, which is made applicable to such an amendment by Rule 121. See *Dworsky v. Alanjay Bias Binding Corp.*, 182 F.2d 803, 805 (2d Cir. 1950); *Glint Factors, Inc. v. Schnapp*, 126 F.2d 207 (2d Cir. 1942); 2 Collier ¶ 18.26 (1966); 3 Moore, *Federal Practice* ¶ 15.15[5] (2d ed. 1964). (Hereinafter citations to the Moore treatise will omit the title and reference to the edition but will include the date of the revision of the cited material.)

Subdivision (d) is a revision of General Order 5(2). A signed statement of the petitioning creditor is made acceptable in lieu of the affidavit required by the general order, in line with the policy declared in Rule 911(b) and discussed in the Note accompanying that provision. The implication of the general order that a transfer for the purpose of commencing a bankruptcy case is a ground for disqualification of a party to the transfer as a petitioner is made explicit. Compare § 146(1) of the Act;

Rule 23.1(1) of the Federal Rules of Civil Procedure. The subdivision requires disclosure of any transfer of his claim by the petitioner as well as a transfer to him and applies to transfers for security as well as unconditional transfers. *Cf. In re 69th & Crandon Bldg. Corp.*, 97 F.2d 392, 395 (7th Cir.), cert.denied, 305 U.S. 629 (1938), recognizing the right of a creditor to sign a bankruptcy petition notwithstanding a prior assignment of his claim for the purpose of security. This rule does not, however, qualify the requirement of § 59b of the Act that a petitioning creditor must have a provable claim not contingent as to liability.

Subdivision (c) is derived from § 59d and f of the Act but does not include its provision for notice by the court to all creditors. The interests of creditors are adequately protected by a provision requiring a reasonable opportunity for other creditors to join in the petition before the hearing is held. The list of creditors filed by the bankrupt affords a petitioner in such a case the information needed to enable him to give notice for the purpose of obtaining the copetitioners required to make the petition sufficient. The statutory requirement that the list be verified is eliminated pursuant to the policy expressed in Rule 911(b). It has been held that a creditor who desires to secure the administration of a debtor's estate in bankruptcy may properly solicit other creditors to join him in filing a petition. *In re Kootenai Motor Co.*, 41 F.2d 403 (D.Idaho 1930); *In re Smith*, 176 Fed. 426, 435 (N.D.N.Y. 1910). After a reasonable opportunity has been afforded for other creditors to join in an involuntary petition, the hearing on the petition should be held without further delay. The last sentence of § 59d is omitted from the rule as unnecessary.

Rule 105. Partnership Bankruptcy

1 *(a) Voluntary Petition.* A voluntary peti-
2 tion may be filed by all the general partners
3 on behalf of the partnership.
4 *(b) Partner's Petition Against Partner-*

5 *ship*. A petition may be filed by fewer than
6 all the general partners to have a partner-
7 ship adjudged bankrupt under § 5b of the
8 Act. ~~A~~ petition filed under this subdivision
9 shall be in triplicate, but if more than one
10 general partner does not join in the petition,
11 an additional copy for each such partner
12 shall be filed. The petition for adjudication
13 of the partnership may be contested by any
14 general partner (or alleged general partner)
15 who is not a petitioner.
16 *(c) Involuntary Petition by Creditors.* An
17 involuntary petition may be filed by credi-
18 tors against a partnership. Within 5 days
19 after the filing, the petitioning creditors
20 shall cause a copy of the petition to be sent
21 by certified mail to the last known address
22 of, or to be delivered to, each general partner
23 who has not been served.
24 *(d) Petition When All ~~Parties~~ Are Adju-*
25 *dicated.* If all the general partners of a part-
26 nership are adjudged bankrupt, any party in
27 interest may file a petition in any court in
28 which a partner's bankruptcy case is pend-
29 ing to have the partnership adjudged bank-
30 rupt.

An original and 2 copies of the

shall be

General Partners

ADVISORY COMMITTEE'S NOTE

This rule is derived from subdivisions a, b, and i of § 5 of the Act and authorizes 4 types of petitions to have a partnership adjudged bankrupt. The joint petitions authorized by § 5 of the Act are abolished by this rule. The statutory provisions for this kind of petition have caused confusion as to the filing fees chargeable and the manner of preparing schedules and statements of affairs. The advantages of joint administration of partnership and

partners' estates where that is feasible are obtainable under Rule 117. Subdivision (d) is an elaboration of the first sentence of § 5i of the Act. See Kennedy, *A New Deal for Partnership Bankruptcy*, 60 Col.L.Rev. 610, 646–49 (1960). The duty to prepare and file schedules and the statement of affairs for the partnership adjudicated on a petition filed under this rule rests on the general partners. See Rule 108(c).

Rule 106. Caption on Petition

1 The caption of every petition shall comply
2 with Rule 904(b). In addition the title of the
3 case as set forth in the caption shall include
4 the name of the bankrupt and all other
5 names used by him within 6 years before the
6 filing of the petition. If the petition is not
7 filed by the bankrupt, the petitioners shall
8 include such other names according to their
9 best information.

ADVISORY COMMITTEE'S NOTE

The second and third sentences of this rule adopt a feature found in some local rules. See, *e.g.*, N.D. Ill. Bankr.R. 5(B)(2); S.D. & E.D. N.Y. Bankr. R. 1(b). Additional names of the bankrupt are also required to appear in the caption of each notice to creditors. See Rule 203(i).

Rule 107. Filing Fees

1 *(a) General Requirement.* Except as
2 otherwise provided in subdivision (b), every
3 petition shall be accompanied by the pre-
4 scribed filing fees.
5 *(b) Payment of Filing Fees in Install-*
6 *ments.*
7 *(1) Application for Permission to Pay Fil-*
8 *ing Fees in Installments.* A voluntary
9 petition shall be accepted for filing by the
10 clerk of the district court if accompanied by

11 an application signed by the petitioner for
12 permission to pay the filing fees in install-
13 ments. The application shall state ~~the facts~~
14 ~~showing the necessity for payment of~~ the
15 filing fees in installments, the proposed
16 terms of such installment payments, and
17 that the applicant has paid no money to his
18 attorney for services in connection with the
19 case. The application shall be filed in dupli-
20 cate, one copy for the clerk and one for the
21 bankruptcy judge.
22 (2) *Action on Application.* At or prior to
23 the first meeting of ~~the~~ creditors, the court
24 after a hearing may make an order permit-
25 ting the payment of the filing fees in install-
26 ments to the clerk of the district court, and
27 fixing the number of installments and the
28 amount and date of payment of each install-
29 ment. The number of installments permitted
30 shall not exceed 4, and the final installment
31 shall be payable not later than 4 months
32 after the ~~date of~~ filing of the petition. For
33 cause shown, however, the court may extend
34 the time for payment of any installment to a
35 date not later than 6 months after the date
36 of filing of the petition.
37 (3) *Postponement of Attorney's Fees.* Fil-
38 ing fees must be paid in full before the bank-
39 rupt may pay his attorney for services in
40 connection with the case.

that the applicant is unable to pay

except

and transf~~erred~~ no property

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Filing fees for bankruptcy cases are prescribed by §§ 40c(1), 48c, and 52a of the Act. Additional fees and charges may be prescribed in accordance with schedules and regulations approved by the Judicial

Conference of the United States pursuant to §§ 40c(2) and (3) of the Act and 28 U.S.C. § 1914(b).

Subdivision (b) is a revision of paragraph (4) of former General Order 35. The payment of filing fees in installments pursuant to the provisions of this general order has been explicitly authorized by §§ 40c(1), 48c, and 52a of the Act. The verification requirement imposed by the general order has been eliminated in conformity with the policy of Rule 11 of the Federal Rules of Civil Procedure. The subdivision allows the court to act on the application in advance of the first meeting or at that meeting. Reference in General Order 35(4) to "any adjournment thereof" is ~~deleted~~ omitted from the rule as unnecessary since an adjournment continues the first meeting. The administrative cost of installments in excess of 4 is disproportionate to the benefits conferred, and prolongation of the period of payment beyond 6 months after bankruptcy causes undesirable delays in administration. Paragraph (2) accordingly imposes a maximum of 4 on the number of installments and reduces the period of installment payments allowable on an original application from 6 to 4 months. Only in extraordinary cases should it be necessary to give an applicant an extension beyond the 4 months allowable ~~in~~ on the original application. The requirement of paragraph (3) that filing fees be paid in full before the bankrupt shall pay ~~any money to~~ his attorney for services in connection with the bankruptcy case codifies the rule declared in *In re Latham*, 271 Fed. 538 (S.D.N.Y. 1921), and *In re Darr*, 232 Fed. 415 (N.D.Cal. 1916). This has also been a local rule in force in a number of districts. *E.g.*, N.D.Ill. Bankr. Rule 6B; D.Ore. Bankr. Rule 83(c); E.D.Va. Bankr. Rule 7(b).

Rule 108. Schedules and Statement of Affairs

1 *(a) Schedules and Statement Required.*
2 The bankrupt shall file with the court sched-
3 ules of all his debts and all his property and
4 a statement of his affairs, prepared by him
5 in the manner prescribed by Official Forms

either

6 No. 6 and No. 7 or No. 8, whichever is ap-
7 propriate. The number of copies of the
8 schedules and statement shall correspond to
9 the number of copies of the petition required
10 by these rules.
11 *(b) Time Limits.* Except as otherwise pro-
12 vided herein, the schedules and statement
13 shall be filed with the petition by a voluntary
14 bankrupt and within 10 days after adjudica-
15 tion by an involuntary bankrupt or by a
16 partnership adjudicated on other than a vol-
17 untary petition. A voluntary petition shall
18 nevertheless be accepted by the clerk if ac-
19 companied by a list of all the bankrupt's
20 creditors and their addresses, and the sched-
21 ules and statement may be filed within 10
22 days thereafter in such case. On application
23 the court may grant up to 10 additional days
24 for the filing of schedules and the statement
25 of affairs; any further extension may be
26 granted only for cause shown and on such
27 notice as the court may direct.
28 *(c) Partnership and Partners.* If the
29 bankrupt is a partnership, the general part-
30 ners shall prepare and file the schedules of
31 the debts and property and statement of af-
32 fairs of the partnership. Every general part-
33 ner not adjudicated shall file a statement of
34 his assets and liabilities with the trustee of
35 the partnership within 10 days after qualifi-
36 cation by the trustee or within such further
37 time as may be allowed by the court for
38 cause shown.
39 *(d) Preparation of Schedules on Default*
40 *by Bankrupt.* If the schedules or statement

or Statement of Affairs

of affairs

41 is not prepared and filed as required by this
42 rule, the court may order the receiver,
43 trustee, a petitioning creditor, or other party
44 in interest to prepare and file any of these pa-
45 pers within such time as the court shall fix.
46 *(e) Interests Acquired or Arising After*
47 *Bankruptcy.* Within 10 days after the infor-
48 mation comes to his knowledge or within
49 such further time as the court may allow,
50 the bankrupt shall file a supplemental sched-
51 ule showing the facts regarding (1) any
52 property that vests in him by bequest, de-
53 vise, or inheritance within 6 months after
54 bankruptcy; (2) any property in which the
55 bankrupt had an estate or interest by the en-
56 tirety on the date of bankruptcy and which
57 became transferable in whole or in part
58 solely by the bankrupt within 6 months after
59 bankruptcy; and (3) any interests in real
60 property that were nonassignable prior to
61 bankruptcy and that, within 6 months there-
62 after, became assignable interests or estates,
63 or gave rise to powers in the bankrupt to ac-
64 quire assignable interests or estates. If any
65 of the property or interests required to be
66 reported under this subdivision is claimed by
67 the bankrupt as exempt, he shall claim his
68 exemption in the supplemental schedule. The
69 duty to file a supplemental schedule in ac-
70 cordance with this subdivision continues not-
71 withstanding the closing of the case before
72 the duty is or can be performed.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is an elaboration of § 7a(8)

and (9) of the Act. The list of creditors required by § 7a(8) has been referred to in Schedule A of Official Form No. 6 as the schedule of debts, and the latter designation is employed in the rules and official forms as revised. The cited clauses of § 7a have required the schedule of property, list of creditors, and statement of affairs to be filed in triplicate, and § 59c of the Act has required petitions to be filed in the same number. Rules 103, 104, and 105 ~~likewise~~ require an original and 2 copies of each petition ~~petitions~~ to be filed ~~in triplicate~~, but if more than one general partner does not join in a petition filed under Rule 105(b), an additional copy for each such partner must be filed. Each required copy of a petition must be accompanied by a copy of the schedules and statement of affairs. Only the original need be signed and verified, but the copies should be conformed to the original. See Rule 911(c).

Subdivision (b) retains the requirement of § 7a(8) of the Act that the schedules of property and debts be filed with any voluntary petition unless a list of creditors and their addresses accompanies the petition. Whereas the latter option is available to the bankrupt under the Act only if the court for cause shown gives him further time for filing the schedules, however, the rule allows the bankrupt who submits a creditor list with his petition 10 more days for the filing of complete schedules without the necessity of applying for and obtaining an extension from the court. A voluntary bankrupt frequently has an urgent need for relief available under the Act, and allowing him up to 10 days in which to provide the information required on the schedules and in the statement of affairs will be less productive of administrative inconvenience and delay than the present requirement that an extension be granted only on application. A bankrupt adjudicated on an involuntary petition and a partnership adjudicated on a petition of less than all the partners under Rule 105(b) or on a petition filed under Rule 105(d) when all the partners have been adjudicated are given 10 days after the adjudication in which to file the schedules. This is 5 days more than § 7a(8) now allows the involuntary bankrupt, but the rule should cut down the number of requests by involuntary bankrupts for an extension. The provision fixing the time limits on the filing of schedules and the statement of affairs by a partnership

adjudicated on a petition by less than all the partners or when all of them have been adjudicated fills a lacuna in the law. Extensions of time beyond the 10-day periods allowed by the first and second sentences of subdivision (b) and beyond the discretionary extension of up to 10 additional days authorized by the first clause of the last sentence of subdivision (b) are governed by the last clause of that sentence and by Rule 906(b).

Submission of the statement of affairs, which § 7a(9) of the Act permits to be filed as late as 5 days before the first meeting of creditors, is made subject by subdivision (b) to the same time requirements as apply to the filing of the schedules of property and debts. Early disclosure of the information called for in the statement is no less needful and helpful for expeditious administration than is prompt filing of the schedules, and ordinarily there is no reason why the schedules and the statement should not be submitted at the same time.

Subdivision (c), prescribing who shall prepare and file schedules and the statement of affairs whenever a partnership is adjudicated, is new. While the duty to prepare and file the schedules and statement of affairs of a partnership attaches to all the general partners, one partner may sign these papers on behalf of the partnership. See, *e.g.*, the form of the oath on behalf of a partnership at the foot of Official Form No. 6. The second sentence of the subdivision embodies a rule frequently stated and applied by the courts. See *Armstrong v. Fisher*, 224 Fed. 97 (8th Cir. 1915); *Dickas v. Barnes*, 140 Fed. 849 (6th Cir. 1905); *In re Ira Haupt & Co.*, 240 F.Supp. 369, 371–72 (S.D.N.Y. 1965); *In re Sugar Valley Gin Co.*, 292 Fed. 508 (N.D.Ga. 1923); Warren, *Corporate Advantages Without Incorporation* 285-86 (1929); *cf. Carter v. Whisler*, 275 Fed. 743, 747 (8th Cir. 1921). Most of the cases cited above were decided while former General Order VIII was in effect, and that general order required a nonadjudicated member of an adjudicated partnership to file a schedule of his debts and an inventory of his property in the same manner as if he had been individually adjudicated. The general order was revoked in 1925, 268 U.S. 712, because it authorized the adjudica-

tion of a partnership on the petition of less than all the partners. The Supreme Court had ruled in *Meek v. Centre County Banking Co.*, 268 U.S. 426 (1925), that since the Act as then written did not authorize such a petition, the general order was in excess of the rule-making power granted the Court by § 30 of the Act. A rule requiring a member of a duly adjudicated partnership to file a statement of his debts and property appears to be well within the rule-making power granted by 28 U.S.C. § 2075.

Subdivision (d) is a substantial revision of General Order 9. The general order deals only with the situation when an involuntary bankrupt is absent or cannot be found and in such case imposes the duty of filing a list of creditors and their addresses on petitioning creditors. The rule provides for any case in which the schedules or statement of affairs is not filed as required by giving the court a choice of persons and discretion as to the time for getting these documents prepared and filed. *Cf.* § 39a(2) of the Act; and see 1 Collier 982 (1960), for a discussion of the practice that has developed for handling such situations. A trustee, receiver, or other party ordered by the court to file schedules or a statement of affairs may request the court to authorize the employment of an assistant in connection with the preparation of these papers. Employment of an accountant by the trustee or receiver must be approved by the court in accordance with Rule 215, and the accountant's compensation would be governed by Rule 219 and §§ 62a(1) and 64a(1) of the Act.

Subdivision (e), which is new, provides a procedure for getting information as to any postbankruptcy acquisition of the bankrupt that passes to the trustee as part of the estate. See 4A Collier ¶¶ 70.17[8], 70.27, 70.37 (1967). A case presenting no controversy or complication may be closed before the end of the 6-month period during which the bankrupt is subject to the duty of disclosure imposed by this subdivision. *Cf.* 1 Collier 280 (1963). The supplemental schedule should be filed in the same place and manner as if the case had not been closed. The case need not be reopened in order for the schedule to be filed but

the filing (or failure to file) may be the precipitating cause for an order to reopen.

Rule 109. Verification of Petitions and Accompanying Papers

1 All petitions, schedules, statements of af-
2 fairs, and amendments thereto shall be veri-
3 fied.

Advisory Committee's Note

This rule combines requirements prescribed by §§ 7a(8) and 18c of the Act. Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c).

Rule 110. Amendments of Voluntary Petitions, Schedules, and Statements of Affairs

1 A voluntary petition, schedule, or state-
2 ment of affairs may be amended as a matter
3 of course at any time before the case is
4 closed. The court may, on application or mo-
5 tion of any party in interest or on its own
6 initiative, order any ~~defective~~ voluntary pe-
7 tition, schedule, or statement of affairs to be
8 amended. Every amendment under this rule
9 shall be filed in the same number as required
10 of the original paper, and the court shall
11 give notice of the amendment to such per-
12 sons as it may designate.

Advisory Committee's Note

General Order 11, from which the first sentence of this rule is principally derived, has required an application for leave to amend a petition or schedule. While this rule adopts a permissive approach to amendment of a voluntary petition, schedule, or state-

men of affairs, it contemplates that every amendment shall be brought to the attention of the court so that it may determine who, if anyone, should be notified of the amendment. A notice to the trustee is appropriate whenever the debtor amends his schedule of property. If additional property is claimed as exempt by the amendment, the trustee must act thereon in accordance with Rule 403. An amendment will ordinarily be filed with the referee. See Rule 509. If a copy of the petition, schedule, or statement being amended is retained by the clerk, a copy of each amendment should be transmitted by the referee to the clerk. If a schedule is amended to include an additional creditor, the effect on the dischargeability of the creditor's claim is governed by the provisions of § 17 of the Act (see particularly § 17a(3)).

¶ The second sentence of the rule is adapted from § 39a(3) of the Act.

Rule 111. Service of Petition and Process

1 Upon the filing of an involuntary petition,
2 the clerk of the district court shall forthwith
3 issue a summons for service on the bank-
4 rupt. Upon the filing of a partner's petition
5 against a partnership under Rule 105(b), the
6 clerk shall forthwith issue a summons for
7 service upon all general partners who are
8 not petitioners. The summons shall conform
9 substantially to Official Form No. 10 and a
10 copy shall be served with a copy of the peti-
11 tion in the manner provided for service of a
12 summons, complaint, and notice of trial by
13 Rule 704(b), (c), or (i). If service cannot be
14 made as provided in the preceding sentence,
15 the court may order the summons and peti-
16 tion to be served by mailing copies thereof to
17 the last known address, if any, and by at least
18 one publication in such manner and form as
19 the court may direct. The summons and peti-

20 tion may be served anywhere. The provisions
21 of Rule 704(e), (g), and (h) apply when
22 service is made or attempted under this
23 rule.

Advisory Committee's Note

This rule is a revision of § 18a of the Act. The substitution of the summons for the writ of subpoena as the process to be served on the bankrupt conforms the usage in bankruptcy to that prevailing generally in civil litigation in federal courts. See 2 Collier ¶ 18.30 (1966). The modes of service prescribed by the rule are personal or by mail, when service can be effected in one of these ways in the United States. Service by either of these modes shall be made in the manner prescribed for personal service or service by mail in adversary proceedings in bankruptcy cases by Rule 704(b) and (c). If service must be made in a foreign country, the mode of service prescribed is one of those referred to in Rule 704(i), which incorporates Rule 4(i) of the Federal Rules of Civil Procedure.

When none of the 3 methods referred to in Rule 704(b), (c), and (i) can be utilized, service by publication coupled with mailing to the last known address is authorized. *Cf.* Rule 704(d)(2). The court determines the form and manner of the publication as provided in Rule 908. The publication need not set out the petition or the order directing service by publication. In order to apprise the bankrupt fairly, however, the publication should include all the information required to be in the summons by Official Form No. 10 and a notice indicating how service is being effected and how a copy of the petition may be obtained. Section 18a of the Act has provided that when personal service on the bankrupt cannot be had, service by publication may be made in the manner provided for suits to enforce a legal or equitable lien in courts of the United States. The procedure for such suits is that prescribed by 28 U.S.C. § 1655, which includes a provision authorizing the vacation of a judg-

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ment at any time within a year after its entry if the defendant was not personally notified. As pointed out in the Note accompanying Rule 924, cases relying on this provision to vacate adjudications of bankruptcy entered without personal notice to the bankrupt are inapplicable to adjudications under these rules.

There are no territorial limits on the service authorized by this rule. Service on a bankrupt under § 18a of the Act has likewise not been limited by territorial boundaries when personal service within the state in which the court of bankruptcy sits has proved impracticable. *United States v. Kramer*, 279 F.2d 751, 83 A.L.R.2d 698 (3rd Cir.), cert. denied, 364 U.S. 879 (1960); *Bookey v. King*, 236 F.2d 871, 877 (9th Cir. 1956); *Benitez v. Anciani*, 127 F.2d 121, 126 (1st Cir.), cert. denied, 317 U.S. 699 (1942); *cf. Stegeman v. United States*, 425 F.2d 984, 987 n.4 (9th Cir. 1970); *Sidney L. Bauman Diamond Co. v. Hart*, 192 Fed. 498, 501–02 (5th Cir. 1911); *In re Berthoud*, 231 Fed. 529, 532–33 (S.D.N.Y.), appeal dismissed, 238 Fed. 797 (2d Cir. 1916). There must of course be a basis for jurisdiction of the bankrupt or his property in order for the court to adjudicate his bankruptcy and to administer his estate. Although Rule 116(a)~~, like § 2a(1) of the Act,~~ relates to venue rather than jurisdiction, the court would have no jurisdiction to act if none of the elements to be considered in the choice of venue could be found in the United States. ~~See~~ Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref.J. 36 (1962); Comment, 35 N.C.L.Rev. 476, 478 (1957).

Cf. § 2a(1) of the Act;

Subdivisions (e), (g), and (h) of Rule 704 govern time and proof of service, the effect of errors in service or proof thereof, and amendment of process or of proof of service.

Rule 112. Responsive Pleading or Motion

1 The alleged bankrupt in an involuntary
2 petition, or, in the case of a petition against
3 a partnership under subdivision (b) or (c) of

4 Rule 105, any general partner (or alleged
5 general partner) who is not a petitioner,
6 may contest the petition. Rule 12 of the Fed-
7 eral Rules of Civil Procedure applies to the
8 making of a defense or objection to the peti-
9 tion, except that an answer or a motion per-
10 mitted under Rule 12(b), (e), or (f) of the
11 Federal Rules of Civil Procedure shall be
12 served and filed within 15 days after the is-
13 suance of the summons, but if service is
14 made by publication upon an alleged bank-
15 rupt or partner not an inhabitant of nor
16 found within the state in which the district
17 court is held, the court shall prescribe the
18 time for such service and filing of the re-
19 sponse. The service of a motion permitted
20 under Rule 12 of the Federal Rules of Civil
21 Procedure shall have the effect prescribed by
22 Rule 712(a) on the time allowed for serving
23 an answer to the petition, but any motion or
24 answer served on the petitioner must be filed
25 with the court no later than the last day al-
26 lowed for service of the motion or the an-
27 swer, as the case may be. The answer to a
28 petition may include the statement of a
29 claim against a petitioning creditor only for
30 the purpose of defeating the petition. No
31 other responsive pleadings shall be allowed,
32 except that the court may order a reply to an
33 answer and prescribe the time for it to be
34 served and filed.

ADVISORY COMMITTEE'S NOTE

The first sentence of this rule is derived from § 18b of the Act. A petition filed by fewer than all the general

partners under Rule 105(b) to have the partnership adjudged bankrupt is referred to as a petition against the partnership because of the adversary character of the proceeding it commences. *Cf.* 2 Collier ¶ 18.38[2.1] (1966). One who denies an allegation of his membership in the firm is nevertheless recognized as a party entitled to contest a petition filed against a partnership under either subdivision (b) or (c) of Rule 105 in view of the possible consequences to him of an adjudication of the entity alleged to include him as a member. *Francis v. McNeal*, 228 U.S. 695 (1913); *Manson v. Williams*, 213 U.S. 453 (1909); *Carter v. Whisler*, 275 Fed. 743, 746 (8th Cir. 1921). The rule preserves the features of the Act permitting no response to a voluntary petition and permitting no response by creditors to an involuntary petition or petition against a partnership under Rule 105(b).

Rule 12 of the Federal Rules of Civil Procedure has been looked to by the courts as prescribing the mode of making a defense or objection to a petition in bankruptcy. See *Fada of New York, Inc. v. Organization Service Co., Inc.*, 125 F.2d 120, (2d Cir. 1942); *In re McDougald*, 17 F.R.D. 2, 5 (W.D.Ark. 1955); *In re Miller*, 6 Fed.Rules Serv. 12f.26, Case No. 1 (N.D.Ohio 1942); *Tatum v. Acadian Production Corp. of La.*, 35 F.Supp. 40, 50 (E.D.La. 1940); 2 Collier, *supra* at 134–40. As pointed out in the Note accompanying Rule 915 an objection that an alleged bankrupt is neither entitled to the benefits of the Act nor amenable to adjudication as an involuntary bankrupt goes to jurisdiction of the subject matter and may be made at any time consistently with Rule 12(h)(3) of the Federal Rules of Civil Procedure. Nothing in this rule recognizes standing in a creditor or any other person not authorized to contest a petition to raise an objection that a person eligible to file a voluntary petition cannot be adjudicated on an involuntary petition. See Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref.J. 36, 38–40 (1962).

As Collier has pointed out, "the mechanics of the provisions in § 18a and b relating to time for appearance and pleading are unnecessarily confusing. . . . These re-

sults [giving the respondent at least 10 days after service without permitting undue extension of the period for appearance and pleading] could be reached more expeditiously and with less confusion by amending § 18 so as to adapt the procedure provided for in Federal Rule 12(a). . . ." 2 Collier, *supra* at 103–04. The time normally allowed for the service and filing of an answer or motion under Rule 112 runs from the date of the issuance of the summons to the bankrupt. *Cf.* Rule 712(a), fixing the time for serving an answer to a complaint commencing an adversary proceeding by reference to the issuance of the summons that accompanies it. Service of the summons and petition will ordinarily be made by mail under Rule 111 and must be made within 5 days of the issuance of the summons under Rule 704(e), which governs the time of service. The 15 days normally allowed by this rule for serving the response is thus comparable to the period that has been prescribed by § 18a and b of the Act. When service is made by publication, the court should fix the time for service and filing of the response in the light of all the circumstances so as to afford a fair opportunity to the bankrupt to enter a defense or objection without unduly delaying the hearing on the petition. *Cf.* Rule 12(a) of the Federal Rules of Civil Procedure.

As provided in the third sentence of the rule, the timely service of a motion permitted by Rule 12(b), (c), (e), (f), or (h) of the Federal Rules of Civil Procedure alters the time within which an answer must be filed. If the court denies a motion or postpones its disposition until trial on the merits, the answer must be served within 5 days after notice of the court's action. If the court grants a motion for a more definite statement, the answer may be served any time within 5 days after the service of the more definite statement.

As provided in Rule 121 many of the rules governing adversary proceedings apply to proceedings on a contested petition unless the court otherwise directs. The specific provisions of this Rule 112 rather than Rule 705(b), however, govern the filing of an answer or motion responsive to a petition. The rules of Part VII are adaptations of the corresponding Federal Rules of Civil

Procedure, and the effect of Bankruptcy Rule 121 is thus to make the provisions of Civil Rules 5(a), 8, 9, 15, and 56 *inter alia* generally applicable to the making of defenses and objections to the petition. Rule 121, follows prior law and practice in this respect. See 2 Collier, *supra* ¶¶ 18.39–18.41.

The next to the last sentence adopts the position taken in many cases that an affirmative judgment against a petitioning creditor cannot be sought by a counterclaim filed in an answer to a petition in a bankruptcy case. See, *e.g., Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 369–70 (5th Cir. 1962); *Associated Electronic Supply Co. of Omaha v. C.B.S. Electronic Sales Corp.*, 288 F.2d 683, 684–85 (8th Cir. 1961). The sentence follows *Harris v. Capehart-Farnsworth Corp.*, 225 F.2d 268 (8th Cir. 1955), in permitting the alleged bankrupt to challenge the standing of a petitioner by filing a counterclaim against him. See also *In re Automatic Typewriter & Service Co.*, 271 Fed. 1, 4 (2d Cir. 1921), and *In re Paige*, 99 Fed. 538 (N.D. Ohio 1899), recognizing the propriety of the bankrupt's alleging a counterclaim in an answer that denies his insolvency. The sentence does not foreclose the court from rejecting a counterclaim that cannot be determined without unduly delaying the decision upon the adjudication. See *In re Bichel Optical Laboratories, Inc.*, 299 F.Supp. 545, 550 (D.Minn. 1969). The last sentence makes it clear that no reply needs to be made to an answer, including one asserting a counterclaim, unless the court thinks one would be helpful and orders it.

Rule 113. Affirmative Defense of Solvency

1 If a petition alleges the commission of the
2 first act of bankruptcy, the alleged bankrupt
3 shall plead and have the burden of proving
4 the defense of solvency at the date of bank-
5 ruptcy.

ADVISORY COMMITTEE'S NOTE

This rule implements the provision in § 3c of the Act that solvency shall be a defense to the commission of the first act of bankruptcy by prescribing how the defense shall be pleaded and proved.

Rule 114. Examination of Bankrupt on Issue of Insolvency or Inability To Pay Debts as They Mature

1 Whenever a petition filed under Rule 104
2 alleges the commission of the second, third,
3 or fifth act of bankruptcy or a petition is
4 filed under Rule 105(b), and the alleged
5 bankrupt denies the allegation of insolvency
6 or inability to pay debts as they mature, the
7 alleged bankrupt shall appear in court ~~on~~ at the
8 hearing, and prior thereto if ordered by the
9 court, with books, papers, and accounts, and
10 submit to an examination as to all matters
11 bearing on the issue of insolvency or inabil-
12 ity to pay debts as they mature. If the al-
13 leged bankrupt fails so to appear or submit
14 to an examination, the court on motion may
15 make such orders in regard to the failure as
16 are just, including those specified in para-
17 graphs (A), (B), and (C), of Rule 37(b)(2) of
18 the Federal Rules of Civil Procedure. The examination provided by this rule is not exclusive of the procedures available under Rules 121 and 205.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 3d of the Act but goes beyond it by making 3 of the sanctions provided by Rule 37 of the Federal Rules of Civil Procedure for failure to obey an order to provide or permit discovery available against an alleged bankrupt who fails to comply with the duty imposed by the rule. The rule thus departs from the

holding in *In re Richards Discount Jewelers, Inc.*, 303 F.Supp. 517, 518 (S.D.N.Y. 1969), and *In re Sheland*, 210 F.Supp. 195, 199–200 (D.Mont. 1962), that § 3d of the Act is inconsistent with Rule 37 of the Federal Rules of Civil Procedure and prescrib[illegible] [illegible] consequence for failure of the bankrupt to a[illegible] his papers and submit to an examination on the [illegible] of insolvency or inability to pay debts as they mature.

[SEE ATTACHED] ~~The examination provided by this rule is not intended to be exclusive of other procedures available under these rules. See, *e.g.*, Rules 121 and 205. *Cf.* 1 Collier ¶ 3.208[2] (1961), 2 *id.* ¶¶ 18.10[1.2], 18.41[7] (1966), and 2 *id.* ¶ 21.08 (1964).~~

Rule 115. Hearing and Disposition of Petition

1 (a) *Contested Petition.* The court shall de-
2 termine the issues of a contested petition at
3 the earliest ~~possible~~ [practicable] time, [and adjudicate the debtor a bankrupt, dismiss the case, or enter such other order as may be appropriate.]
4 (b) *Jury Trial.*
5 (1) An alleged bankrupt may, at or before
6 the time within which an answer may be
7 filed, demand a trial by jury of any issue
8 triable of right by a jury under § 19a of the
9 Act, by serving upon the petitioners a de-
10 mand therefor in writing and filing it. Such
11 demand may be indorsed upon the answer. If
12 the demand specifies that a district judge
13 conduct the trial or if a local rule of court so
14 provides, the trial shall be placed on the cal-
15 endar of the district court as a jury action;
16 otherwise the referee shall conduct the jury
17 trial. The failure of a party to serve and file
18 a demand in accordance with this rule con-
19 stitutes a waiver by him of trial by jury or
20 of a jury trial before a district judge, as the
21 case may be.

INSERT ON p. 28

Rule 121 makes applicable in proceedings relating to a contested petition the rules governing discovery and deposition in adversary proceedings, which are adaptations of Rules 26-37 of the Federal Rules of Civil Procedure. Rule 205 is an adaptation of § 21a of the Act. The last sente[illegible] of this Rule 114 eliminates doubts as to the availability to petitioning creditors of the discovery procedures afforded to litigants generally in civil practice, and of an examination of the bankrupt and others in accordance with the practice that developed under § 21a of the Act. See 1 Collier ¶ 3.208[2](1961); 2 id. ¶¶ 18.10[1.2], 18.41[7](1966); 2 id. ¶ 21.08(1964).

22 (2) When trial by jury has been de-
23 manded in accordance with this rule, the
24 trial of all issues so demanded shall be by
25 jury unless the alleged bankrupt, by a writ-
26 ing filed with the court or by an oral state-
27 ment made in open court and entered in the
28 record, consents to trial by the court sitting
29 without a jury. A trial with an advisory
30 jury or a jury trial conducted as of right on
31 consent of the parties may be ordered in ac-
32 cordance with Rule 39(c) of the Federal
33 Rules of Civil Procedure.
34 (3) When issues triable of right by jury
35 have been placed on the district court calen-
36 dar as provided in paragraph (1) of this sub-
37 division, the district judge may order the
38 trial before him of any other issues pre-
39 sented by the pleadings in the interest of ex-
40 pediting the court's business or for other
41 good cause.
42 (4) Except as provided in subdivision (d)
43 of this rule, Rules 47–51 of the Federal
44 Rules of Civil Procedure apply to a jury
45 trial conducted under this subdivision.
46 *(c) Default.* If no pleading or other de-
47 fense to a petition is filed within the time
48 provided by these rules, the court shall on
49 the next day, or as soon thereafter as prac-
50 ticable, make the adjudication or make such
51 other order as may be appropriate.
52 *(d) Adjudication.* An adjudication shall
53 conform substantially to Official Form No.
54 11 and shall be entered in the referee's
55 docket or the civil docket of the district
56 court, as the case may be.

case commenced by the filing of a

pursuant to Rule 104(a) or Rule 105(b) or (c)

57 (c) *Award of Costs.* When a petition
58 against any person is dismissed the court on
59 reasonable notice to the petitioner or peti-
60 tioners may award to the prevailing party
61 the same costs that are allowed to a prevail-
62 ing party in a civil action and reasonable
63 counsel fees, and shall award any other sums
64 required by the Act.

or withdrawn,

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is a revision of § 18d of the Act. ~~The requirement of the rule that the issues be determined at the "earliest possible time" is a more explicit and positive direction to the court to give priority to the hearing on a contested petition and its disposition than is the statutory guide, "as soon as may be."~~

Subdivision (b) of this rule preserves the right of trial by jury given by § 19 of the Act but recognizes that the alleged bankrupt may accept a jury trial before the referee if he does not specifically demand such a trial before the district judge and if a local rule does not prohibit a jury trial before a referee. The subdivision is an adaptation of Rules 38(b) and (d) and 39(a) and (c) of the Federal Rules of Civil Procedure. To preserve his right to a jury trial and, absent a local rule requiring every such trial to be on the district court's calendar, his right to a jury trial before a district judge, the alleged bankrupt must not only serve but file his demand within the time limits prescribed by this rule. The place of filing is governed by Rule 509. A case ordinarily remains with a referee after automatic reference in accordance with Rule 102(a) unless there is a demand for jury trial before a district judge under this rule or there is a transfer or revocation of a reference as provided in Rule 102(b). Paragraph (3) of subdivision (b) represents a modest extension of the district judge's authority in respect of a bankruptcy case to permit the exercise of his discretion in appropriate cases to minimize the unseemly consequences of fragmentation of the trial of issues arising on a petition.

Except as otherwise provided in this and other rules in Part I and subject to the authority of the court to direct otherwise, the rules in Part VII that govern adversary proceedings apply directly, or may be made applicable by direction of the court, to the proceedings on a contested petition. See Rule 121. When there is a jury trial, the provisions governing jurors, verdicts, instructions to juries, and related matters in Rules 47–51 of the Federal Rules of Civil Procedure apply, as provided in paragraph (4) of subdivision (b) of this rule. For the purposes of applying Civil Rule 49(b), however, subdivision (d) of this rule (rather than Rule 58, to which Civil Rule 49(b) refers) shall govern the entry of the adjudication.

Subdivision (c) is derived from § 18e of the Act. If adjudication is not made on default, dismissal will ordinarily be the appropriate disposition as provided in § 18e, but the court may find reason to postpone definitive action of either kind pending particular developments. See, *e.g.*, §§ 325, 425, and 625 of the Act. For good cause shown an adjudication on default may be set aside in accordance with Rule 924.

Subdivision (d). When an adjudication is made by the referee, it shall be entered on the referee's docket kept by him as provided in Rule 504(a). When the adjudication is by the district judge, it shall be entered in the civil docket kept by the clerk as provided in Rule 79(a) of the Federal Rules of Civil Procedure.

Subdivision (e). General authority for an award of costs to a prevailing party is found in § 2a(18) of the Act. General Order 34 has provided in its first clause for the recovery by a petitioning creditor of costs when adjudication is made on a contested involuntary petition. This provision was effectively superseded, however, by the 1962 amendment of § 64a(1) of the Bankruptcy Act, which explicitly authorizes allowance, as an administrative expense entitled to first priority, of "the reasonable costs and expenses incurred, or the reasonable disbursements made," by petitioning creditors, "including but not limited to compensation of accountants and appraisers employed by them." The first clause of General Order

34 is accordingly not carried over into this rule. Subdivision (c) embodies the substance of the last clause of General Order 34, authorizing recovery of costs by the debtor in the event of dismissal, and recognizes the right of the alleged bankrupt under § 69b of the Act to costs, counsel fees, and indemnification for expenses and damages caused by the action of a receiver or marshal in taking or holding his property. An award may be made under this subdivision in the event of a dismissal on account of a withdrawal of the petition as well as by reason of an involuntary dismissal.

Rule 116. Venue and Transfer

1 *(a) Proper Venue.*
2 *(1) Natural Person.* A petition by or
3 against a natural person may be filed ~~only~~ in
4 the district where the bankrupt has had his
5 principal place of business, residence, or
6 domicile for the preceding 6 months or for a
7 longer portion thereof than in any other dis-
8 trict. A petition by or against a natural per-
9 son who has had no principal place of busi-
10 ness, residence, or domicile within the
11 United States during the preceding 6 months
12 may be filed only in a district wherein he has
13 property.
14 *(2) Corporation or Partnership.* A peti-
15 tion by or against a corporation or partner-
16 ship may be filed ~~only~~ in the district [where (A)
17 the bankrupt has had its principal place of
18 business or its principal assets for the pre-
19 ceding 6 months or for a longer portion
20 thereof than in any other district, or, if (B) ;
21 there is no such district, in any district
22 where the bankrupt has property.
23 *(3) Partner with Partnership or Copart-*

see attached

24 *ner*. Notwithstanding the foregoing: (A) ~~if a~~
25 ~~petition by or against a partnership is filed~~
26 ~~in accordance with paragraph (2) of this~~
27 ~~subdivision, a petition may also be filed in~~
28 ~~the same district by or against any general~~
29 ~~partner; or (B) if a petition by or against a~~
30 ~~general partner is filed in accordance with~~
31 ~~paragraph (1) of this subdivision, a petition~~
32 ~~may be filed concurrently or thereafter in~~
33 ~~the same district by or against the partner-~~
34 ~~ship or by or against any other general part-~~
35 ~~ner or by or against any combination of the~~
36 ~~partnership and the general partners~~.
37 ~~(4) *Affiliate*. Notwithstanding the forego-~~
38 ~~ing, if a petition by or against a bankrupt is~~
39 ~~filed in accordance with any of the foregoing~~
40 ~~paragraphs of this subdivision, a petition~~
41 ~~may also be filed in the same district by or~~
42 ~~against an affiliate of the bankrupt~~.
43 *(b) Transfer of Cases; Dismissal or Re-*
44 *tention When Venue Improper.*
45 (1) ~~*Where*~~ When *Venue Proper*. Although a pe-
46 tition is filed in accordance with subdivision
47 (a) of this rule, the court may, after hearing on notice to
48 the petitioner or petitioners and such other
49 persons as it may direct ~~and after hearing~~,
50 in the interest of justice and for the conven-
51 ience of the parties, transfer the case to any
52 other district. The transfer may be ordered
53 at or before the first meeting of creditors ei-
54 ther on the court's own initiative or on mo-
55 tion of a party in interest but thei. fter
56 only on a timely motion.
57 (2) ~~*Where*~~ When *Venue Improper*. If a petition
58 is filed in a wrong district, the court may, after hearing on

a petition commencing a bankruptcy case may be filed by or against any general partner in a district where a petition under the Act by or against a partnership is pending; (B) a petition commencing a bankruptcy case may be filed by or against a partnership or by or against any other general partner or by or against any combination of the partnership and the general partners in a district where a petition under the Act by or against a general partner is pending.

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

59 notice to the petitioner or petitioners and
60 such other persons as it may direct ~~and after~~
61 ~~hearing~~, dismiss the case or, in the interest
62 of justice and for the convenience of the par-
63 ties, retain the case or transfer it to any
64 other district. Such an order may be made at
65 or before the first meeting of creditors either
66 on the court's own initiative or on motion of
67 a party in interest but thereafter only on a
68 timely motion. Notwithstanding the forego-
69 ing, the court may without a hearing retain
70 a case filed in a wrong district if no objec-
71 tion is raised.
72 *(c) Procedure When Petitions Involving*
73 *the Same Bankrupt or Related Bankrupts*
74 *Are Filed in Different Courts.* If petitions

commencing bankruptcy cases or a bankruptcy case and any other case under the Act

75 are filed in different districts by or against
76 (1) the same bankrupt, or (2) a partnership
77 and one or more of its general partners, or
78 (3) 2 or more general partners, or (4) a
79 bankrupt and an affiliate, the court in which
80 the first petition is filed shall, ~~upon~~ motion

after hearing on

81 and notice to the petitioners and such other
82 persons as the court may designate ~~and after~~
83 ~~hearing~~, determine the court or courts in

case or

84 which the cases should proceed in the inter-
85 est of justice and for the convenience of the
86 parties. The proceedings ~~upon~~ the other peti-
87 tions shall be stayed by the courts in which
88 such petitions have been filed until such de-
89 termination is made. Thereafter all the
90 courts in which petitions have been filed
91 shall proceed in accordance with the deter-
92 mination.
93 *(d) Reference of Transferred Cases.* A

94 case transferred under this rule shall, in ac-
95 cordance with Rule 102(a), be referred by
96 the clerk of the district court to which it has
97 been transferred.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Paragraphs (1) and (2) of subdivision (a) of this rule are a revision of § 2a(1) of the Act. Although the statutory provision is phrased in terms of jurisdiction, it is now settled that it relates to venue. *Bass v. Hutchins*, 417 F.2d 692, 694–95 (5th Cir. 1969); *In re Eatherton*, 271 F.2d 199, 201–03 (8th Cir. 1959); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref.J. 36 (1962). The revision of the statutory provision effected by the rule consists primarily in a reorganization for the purpose of clarification. Paragraph (2) of subdivision (a), however, eliminates the notion that residence or domicile may serve as a useful basis for determining venue of a corporation or partnership. The reference in this paragraph to location of the principal assets as a criterion of venue in a petition by or against a corporation or a partnership is derived from § 128, the general venue provision of Chapter X of the Act.

[Margin annotations: "The statutory reference to "property within their jurisdiction" may be viewed as establishing jurisdiction as well as prescribing venue. Cf. Comment, 35 N.C.L. Rev. 476, 477-78 (1957)"; "primarily"; "insofar as it speaks of principal place of business, residence, and domicile."; "see attached"]

~~Paragraph (3) of subdivision (a) incorporates and extends the principle embodied in § 5d of the Act. Like § 2a(1), § 5d is a venue provision couched in jurisdictional terms. See 1 Collier ¶ 2.17[1]. Clause (B) of subdivision (a)(3) of the rule is a restatement of the effect of § 5d of the Act. Clause (A), which is new, is the obverse of clause (B): if the filing of a petition by or against a partner in a proper court of bankruptcy makes the court's district also proper venue for the partnership and the other partners, *a fortiori* the filing of a petition by or against a partnership in a proper court makes the venue chosen also proper for the partners. Rule 117 authorizes joint administration of partnership and partners' estates under appropriate circumstances.~~

Paragraph (4) of subdivision (a) is derived from but goes considerably beyond § 129 of the Act, which authorizes a petition by or against a subsidiary to be filed in a court which has approved a Chapter X petition by or

Paragraph (3) of subdivision (a) extends the principle embodied in § 5d of the Act. Like § 2a(1) of the Act, § 5d has served primarily as a venue provision though couched in jurisdictional terms. See 1 Collier ¶2.17[1] (1968). Paragraph (3) goes beyond § 5d by permitting a petition to be filed by or against a partner or partnership in a district because of the pendency there of a case which may not have been filed in accordance with the provisions of paragraph (1) or (2) of the subdivision that prescribe proper venue for such a case. The procedure for effecting a transfer of both cases, if in the interest of justice and for the convenience of the parties, is provided in subdivision (b). Paragraph (3) of subdivision (a) is also new in permitting a petition in bankruptcy to be filed in a district because of the pendency there of a case commenced under one of the debtor relief chapters. Rule 117 authorizes joint administration of partnership and partners' estates under appropriate circumstances.

against its parent corporation. An "affiliate" is defined in Rule 901(3) to include a subsidiary as defined in Chapter X of the Act (§ 106(13)), a parent corporation, and a variety of persons having connections different from those contemplated by §§ 106(13) and 129 of the Act. Joint administration of the estates of affiliates may be authorized under Rule 117.

Subdivision (b) of the rule incorporates the features of § 32b and c of the Act and clarifies the procedure to be followed in requesting and effecting transfer of a case. While § 32b, which deals with cases filed in the wrong court of bankruptcy, authorizes transfer only on the filing of an objection, § 32c, which deals with transfer of cases even though filed in a proper venue, curiously appears to require no objection by a party in interest. Subdivision (b) authorizes the court to transfer a case on its own initiative as well as on motion, irrespective of whether the venue is proper or improper, but protects the parties against being subjected to a transfer in either event after the first meeting of creditors except on a timely motion of a party in interest. If the transfer would result in fragmentation or duplication of administration, increase expense, or delay closing the estate, such a factor would bear on the timeliness of the motion as well as on the propriety of the transfer under the standards prescribed in subdivision (b). Section 32b, in authorizing a transfer from a wrong court to a proper court of bankruptcy, requires the judge to act in the "interest of justice," whereas § 32c authorizes the judge to transfer any case to a court of bankruptcy in any other district if the interests of the parties will be best served thereby. Subdivision (b) of the rule requires the interest of justice and the convenience of the parties to be the grounds of any transfer of a case or of the retention of a case filed in a wrong district. *Cf.* 28 U.S.C. §§ 1404(a) (district court may transfer any civil action "[f]or the convenience of parties and witnesses, in the interest of justice") and 1406 (district court "shall dismiss or, if it be in the interest of justice, transfer" a case "laying venue in the wrong division or district"). The subdivision expressly requires a hearing on notice to the petitioner or

This requirement applies as well when the court acts on its own initiative as when it transfers or dismisses a case on motion.

petitioners before the transfer of any case may be ordered and before a case filed in the wrong district may be dismissed.

Although it has been said that under § 32 a court of bankruptcy cannot dismiss a case though filed in the wrong district, see, *e.g.*, *In re Bankers Trust*, 403 F.2d 16, 22–23 (7th Cir. 1968); *In re Eatherton*, 271 F.2d 199, 201 (8th Cir. 1959), the rule recognizes dismissal as one of the options available to the court in such a case, as it is under the amendment of 1949 to 28 U.S.C. § 1406(a) when the wrong venue is selected for ordinary civil litigation in a federal district court. Transfer or retention would normally be in the interest of justice, however, unless the choice of the wrong venue appears deliberate and "smacks of harrassment or evidences some other element of bad faith" on the petitioner's part. 1 Moore 1909 (1961). If no motion objecting to venue or requesting a transfer is made, the court may retain the case without a hearing even though the venue is in fact improper. *Cf. Bass v. Hutchins*, 417 F.2d 692, 696 (5th Cir. 1969).

Section 32b and c of the Act purport to authorize only the judge to transfer a case to another court, but there is no procedure provided in either subdivision for a case that is automatically referred to the referee by the clerk pursuant to § 22a of the Act to come to the attention of the judge. Subdivision (b) vests the authority for determining the issues and entering orders thereunder in the court, which is ordinarily the referee.

Subdivision (c) is derived from § 32a of the Act and General Order 6. It extends the procedure provided by the statute and general order for petitions in different courts involving the same bankrupt and petitions involving members of the same partnership to petitions in different courts involving a partnership and one or more of its members and to petitions involving affiliates as defined in Rule 901(3). The courts have entertained requests for transfers of the kind contemplated in subdivision (c)(2) by stretching the language of §§ 5d and 32a of the Act. *In re Imperial "400" National, Inc.*, 429 F.2d 671, 679 (3d Cir. 1970); and see *In re Andreana Classics*, 131 F.Supp. 413, 414 (S.D.N.Y. 1955). Subdivision (c) is

It also authorizes the court in which the first petition is filed under the Act by or against a bankrupt to entertain a motion seeking a determination whether the case so commenced should continue or be transferred and consolidated or administered jointly with another case commenced by or against the same or a related person in another court under a different chapter of the Act.

correlated with paragraphs (3) and (4) of subdivision (a) of this rule, which authorize petitioners to bring cases involving a partnership and partners or affiliated bankrupts into a court of bankruptcy. ~~that is proper for any one of the bankrupt persons.~~ Subdivision (c), however, makes it the responsibility of the court receiving the first of the petitions that might have been but were not filed in the same court to determine whether transfer of the cases to one court or some other disposition of them would be appropriate. The standards, "interest of justice" and "convenience of the parties," are the same as those that govern transfers under subdivision (b) of the rule and are derived from § 32a and b of the Act.

The references in subdivision (a)(3) and (4) and subdivision (c) to petitions filed "by" a partner or "by" any other of the persons mentioned are to be understood as referring to voluntary petitions. There is no purpose in either subdivision to permit ~~cases~~ more than one case to be filed in ~~one~~ the same court because ~~any of the persons named therein is~~ a creditor happens to be a partner, partnership, or an affiliate of a bankrupt. signing an involuntary petition.

Subdivision (d). Section 32 and General Order 6, which are the sources of the provisions of subdivisions (b) and (c) of Rule 116, are silent as to the procedure to be followed by the court to which a case is transferred. Subdivision (d) of this rule provides for an automatic reference in consonance with the procedure prescribed for handling cases originally filed in a court of bankruptcy.

Transfer of adversary *proceeding* ~~*within case*~~. Transfers of adversary proceedings in bankruptcy are governed by Rule 782.

Rule 117. Consolidation or Joint Administration of Cases Pending in Same Court

1 *(a) Cases Involving Same Bankrupt.* If 2
2 or more petitions are pending in the same
3 court by or against the same bankrupt, the
4 court may order consolidation of the cases.
5 *(b) Cases Involving 2 or More Related*
6 *Bankrupts.* If 2 or more petitions are pend-

7 ing in the same court by or against (1) a
8 husband and wife, or (2) a partnership and
9 one or more of its general partners, or (3) 2
10 or more general members of a partnership,
11 or (4) a bankrupt and an affiliate, the court
12 may order a joint administration of the es-
13 tates.

Before making such an order the court shall give due consideration to the protection of creditors of the different estates against potential conflicts of interest.

14 *(c) Expediting and Protective Orders.*
15 When an order for consolidation or joint ad-
16 ministration of 2 or more cases is entered
17 pursuant to this rule, the court, while pro-
18 tecting the rights of the parties under the
19 Act, may make such orders as may tend to
20 avoid unnecessary costs and delay.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is derived from General Order 7. It governs cases where the same debtor is named in both voluntary and involuntary petitions as well as cases where 2 or more involuntary petitions are filed against the same bankrupt. It also applies when the cases are pending in the same court by virtue of a transfer of one or more of the petitions from another court pursuant to Rule 116(b) or (c). Subdivision (c) allows the court discretion as to the order of trial of issues raised by 2 or more involuntary petitions against the same bankrupt.

Subdivision (b) recognizes the appropriateness of joint administration of estates in certain kinds of cases. The authorization for joint petitions and joint adjudications when a partnership is one of the bankrupts is not retained in these rules, since the provisions therefor in subdivisions a and b of § 5 of the Act have been more confusing than helpful. Joint administration, on the other hand has, manifest advantages which ought not to be restricted to cases involving partnerships and partners. The election or appointment of one trustee for 2 or more jointly administered estates is authorized by Rule

210. The authority of the court to order join. administration under subdivision (b) of this rule extends equally to the situation where the petitions are filed under different rules, *e.g.*, where one petition is voluntary and the other involuntary, and to that where all of the petitions are filed under the same rule.

Consolidation of cases implies a unitary administration of the estate and will ordinarily be indicated under the circumstances to which subdivision (a) applies. This rule does not deal with the consolidation of cases involving 2 or more separate bankrupts. Although consolidation of the estates of separate bankrupts may sometimes be appropriate, as when the affairs of an individual and a corporation owned or controlled by him are so intermingled that the court cannot separate their assets and liabilities, such consolidation, as distinguished from joint administration, is ~~not~~ neither authorized nor prohibited by this rule since the propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates. For an illustration of the substantive consolidation of separate estates, see *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941).

See also Chemical Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966); Seligson & Mandell, Multi-Debtor Petition - Consolidation of Debtors and Due Process of Law, 73 Com.L.J. 341 (1968); Kennedy, Insolvency and the Corporate Veil in the United States in Proceedings of the 8th International Symposium on Comparative Law 232, 248-55 (1971).

Joint administration as distinguished from consolidation may include combining the estates to the extent that a single docket may be used for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and other purely administrative matters that may aid in expediting the cases and rendering the process less costly.

Subdivision (c) is an adaptation of the provisions of Rule 42(a) of the Federal Rules of Civil Procedure for the purposes of administration of estates under this rule. The rule does not deal with filing fees when an order for the consolidation of cases or joint administration of estates is made. *Cf.* Rule 107.

Rule 118. Death or Insanity of Bankrupt

1 The death or insanity of the bankrupt
2 shall not abate a bankruptcy case. In such
3 event the estate of the bankrupt shall be ad-
4 ministered and the case concluded in the
5 same manner, so far as possible, as though
6 the death or insanity had not occurred.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of § 8 of the Act. The proviso of this section is incorporated into Rule 403(f).

Rule 119. ~~**Dismissal or Suspension of Case of Bankrupt Adjudged in a Foreign Jurisdiction**~~ Bankrupt Involved in Foreign Proceeding

1 ~~When a bankrupt has been adjudged~~
2 ~~bankrupt by a court of competent jurisdic-~~
3 ~~tion without the United States,~~ When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy
4 may, after hearing on notice to the peti-
5 tioner or petitioners and such other persons
6 as it may direct, having regard to the rights
7 and convenience of local creditors and other
8 relevant circumstances, dismiss a case or
9 suspend the proceedings therein under such terms as may be appropriate.

ADVISORY COMMITTEE'S NOTE

~~This rule is derived from § 2a(22) of the Act.~~ Cf. Nadelmann, The National Bankruptcy Act and the Conflict of Laws, 59 Harv.L.Rev. 1025, 1041-46 (1946). Proceedings suspended pursuant to this rule may be reinstated after hearing on notice or as provided in the order suspending the proceedings. *Cf.* Note, *Consequences of Abstention by a Federal Court*, 73 Harv.L.Rev. 1358 (1960). Since the merits will rarely have been considered by the court in ordering a dismissal under this rule, such a dismissal is ordinarily without prejudice when the court includes no provision to the contrary in its order. Rule 120(c).

Rule 120. Dismissal of Case Without Determination of Merits

1 *(a) Voluntary Dismissal; Dismissal for*
2 *Want of Prosecution.* A case shall not be dis-
3 missed ~~upon~~ on application or motion of the pe-
4 titioner or petitioners or for want of prose-
5 cution or by consent of the parties until
6 after hearing upon notice to the creditors as

7 provided in Rule 203(a). To enable the court
8 to give such notice, the bankrupt, if he has
9 not already done so, shall file a list of all his
10 creditors with their addresses. If the bank-
11 rupt fails to file such list, ~~within the time~~
12 ~~fixed,~~ the court may order ~~the list to be pre-~~
13 ~~pared and filed by the trustee, receiver, a pe-~~
14 ~~titioning creditor, or other party in interest.~~
15 *(b) Dismissal for Failure to Pay Filing*
16 *Fees.*
17 (1) ~~Upon~~ nonpayment of any installment
18 of the filing fees as ordered ~~under~~ Bank-
19 ruptcy Rule 107(b) and after hearing ~~upon~~
20 notice to the bankrupt, the court may dis-
21 miss the case.
22 (2) If a case is dismissed or closed with-
23 out the payment in full of the filing fees, the
24 installments collected shall be distributed in
25 the same manner and proportions as if the
26 filing fees had been paid in full.
27 (3) Notice of dismissal for failure to pay
28 the filing fees shall be given within 30 days
29 after the dismissal to creditors appearing on
30 the list of creditors and to those who have
31 filed claims, ~~and to the district director of in-~~
32 ~~ternal revenue~~ in the manner provided in
33 Rule 203.
34 *(c) Effect of Dismissal.* Unless the order
35 specifies to the contrary, dismissal of a case
36 otherwise than on the merits is without prej-
37 udice.

within the time fixed by the court,

by

provide for the preparation and filing of the list in such manner as may be appropriate.

On

pursuant to

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ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is an adaptation of § 59g of the Act. While this rule, like § 59g, applies to a case

commenced by a voluntary or an involuntary petition, the "consent of the parties" referred to in the first sentence of the rule is that of the petitioning creditors and the bankrupt in an involuntary proceeding. The last sentence of the subdivision, like Rule 108, recognizes that the court should not be confined to the petitioning creditors in its choice of parties on whom to call for assistance in preparing the list of creditors when the bankrupt has defaulted in the performance of his duty to provide such a list. Since these rules do not contemplate a dismissal for failure to pay costs except as provided in subdivision (b), the proviso of § 59g of the Act referring to such a dismissal is not retained in the rules.

Subdivision (b) is derived from General Order 35(4)(b). A dismissal under this subdivision can occur only when the petition has been permitted to be filed pursuant to Rule 107(b). The provision in paragraph (3) for notice of the dismissal is correlated with the provision in Rule 408 for notice to creditors when there is a waiver, denial, or revocation of a discharge. As pointed out in the Note accompanying Rule 408, the purpose of notifying creditors of a bankrupt that no discharge has been granted is to correct their assumption to the contrary so that they can take whatever steps to protect their claims appear to be appropriate in the light of such information.

Subdivision (c) is new. Dismissal of a bankruptcy case for a reason comprehended by this rule, and especially for failure to pay filing fees, has often operated harshly against the bankrupt. See, *e.g.*, *In re Frey*, 95 F.Supp. 1007 (S.D.N.Y. 1951); MacLachlan, *Bankruptcy* 100 (1956); Shaeffer, *Proceedings in Bankruptcy in Forma Pauperis*, 69 Col. L.Rev. 1203, 1204 (1969). Typically he has been held thereafter barred from obtaining a discharge on the debts which could have been discharged in the case that was dismissed. *In re Seiden*, 174 F.2d 586, 587 (2d Cir. 1949); *Perlman v. 322 West Seventy-Second Street Co.*, 127 F.2d 716 (2d Cir. 1942). Although the court of bankruptcy has undoubtedly had discretion under Rule 41(b) of the Federal Rules of Civil Procedure to indicate that an involuntary dismissal was without prejudice to future relief under the Act, see Donnelly,

The Non-Dischargeability of Dischargeable Debts in Bankruptcy, 36 Va.L.Rev. 185, 191 (1950), "the reported cases reveal no instance of a bankrupt escaping the res judicata effect of a dismissal because the dismissing court had so exercised its discretion." Countryman, *Cases and Materials on Debtor and Creditor* 792 (1964). Subdivision (c) leaves discretion in the court to determine in the light of the circumstances whether dismissal of a bankruptcy case otherwise than on the merits should bar future relief under the Act, but when it makes no specific reference one way or the other in the order, a dismissal not on the merits is without prejudice. Under § 17b of the Act, added by the amendment of 1970, a failure to obtain a discharge in a prior proceeding dismissed without prejudice for failure to pay filing fees or to secure costs does not bar a discharge in a subsequent bankruptcy.

Rule 121. Applicability of Rules in Part VII

1 Except as otherwise provided in ~~the~~ Part I of these rules
2 ~~in Part I~~ and unless the court otherwise di-
3 rects, the following rules in Part VII apply
4 in all proceedings relating to a contested pe-
5 tition and in all proceedings to vacate an ad-
6 judication: Rules 705, 708–710, 715, 716,
7 724–726, 728–737, 744.1, 752, 756, and 762.
8 The court may direct that one or more of the
9 other rules in Part VII shall also apply in
10 such a proceeding. For the purposes of this
11 rule a reference in the rules in Part VII to
12 adversary proceedings shall be read as a ref-
13 erence to proceedings relating to a contested
14 petition or proceedings to vacate an adjudi-
15 cation, and a reference in the Federal Rules
16 of Civil Procedure to the complaint shall be
17 read as a reference to the petition.

ADVISORY COMMITTEE'S NOTE

The rules in Part VII to which this rule refers are adaptations of the Federal Rules of Civil Procedure for the purpose of governing the procedure in adversary proceedings in bankruptcy cases. See the Note accompanying Rule 701 *infra*. Because of the special need for dispatch and expedition in the determination of the question of adjudication, see *Acme Harvester Co. v. Beekman Lbr. Co.*, 222 U.S. 300, 309 (1911), the objective of some of the Rules of Civil Procedure and their adaptations in Part VII to facilitate the settlement of multiple controversies involving many persons in a single lawsuit is not compatible with the exigencies of bankruptcy administration. See *United States F. & G. Co. v. Bray*, 225 U.S. 205, 218 (1912). For that reason such rules as 713, 714, and 718–723 would be rarely if ever appropriate for application in a proceeding on a contested petition.

Certain terms used in the Federal Rules of Civil Procedure have altered meanings when they are made applicable in bankruptcy cases by these rules. See Rule 902 *infra*. This Rule 121 requires that the terms "adversary proceedings" when used in the rules in Part VII and "complaint" when used in the Federal Rules of Civil Procedure be given altered meanings when they are made applicable to proceedings relating to a contested petition or proceedings to vacate any adjudication. A motion to vacate an adjudication, whether or not made on a petition that was or could have been contested, is governed by the rules in Part VII referred to in this Rule 121.

Rule 122

Conversion of a Chapter Case to Bankruptcy

1 When an order is entered in a Chapter X, XI, XII, or XIII
2 case directing that the case continue as a bankruptcy case, the
3 procedure shall be as follows:

4 (1) In all respects other than as provided in the following
5 paragraphs, the case shall be deemed to have been commenced as
6 of the date of the filing of the first petition initiating a case
7 under the Act and shall be conducted as far as possible as if no
8 petition commencing a chapter case had been filed.

9 (2) Unless otherwise directed by the court, lists, inven-
10 tories, schedules, and statements filed in the superseded case
11 shall be deemed to be the schedules and statement of affairs
12 filed in the bankruptcy case pursuant to Rules 108 and 403(4)
13 and in full compliance therewith; but if no such documents have
14 been previously filed, the bankrupt shall comply with Rule 108
15 as if he had been adjudicated an involuntary bankrupt on the
16 date of the entry of the order directing that the case continue
17 as a bankruptcy case.

18 (3) Notice of the order directing that the case continue
19 as a bankruptcy case shall be given to all creditors in the
20 manner provided by Rule 203 within 20 days after entry of the
21 order and shall accompany the notice of the first meeting of
22 creditors if one is held. If no first meeting of creditors is
23 held, the date of the mailing of the notice of the order as
24 provided in this paragraph shall be deemed the first date set

25 for the first meeting of creditors for the purposes of
26 Rules 302(e), 404(a), and 409(a)(2); but if the time for
27 filing claims, a complaint objecting to discharge, or a com-
28 plaint to obtain a determination of the dischargeability of
29 any debt had expired in a pending bankruptcy case prior to the
30 filing therein of a chapter petition, the preceding clause of
31 this paragraph shall not be deemed to revive or extend such
32 time.

33 (4) A trustee shall be appointed by the court and noti-
34 fied pursuant to Rule 209(c), and shall qualify pursuant to
35 Rule 212, unless

36 (A) a trustee has been previously selected pursuant
37 to Rule 209 and has qualified, in which event he shall be
38 immediately notified of the order directing that the case
39 continue as a bankruptcy case and shall enter upon the
40 performance of his duties without further qualification; or

41 (B) a standby trustee has been nominated in the super-
42 seded case, in which event he shall be immediately notified
43 pursuant to Rule 209(c) and, within 5 days after receipt
44 of notice, shall qualify in the manner provided by Rule
45 212; or

46 (C) the court pursuant to Rule 211 orders that no
47 trustee be appointed.

48 If a trustee notified under this paragraph fails to qualify
49 or to enter upon the performance of his duties, the court shall
50 appoint a trustee pursuant to Rule 209.

51 (5) All claims filed in the superseded case shall be
52 deemed filed in the bankruptcy case.
53 (6) Forthwith after qualification of the trustee or entry
54 by him on the performance of his duties as provided in para-
55 graph (4) of this rule, any trustee, receiver, or debtor in
56 possession previously acting in the chapter case shall, unless
57 otherwise ordered, turn over to the trustee in bankruptcy all
58 the records and property of the estate in his possession or
59 subject to his control.
60 (7) Each trustee, receiver, and debtor in possession
61 acting in the superseded chapter case shall, unless the court
62 otherwise directs, file with the court a final report and account
63 within 30 days after the entry of the order directing that the
64 case continue as a bankruptcy case, including, in a superseded
65 Chapter X, XI, or XII case, a separate schedule listing unpaid
66 debts incurred by him after the commencement of the chapter
67 case. If the order is entered after confirmation of a plan,
68 the debtor shall file with the court schedules of (A) property
69 not listed in the final report filed pursuant to the preceding
70 sentence of this paragraph and acquired by him after the filing
71 of the original petition under the Act and before the entry
72 of the order directing that the case continue as a bankruptcy
73 case and (B) debts not listed in the final report filed pursu-
74 ant to the preceding sentence of this paragraph and incurred
75 by him after confirmation and before the entry of such order.
76 (8) On the filing of a schedule required by the preceding

77 paragraph, the court shall enter an order directing the claims
78 so scheduled, including claims of the United States, any state,
79 and any subdivision thereof, to be filed and shall give notice
80 by mail to the holders thereof to file their claims pursuant
81 to Rules 301 and 302(a)-(d) within 60 days from the entry of
82 the order directing them to be filed, except that claims not
83 scheduled as provided in the preceding paragraph and claims
84 arising from rejection of executory contracts under paragraph
85 (10) of this rule may be filed within such further time as the
86 court may direct.
87 (9) If the court grants an extension of time for the filing
88 of claims pursuant to Rule 302(e)(5), the extension shall apply
89 to holders of claims who failed to file within the time pre-
90 scribed by, or fixed by the court pursuant to, paragraph (8)
91 of this rule, and notice shall be given them in the manner
92 provided in Rule 203(a).
93 (10) Rule 607 shall govern the assumption, rejection, and
94 assignment of contracts entered into or assumed by a trustee,
95 receiver, or debtor in possession acting in the superseded
96 chapter case which are executory in whole or in part at the
97 time of the entry of the order directing the case to continue
98 as a bankruptcy case, except that with respect to a trustee
99 selected as provided in paragraph (4)(A) of this rule the
100 time periods prescribed by Rule 607 shall begin to run from
101 the entry of such order.

ADVISORY COMMITTEE'S NOTE

This rule is derived from §§ 238, 261, 338, 378, 381, 391, 483, 486, 516, 643, 667, 669 and 676 of the Act. The rule applies to proceedings in a bankruptcy case following supersession of a case commenced under Chapter X, XI, XII, or XIII, whether the latter was initiated by an original petition or by a petition filed in a pending bankruptcy or another chapter case. The case may have originated as a bankruptcy case in which a petition commencing a chapter case was filed but in which an order was entered directing the resumption of the bankruptcy case. There may have been more than one aborted chapter case, *e.g.*, a Chapter XI case, converted to a Chapter X case, in which was entered the order directing the case to continue in bankruptcy. The rule is not intended to invalidate any action taken in the superseded case before its conversion to bankruptcy.

If requirements applicable in the superseded case respecting the filing of schedules of debt and property, or lists of creditors and inventory, and of statements and executory contracts have been complied with before the order directing conversion to bankruptcy, these documents will ordinarily provide all the information about the debts, property, financial affairs, and contracts of the bankrupt needed for the administration of the estate in bankruptcy. If the information submitted in the superseded case is inadequate for the purposes of bankruptcy administration, however, the court may direct the preparation of further informational material and the manner and time of its submission pursuant to paragraph (2). If no schedules, lists, inventories, or statements were filed in the superseded case, this paragraph imposes the duty on the bankrupt to file schedules and a statement of affairs pursuant to Rule 108 as if he had been adjudicated an involuntary bankrupt on the date when the court directed the continuation of the case as a bankruptcy case.

Paragraphs (4) and (6) contemplate that typically, after the court orders conversion of a chapter case to bankruptcy, a trustee in bankruptcy will forthwith take charge of the property of the estate and proceed expeditiously to liquidate it. If no trustee has previously qualified and no standby trustee selected in the chapter case is awaiting notification of an order of conversion, the court will appoint a trustee. The procedure so prescribed follows that established by the 1967 amendment of § 378 of the Act for a bankruptcy that supersedes a Chapter XI case. See 8 Collier ¶5.49[14](1968); 9 *id.* ¶10.11(1968). Paragraph (4) of this rule eliminates the hiatus that would otherwise occur in the control and supervision of the estate on the entry of an order of conversion to bankruptcy in a case where no trustee previously selected pursuant to Rule 209 has qualified and no standby trustee has been nominated in the superseded chapter case.

Paragraphs (7), (8), (9), and (10) of the rule embody the substance of amendments of provisions in Chapters X, XI, and XII that were enacted in 1967 to improve the administration of estates in superseding bankruptcies. The procedures prescribed by this legislation are extended by this rule to the extent they are appropriate to bankruptcies that supersede Chapter XIII cases. The provision in the last sentence of §§ 238b, 378b, and 483b of the Act to the effect that rejection in the bankruptcy case of a contract entered into or assumed in a superseded chapter case creates a cost of administration of the superseded case prescribes a rule of priority inappropriate for inclusion in this rule.

PART II. OFFICERS FOR ADMINISTERING THE ESTATE; NOTICES TO CREDITORS; CREDITORS' MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 201. Appointment and Duties of Receivers

1 *(a) Purposes and Term of Receivership.*
2 Subject to the provisions of this rule, the
3 court may appoint a receiver when necessary
4 in the best interest~~s~~ of the estate (1) to take
5 charge of the property of a bankrupt; (2) to
6 conduct the business of the bankrupt; or (3)
7 to afford representation to the estate in an
8 action, adversary proceeding, or ~~a~~ contested
9 matter when no trustee has qualified or the
10 interest of the trustee may be adverse to
11 that of the estate. Such appointment shall be
12 terminated when the trustee qualifies or
13 there is no further need for a receiver, and
14 the authorization to conduct the business of
15 the bankrupt after adjudication shall con-
16 tinue only for such time as may be in the
17 best interest~~s~~ of the estate and consistent
18 with orderly liquidation.
19 *(b) Application for Appointment.* An ap-
20 plication for appointment of a receiver shall
21 state the specific facts showing the necessity
22 for the appointment.
23 *(c) Appointment Before Adjudication.* Be-
24 fore adjudication, appointment of a receiver
25 may be made only upon application. ~~Such~~ The ap-

26 plication may be granted only after hearing [alleged]
27 upon notice to the bankrupt and ~~any~~ [such] other
28 parties in interest ~~designated by~~ [as] the court, [may designate,]
29 except that a receiver may be appointed
30 without notice if irreparable loss to the es-
31 tate may otherwise result. An application
32 for appointment of a receiver without notice
33 and any order of appointment made without
34 notice shall state what loss may result and
35 why it would be irreparable.
36 *(d) Bond of Applicant.* Before adjudica-
37 tion, no receiver may be appointed unless the
38 applicant furnishes a bond in such amount
39 and with such surety as the court shall ap-
40 prove, conditioned to indemnify the bank-
41 rupt for the costs, counsel fees, expenses,
42 and damages occasioned by the appointment
43 and action of the receiver in the event the
44 petition is dismissed or withdrawn. The
45 property of the bankrupt shall be released,
46 however, if he files a counter-bond in such
47 amount and with such surety as the court
48 shall approve, conditioned that the bankrupt
49 account for and turn over such property or
50 pay to the trustee the value thereof in money
51 at the time of release, in the event the adju-
52 dication is made.
53 *(e)Appointment After Adjudication.* After
54 adjudication the court may appoint a re-
55 ceiver on application or on its own initia-
56 tive. Such appointment shall be made only
57 after notice to such persons as the court may
58 designate, unless it clearly appears that no-
59 tice is impracticable or unnecessary.
60 *(f) Eligibility.* ~~Any~~ [Only a] person who is eligible

a

a

61 to be trustee may be appointed receiver.

under Rule 209(d)

62 *(g) Order of Appointment.* An order ap-
63 pointing a receiver shall state why the ap-
64 pointment is necessary. A receiver is a mere
65 custodian unless, upon proper cause shown,
66 his duties are enlarged or otherwise specified
67 by order of court. A copy of every order ap-
68 pointing a receiver shall forthwith be deliv-
69 ered to the bankrupt, or mailed to him at his
70 last known address, and to such other per-
71 sons as the court may designate.

Notice of Appointment;

The court shall immediately notify the receiver of his appointment, inform him as to how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office.

72 *(h) Qualification.* A receiver shall qualify
73 ~~by filing a bond in accordance with~~ Rule 212.

as provided in

74 *(i) Duties.* A receiver shall perform the
75 duties prescribed in Rule 218 to the extent it
76 is appropriate, except as the court may
77 otherwise direct. Forthwith after qualifica-
78 tion of the trustee, the receiver shall, unless
79 otherwise ordered, turn over to the trustee
80 all the records and property of the estate in
81 his possession or subject to his control as re-
82 ceiver. The receiver shall file his final report
83 and account within 30 days after qualifica-
84 tion of the trustee unless the court otherwise
85 directs.

Advisory Committee's Note

Subdivision (a) of Rule 201 is derived from § 2a(3) and (5) of the Act but adds, in clause (3), a provision for appointment of a receiver when the interest of the trustee may be adverse to that of the estate. Such a situation may arise for example in a proceeding to remove the trustee under Rule 221(a). The subdivision also accommodates the appointment of a receiver to represent the estate when no trustee is appointed (see Rule 211) and a need arises in the course of administration for appoint-

The appointment of the receiver ordinarily terminates automatically on the qualification of the trustee.

ment of a temporary or ad hoc representative of the estate rather than a trustee (or a new trustee) with all the duties and compensation that appertain to that officer. For a reference to such a situation, see Rule 403(d). *Cf. Bartle v. Markson*, 357 F.2d 517, 524 (2d Cir. 1966) (appointment of trustee authorized in reopened Chapter XI case "for the limited purpose of insuring effective prosecution of creditors' claims"). The requirement of the last clause of the subdivision that the receiver's continuation of the bankrupt's business be consistent with orderly liquidation is correlated with a similar limitation imposed on the trustee in Rule 216.

Subdivisions (b), (c), (e), and (g). Subdivisions (b), (c), and (e), and the first and third sentences of subdivision (g) are new. The policy expressed in § 2a(3) of authorizing appointment of receivers only in cases of necessity is preserved and reinforced by the provisions in subdivisions (b) and (g) of the rule requiring the application for a receiver and the order of appointment to state why the appointment is necessary. The theme of General Order 40 to restrict receivership expense, by presuming the receiver's duties and compensation to be those of a mere custodian in the absence of explicit enlargement by court order, is retained in the second sentence of subdivision (g).

Subdivisions (c) and (e) differentiate between appointment of a receiver before adjudication and one made afterward in recognition of the fact that prior to adjudication the divestment of the bankrupt's title to his property has not yet been legally established. The restriction of subdivision (c) against appointment of a receiver before adjudication without notice unless irreparable loss would otherwise result to the estate codifies a limitation applied by the courts under § 2a(3) of the Act. See *In re Press Printers & Publishers, Inc.*, 12 F.2d 660, 661 (3d Cir. 1926), cert.denied, 276 U.S. 633 (1928); 1 Collier ¶ 2.26 (1968). Appointment of a receiver without prior notice is made the exception after as well as before adjudication, and subdivision (g) provides for prompt notice to the bankrupt of any appointment of a receiver after it has been made. Subdivision (e) recognizes that

after adjudication the court may appoint a receiver without waiting for an application and in exceptional circumstances may do so without giving notice. The authority of a referee under the Act to appoint a receiver on his own motion, even where the alternative appears to be loss to the estate, has been a matter of debate. See *Proceedings of Seminar for Newly Appointed Referees in Bankruptcy* 120–21 (1964). *Cf.* E.D.Va.Bankr.Rule 13 (a).

Subdivision (d) is derived from § 69a of the Act and includes clarifying language from Official Form No. 8. Rule 925 applies to any proceeding to enforce liability on a bond given pursuant to this subdivision.

Subdivision (f) follows § 45 of the Act in assimilating eligibility requirements for receivers to those for trustees. The requirements for trustees are set out in Rule 209(d).

Subdivision (h). Rule 212, to which subdivision (h) refers, incorporates, the requirements respecting a receiver's bond set out in § 50b and h of the Act.

with modifications

The notice to the receiver should inform him of the penal sum of his bond, if required, or of whatever other mode of qualification is prescribed by the court pursuant to Rule 212.

Subdivision (i) is new but is substantially a restatement of sound practice as recognized in the cases and local rules. See 1 Collier ¶ 2.31 (1968); 11 *id.* § 6.003 (1968). The last sentence is an adaptation of Bankruptcy Rule 8(f) of the Southern and Eastern Districts of New York. As the last clause recognizes, the rule does not preclude a local rule or court order requiring an earlier report and account by a receiver—*e.g.*, at the first meeting of creditors. See, *e.g.*, D.Minn. Bankr.R. 8(j).

Rule 202. Appointment of Marshal in Lieu of Receiver; His Duties

1 The court may appoint a marshal in lieu
2 of a receiver and, in such event, the provi-
3 sions of Rule 201 except subdivisions (f) and
4 (h) shall apply.

ADVISORY COMMITTEE'S NOTE

This rule derives from provisions in §§ 2a(3) and (5) of the Act and General Order 40. The reference in the rule, as in the Act, is to the United States marshal.

Rule 203. Notices to Creditors and ~~District Director of Internal Revenue~~ the United States

1 *(a) Ten-Day Notices to All Creditors.* Ex-
2 cept as provided hereinafter, the court shall
3 give all creditors at least 10 days' notice by
4 mail of (1) a meeting of creditors; (2) any
5 proposed sale of property, including the time
6 and place of any public sale, unless the court
7 upon cause shown shortens the time or or-
8 ders a sale without notice; (3) the hearing on
9 the approval of a compromise or settlement
10 of a controversy, unless the court upon cause
11 shown directs that notice not be sent; ~~(4) the~~
12 ~~hearing on the trustee's application to aban-~~
13 ~~don property unless the court directs that~~
14 ~~notice not be sent;~~ (~~5~~ 4) the date fixed for the
15 filing of claims against a surplus in an es-
16 tate as provided in Rule 302(e)(5); (~~6~~ 5) the
17 hearing on the dismissal of a case when no-
18 tice is required by Rule 120(a); and (~~7~~ 6) the
19 hearing on approval of a trustee's or a re-
20 ceiver's account and on an application for
21 compensation or reimbursement of expenses filed by a receiver, marshal,
22 trustee, attorney, or accountant, except
23 when no final meeting of creditors is re-
24 quired to be ordered ~~under~~ pursuant to Rule 204(c). The
25 notice of a proposed sale of property, includ-
26 ing real estate, is sufficient if it generally de-
27 scribes the property to be sold. The notice of
28 a hearing on an application for compensa-

or reimbursement of expenses

29 tion shall specify the applicant and the
30 amount requested.
31 (b) *Notice of No Dividend.* If it appears
32 from the schedules that there are no assets
33 from which a dividend can be paid, the court
34 may include in the notice of the first meeting
35 a statement to that effect, that it is unneces-
36 sary to file claims, and that if sufficient as-
37 sets become available for the payment of a
38 dividend, the court will give further notice
39 of the opportunity to file claims and the time
40 allowed therefor.
41 (c) *Other Notices to All Creditors.* The
42 court shall give notice to creditors of (1) the
43 dismissal of a case for failure to pay filing
44 fees under Rule 120(b); (2) the time allowed
45 for filing claims after notice of no dividend
46 under Rule 302(e)(4); (3) the time fixed for
47 filing a complaint objecting to the bank-
48 rupt's discharge under Rule 404(b); (4) the
49 waiver, denial, or revocation of a discharge
50 under Rule 408; and (5) the time allowed for
51 filing a complaint to determine the discharge-
52 ability of a debt pursuant to § 17c(2) of the
53 Act under Rule 409(a)(2).
54 (d) *Notices to Creditors Whose Claims*
55 *are Filed.* After 6 months following the first
56 date set for the first meeting of creditors,
57 the court may direct that all notices required
58 by subdivision (a) of this rule, except clause
59 (5) thereof, be mailed only to creditors whose
60 claims have been filed and creditors, if any,
61 who are still permitted to file claims by rea-
62 son of an extension granted under Rule
63 302(e).

by mail

all

the

pursuant to

(2) the entry of an order directing that a chapter case continue as a bankruptcy case as provided in Rule 122(4);

3

issuance of a

pursuant to Rule 302(e)(4)

4

6

pursuant to

(5) the order of discharge as provided in Rule 404(h);

7

as provided in

as provided in

Are

4

64 (e) *Addresses of Notices* ~~to Creditors~~. All
65 notices to which a creditor is entitled under
66 these rules shall be addressed to the creditor
67 as he or his duly authorized agent may di-
68 rect in a request filed with the court; other-
69 wise, to the creditor at the address shown in
70 the schedules or, if a different address is
71 stated in a proof of claim duly filed, then at
72 the address so stated.

73 (f) *Notices to Creditors' Committee.* Not-
74 withstanding the foregoing subdivisions, if a
75 creditors' committee has been elected, the
76 court may order that notices required by
77 clauses (2), (3), ~~(4),~~ and ~~(7)~~ 5 of subdivision (a)
78 be mailed only to the committee or to its ~~duly~~
79 authorized agent and to the creditors who
80 file with the court a request that all notices
81 under these clauses be mailed to them.

6

82 (g) *Notices to the United States.* Copies of
83 ~~all~~ notices required to be mailed to creditors
84 under ~~subdivisions (a), (b), and (c) of this~~
85 ~~rule~~ shall be mailed (1) to the district direc-
86 tor of internal revenue for the district in
87 which the case is pending and (2) whenever
88 the schedules, the list of creditors, or any
89 other paper filed in the case discloses a debt
90 to the United States other than one for
91 taxes, to the United States attorney for the
92 district in which the case is pending and, if
93 disclosed by the filed papers, to the depart-
94 ment, agency, or instrumentality of the
95 United States through which the bankrupt
96 became so indebted.

all

these rules

97 (h) *Notice by Publication.* If the court
98 finds that it is impracticable to give notice to

99 creditors by mail as provided in this rule or
100 that it is desirable to supplement such no-
101 tice, the court may order publication thereof.
102 *(i) Caption.* The caption of every notice
103 given under this rule shall comply with Rule
104 106 and shall include all names used by the
105 bankrupt within 6 years before the filing of
106 the petition, as disclosed on the ~~petition pur-~~
107 ~~suant to Rule 106 and the~~ statement of af-
108 fairs filed pursuant to Rule 108.

also

ADVISORY COMMITTEE'S NOTE

This rule collects the provisions for notices specifically applicable to creditors in bankruptcy cases, but reference must be made to other rules for the time and ~~manner in which~~ the notices ~~required by~~ subdivision (c) ~~shall be given~~. The grant of general authority to the court to regulate notices in Rule 907 supplements but is subject to the specific provisions of Rule 203 and any other rules prescribing the terms of notice.

listed in

certain other requirements respecting

Subdivision (a) essentially restates the requirement of § 58a of the Act that all creditors get 10-day notices by mail of the significant events in a bankruptcy case. ~~The~~ requirement of this subdivision is satisfied if the notices it prescribes are deposited in the mail at least 10 days before the event. ~~of which notice is to be given, even though the creditors receive the notice within the 10 day period. See 3 Collier 491 (1964). *Cf.* Fed.R.Civ.P. 5(b); Fed.R.App.P. 25(c).~~ The time limits prescribed by subdivision (a) cannot be reduced except to the extent and under the conditions stated in this rule. *Cf.* Rule 906(c) *infra*. The exceptions referred to by the introductory phrase of ~~this~~ subdivision (a) include ~~the provisions for notice of dismissal for failure to pay filing fees and for notices in proceedings involving discharge that are referred to in subdivision (c), and~~ the modifications in the notice procedure permitted by subdivision (d) as to nonfiling creditors after the time for filing claims has ex-

Since notice by mail is complete on mailing, the

See Rule 906(e); 3 Collier 494 (1971).

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

The provision in § 58a(1) of the Act for notice of examinations of the bankrupt is deleted as unnecessary. As provided in Rules 204(a)(2) and 205(b), the examination of the bankrupt is ordinarily conducted at the first meeting of creditors, notice of which is required by subdivision (a) of this rule. If an examination is conducted at any other time pursuant to Rule 205(a), the court may give notice to some or all creditors pursuant to Rule 907. Notice to creditors of examinations of the bankrupt was made discretionary in 1938 in recognition of the fact that such notice is often not feasible. See 3 Collier ¶ 58.01 n.11, ¶ 58.06 (1964).

¶ If a meeting of creditors is adjourned before its conclusion, no notice of the adjourned date is required to be given to creditors under this rule. Treatment of the adjournment as a continuance of the meeting conforms to established and approved practice under the Act. 3 Collier 11-12 (1964).

The notice of a proposed sale carried over from § 58a(4) of the Act to clause (2) of this rule affords the creditors an opportunity to express their views as to whether the sale should be public or private, in bulk or by parcels, etc. The notice to creditors of a proposed sale of property is required to specify its time and place in order to enable the creditors to protect their interests by attending the sale or sending a representative. Protection of creditor interests does not, however, require the notice to contain a legal description of real estate or other property to be sold. See *In re Nevada-Utah Mines & Smelters Corp.*, 202 Fed. 126, 129 (2d Cir. 1913); *In re Park Distributors, Inc.*, 176 F.Supp. 38, 41 (S.D.Cal. 1959).

~~The provision in clause (4) for notice of a hearing on an application to abandon property is new. Complete administration of an estate requires an ordered disposition by the court of all of the bankrupt's property, and failure of the court to authorize abandonment of worthless and burdensome assets has often engendered unnecessary litigation after the closing of a bankruptcy case. See 4A Collier ¶ 70.42[3] n.9a (1967). The interest of the creditors in maximizing the realization from the estate generally warrants giving notice to them of proceedings to determine whether particular property should be abandoned. See *Fairaherly v. E. Kahn's Sons Co.*, 75 F.2d~~

~~110, 114 (5th Cir. 1935); *Felty v. Olson*, 284 Ky. 762, 765, 145 S.W.2d 1059, 1060 (1940); 4A Collier, *supra* at 507 n.9, 518 n.15. The court should nevertheless retain discretion to dispense with such notice in appropriate cases in the interest of minimizing administrative expense.~~

4 The provision in clause (5) for notifying creditors of a deadline fixed pursuant to Rule 302(e)(5) is also new. A notice to all creditors of the fixing of a new date for filing claims when a surplus remains in the estate is necessary if the opportunity to share therein afforded late filers by § 57 of the Act is to be meaningful and the distribution is to be fair. See *In re Searles*, 166 F.2d 475, 477–78 (2d Cir. 1948) (Frank, J., dissenting). Subdivision (d) recognizes that nonfilers and late filers must get the notice prescribed by clause (5) of subdivision (a). 4

The hearing on a trustee's account or an application for compensation [or reimbursement of expenses] filed under Rule 219 is typically held at the final meeting of creditors. Rule 204(c) excuses the calling of a final creditors' meeting when the net realization for the estate does not exceed $250, and the exception to the notice requirements of clause (7) is correlated with the dispensation respecting the final meeting.

Subdivision (b), authorizing a notice of the apparent insufficiency of assets for the payment of any dividend, to be given in conjunction with the notice of the first meeting of creditors, is correlated with Rule 302(e)(1), which provides for the issuance of an additional notice to creditors if the possibility of a payment of a dividend later materializes.

Subdivision (d). After the time for filing claims has expired, creditors who have not filed their claims in accordance with Rule 302 are not entitled to share in the estate except as they may come within the special provisions of Rule 302(e)(1)–(5). Subdivision (d) takes account of the fact that eliminating notice to creditors who have no recognized stake in the estate may permit economies in time and expense. Reduction of the list of creditors to receive notices under this subdivision is discretionary. This subdivision does not of course apply to the notice of the first meeting of creditors.

Subdivision (e) recognizes that an agent authorized to receive notices for a creditor may, without a court order, designate how notices to the creditor he represents should be addressed. Such an agent includes an officer of a corporation, an attorney at law, or an attorney in fact if the requisite authority has been given him. It should be noted that Official Forms No. 13 and No. 14 do not include an authorization of the holder of a power of attorney to receive notices for the creditor, but neither these forms nor this rule carries any implication that such an authorization may not be given in a power of attorney or that a request for notices to be addressed to both the creditor and his duly authorized agent may not be filed.

Subdivision (f) is an adaptation of the proviso at the end of § 58a. It enlarges the list of matters of which notice may be given a creditors' committee in lieu of notice to the creditors to include hearings on approval of the trustee's or receiver's account, on applications for compensation, and on applications to abandon property. Such notice may serve every practical purpose of a notice to all the creditors and save delay and expense. *In re Schulte-United, Inc.*, 59 F.2d 553, 561 (8th Cir. 1932).

Subdivision (g) is a revision of § 58e of the Act. The premise of the requirement that the district director of internal revenue receive ~~all~~ copies of notices that all creditors receive ~~under subdivisions (a), (b), and (c)~~ is that every bankrupt is at least potentially a tax debtor of the United States. Notice to the district director alerts him to the possibility that a tax debtor's estate is about to be liquidated and that he may be discharged in bankruptcy. Where other indebtedness to the Federal Government is indicated ~~in the schedule~~, the United States district attorney is notified in every case as the person in the best position to see to it that the interests of the government are protected. In addition, the provision in the last sentence of § 58e requiring notice by mail to the head of any department, agency, or instrumentality of the United States through whose action the bankrupt became indebted to the United States is carried into this subdivision of the rule. This rule is not intended to preclude a local rule from requiring a state or local tax authority to receive

some or all of the notices creditors are entitled to receive under subdivisions (a), (b), and (c).

Subdivision (h) specifies two kinds of situations in which notice by publication may be appropriate: (1) when notice by mail is impracticable; and (2) when notice by mail alone is less than adequate. Notice by mail may be impracticable when, for example, the bankrupt has disappeared or his records have been destroyed and the names and addresses of his creditors are unavailable, or when the number of creditors with nominal claims is very large and the estate to be distributed may be insufficient to defray the costs of issuing the notices. Supplementation of notice by mail is indicated when the bankrupt's records are incomplete or inaccurate and it is reasonable to believe that publication may reach some of the creditors who would otherwise be missed. Rule 908 applies when the court directs notice by publication under this rule. Neither clause (2) of subdivision (a) nor subdivision (g) of this rule is concerned with the publication of advertisement to the general public of a sale of property of the estate at public auction under Rule 606(b). See 3 Collier 500–01 (1964), 4A *id.* 1165–67 (1967).

Subdivision (i). As noted in connection with Rule 106, the disclosure requirement in subdivision (i) of this rule follows the practice established in some districts by local rule. Inclusion in notices to creditors of information as to other names used by the bankrupt will assist them in the preparation of their proofs of claim and in deciding whether to file a complaint objecting to the bankrupt's discharge. The mailing of notices should not be postponed to await a delayed filing of the statement of affairs.

While the other names used by the bankrupt and required to be disclosed will ordinarily be included in the caption pursuant to Rule 106, there may be additional names listed by the bankrupt on his statement of affairs when he did not file the petition.

Disposition of provisions of § 58c of Act. The provisions of § 58c of the Act, requiring notices to be given by the referee unless otherwise ordered by the judge and authorizing written waiver of any notice required by the Act, have been omitted from the Rule as unnecessary. The duty to give notice to the creditors under this rule and under Rules 404 and 408 is imposed on the court. This duty may be delegated to an assistant or an em-

ployee in the clerk's office as provided in Rule 506. Rule 907 authorizes the court to prescribe the manner in which any other notice is to be given under the rules. These rules pose no obstacle to the court's giving notice by mail deposited at the location of a national or regional computer center on the basis of information supplied the center by the court. Waiver of notice may be by conduct as well as in writing, and its effect may be appropriately left to case law. See, *e.g.*, *Connelly v. Hancock, Dorr, Ryan & Shove*, 195 F.2d 864, 868–69 (2d Cir. 1952); *In re Purrier*, 73 F.Supp. 418, 420 (W.D.Wash. 1947).

Rule 204. Meetings of Creditors

1 *(a) First Meeting.*
2 *(1) Date and Place.* The first meeting of
3 creditors shall be held not less than 10 nor
4 more than 30 days after the adjudication,
5 but if there is an appeal from, or a motion to
6 vacate, the adjudication, or if there is a mo-
7 tion to dismiss the case, the court may ~~post-~~ delay fixing a date for such
8 ~~pone the~~ meeting. The meeting may be held
9 at a regular place for holding court or at
10 any other place within the district more con-
11 venient for the parties in interest.
12 *(2) Agenda.* The bankruptcy judge shall
13 preside over the transaction of all business
14 at the first meeting of creditors, including
15 the examination of the bankrupt. He shall,
16 when necessary, determine which claims are
17 entitled to vote at the meeting and shall con-
18 duct the election of a trustee and, if one is
19 held, the election of a creditors' committee.
20 *(b) Special Meetings.* The court may call a
21 special meeting of creditors on application or
22 on its own initiative.

23 (c) *Final Meeting.* The court shall order a
24 final meeting of creditors in every case in
25 which the net proceeds realized exceed $250
26 and shall mail a summary of the trustee's
27 final account to the creditors with the notice
28 of the meeting, together with a statement of
29 the amount of the claims allowed. The trustee
30 shall attend the final meeting and shall, if
31 requested, report on the administration of
32 the estate.

Advisory Committee's Note

This rule is derived essentially from § 55 of the Act.

Subdivision (a). Paragraph (1) follows § 55a closely in establishing limits on the time and place for the first meeting of creditors. The Judicial Conference designates regular places for holding court under § 37b(1) of the Act. See also Rule 501(b). The filing of an appeal from an adjudication or of a motion to vacate an adjudication or to dismiss a case is likely to cause the court to ~~postpone~~ delay the first meeting, but as is made clear in the first sentence of the rule, this is a matter properly lying within the discretion of the court. The last sentence of § 55a of the Act requiring the court to set a date "as soon as may be thereafter" if the first meeting by some "mischance" is not held within the statutory time limits is omitted as unnecessary.

Paragraph (2) is an adaptation of § 55b of the Act. The bankruptcy judge will have occasion to allow or disallow a claim at the first meeting of creditors only when there has been an objection or a creditor has filed a proof of claim insufficient on its face. See Rules 207(a) and 306(b). Ordinarily allowance of a claim at the first meeting will be made only for the purpose of enabling the creditor to vote. The bankruptcy judge will also determine any issues arising under Rule 208 at the first meeting of creditors.

Subdivision (b) is derived from § 55d of the Act but vests discretion in the court as to when or whether a

Cf. General Order 25.

special meeting of creditors shall be called. The rule does not retain the requirement of § 55c that creditors at each meeting take pertinent and necessary steps to promote the best interests of the estate and the enforcement of the Act. The trustee is charged with the duty of taking whatever steps are pertinent and necessary for these purposes. See 2 Collier ¶ 47.02 (1964). While the trustee should give heed to the wishes of creditors, the responsibility for decision rests on him. *Id.* ¶ 47.03. If he defaults in the performance of any specific duty, "the court may upon application direct him in his duty or, if he be recalcitrant, remove him for disobedience, or permit a creditor to act in his name." *Reuping Leather Co. v. Ft. Greene Nat. Bank*, 102 F.2d 372, 373 (3d Cir. 1939). ~~*Cf.* General Order 25.~~

Subdivision (c) is derived from § 47a(14) and § 55e of the Act and General Order 12(4), but a final meeting may be dispensed with under the rule even when there are assets in the estate if the net proceeds realized on liquidation of the estate do not exceed $250. The net realization is required to be determined under the schedule of additional fees chargeable in asset and nominal asset cases which has been promulgated by the Judicial Conference pursuant to § 37b of the Act. The reduction in the number of final meetings permitted by this rule should result in substantial savings of time and expense to referees' offices and facilitate earlier closing of cases.

Rule 205. Examination

1 *(a) Examination on Application.* Upon
2 application of any party in interest, the
3 court may order the examination of any per-
4 son. The application shall be in writing un-
5 less made during a hearing or examination
6 or unless local rules otherwise provide.
7 *(b) Examination of Bankrupt at First*
8 *Meeting.* At the first meeting of creditors,
9 the court shall publicly examine the bank-

10 rupt or cause him to be examined and may
11 permit any party in interest to examine the
12 bankrupt.
13 *(c) Bankruptcy Judge to Preside.* The
14 bankruptcy judge shall preside at any exam-
15 ination under subdivision ~~(a) or~~ (b) of this
16 rule.
17 *(d) Scope of Examination.* The examina-
18 tion under subdivisions (a) and (b) of this
19 rule may relate only to the acts, conduct, or
20 property of the bankrupt, or to any matter
21 which may affect the administration of the
22 bankrupt's estate, or to his right to dis-
23 charge.
24 *(e) Compelling Attendance for Examina-*
25 *tion and Production of Documentary Evi-*
26 *dence.* The attendance of any person for
27 examination and the production of documen-
28 tary evidence may be compelled by the use of
29 a subpoena ~~as provided in Rule 916~~ for a
30 hearing or trial.

in accordance with the provisions of Rule 916

31 *(f) Place of Examination of Bankrupt.*
32 ~~Notwithstanding Rule 916,~~ the court may
33 for cause shown and upon such terms as it
34 may impose ~~authorize~~ the bankrupt to be ex-
35 amined under subdivision (a) at any place it
36 designates, whether within or without the
37 district wherein the case is pending.

Without issuing a subpoena,

order

of this rule

38 *(g) Mileage.* A person other than a bank-
39 rupt shall not be required to attend as a wit-
40 ness before a bankruptcy judge unless his
41 lawful mileage and fee for one day's attend-
42 ance shall be first tendered to him. If the
43 bankrupt resides over 100 miles from the
44 place of examination when he is required to

45 appear for an examination under subdivi-
46 sion (a) of this rule, he shall be tendered
47 mileage allowed by law to a witness for any
48 distance over 100 miles from his residence at
49 the date of bankruptcy, or his residence at the time he is required to appear for such examination, whichever is the lesser.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is an adaptation of the first sentence of § 21a of the Act. No change in the persons who can apply for the examination or who can be examined under this subdivision of the Act is intended. See generally 2 Collier ¶¶ 21.06, 21.08, 21.09 (1964). The second sentence clarifies the manner of making application for an examination. The rule omits the provision in § 21a requiring a person to appear before the judge of any state court for examination. The provision appears to be unnecessary and to have been little used. The possible need for an examination before a nearby state court judge when the witness resides in the district but more than 100 miles from the place of examination is suggested in 2 Collier 332 (1964), but this need does not arise under the rule by virtue of the supersession of the special territorial limitation on holding examinations contained in the proviso of § 41a of the Act. See the comments *infra* regarding subdivisions (c) and (g) of the rule.

Subdivisions (b) and (c) are derived from § 55b of the Act. ~~but the bankruptcy judge's duty to preside is extended by subdivision (c) to any examination covered by the rule. The case law is generally in accord. *In re Eskay*, 122 F.2d 819, 824-25 (3d Cir. 1941); *United States v. Lieberman*, 199 F.Supp. 418, 419 (S.D.N.Y. 1961); Snedecor, *The Importance of Referees' Examinations of the Bankrupt*, 26 Ref.J. 45 (1962).~~

Subdivision (d) combines provisions in §§ 7a(10) and 21a of the Act for the purpose of defining the scope of any examination under the rule. The references in § 7a(10) to "the conducting of his [*i.e.*, the bankrupt's] business, the cause of his bankruptcy, his dealings with

his creditors and other persons, and whereabouts of his property" as appropriate subjects of inquiry of the bankrupt are omitted from the rule because embraced by the broad definition of the scope of examination derived from the merger of other language in § 7a(10) with the definition in § 21a. It has indeed been held that the scope of examination under the latter provision is not less broad in scope than that permitted by the more elaborate definition in § 7a(10). *Freeman v. Seligson*, 405 F.2d 1326, 1333 (D.C.Cir. 1968); *Chereton v. United States*, 286 F.2d 409, 413 (6th Cir.), cert.denied, 366 U.S. 924 (1961); *Ulmer v. United States*, 219 Fed. 641, 644 (6th Cir. 1915); *In re Insull Utility Investments, Inc.*, 27 F.Supp. 887, 890 (S.D.N.Y. 1934). The provisos of § 21a relating to examination of the bankrupt's spouse are not included in the rule since (1) no special provision negating a spousal privilege is necessary (see Advisory Committee's Notes accompanying Rules 501 and 505 of the ~~proposed~~ Federal Rules of Evidence), and (2) no special limitation on spousal testimony in bankruptcy cases is warranted. *Cf.* McCormick, *Evidence*, 179–80 (1954); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn.L.Rev. 675 (1929).

for an examination

Subdivision (e) clarifies the mode of compelling attendance of a witness or party and for the production of evidence ~~for an examination~~ under this rule. The subdivision is substantially declaratory of the practice that has developed under § 21a of the Act. See 2 Collier ¶ 21.20 (1964). The special limitation of the proviso of § 41a of the Act that protects a person other than the bankrupt from being required to attend as a witness before a referee at a place over 100 miles from his residence even though within the same district is not retained in the rules. The governing limits for such a person are those prescribed by Rule 45(e)(1) of the Federal Rules of Civil Procedure, made applicable to examinations under this rule by subdivision (e) and Rule 916.

Subdivision (f) is derived from the second proviso of § 7a(10) of the Act. There are no territorial limits on the service of an order on the bankrupt. See, *e.g.*, *In re*

and is not a limitation on subdivision (e). Any person, including the bankrupt, served with a subpoena within the range of a subpoena must attend for examination pursuant to subdivision (e). Subdivision (f) applies only to the bankrupt.

Totem Lodge & Country Club, Inc., 134 F.Supp. 158 (S.D.N.Y. 1955).

Subdivision (g) is a revision of the first proviso of § 7a(10) and the proviso of § 41a of the Act. The lawful mileage and fee for attendance at a United States court as a witness are prescribed by 28 U.S.C. § 1821.

Definition of bankrupt. The word "bankrupt" as used in this rule includes the persons specified in the definition in Rule 901(6).

Rule 206. Apprehension and Removal of Bankrupt to Compel Attendance for Examination

1 *(a) Order to Compel Attendance for Ex-*
2 *amination.* Upon a verified application of
3 any party in interest alleging (1) that the
4 examination of the bankrupt is necessary for
5 the proper administration of the estate and
6 that there is reasonable cause to believe that
7 the bankrupt is about to leave his residence
8 or his principal place of business to avoid ex-
9 amination, or (2) that he has evaded service
10 of a subpoena or of an order to attend for
11 examination, or (3) that he has willfully dis-
12 obeyed a subpoena or order to attend for ex-
13 amination, duly served upon him, the court
14 may issue to the marshal, or some other
15 officer authorized by law, an order directing
16 him to bring the bankrupt forthwith before
17 the court. If after hearing the court finds the
18 allegations to be true, the court shall there-
19 upon examine the bankrupt or cause him to be
20 examined as soon as possible, but, in any
21 event, the examination shall be commenced
22 within 10 days after he was taken into cus-

23 tody. If it is necessary, the court shall fix
24 conditions for further examination and for
25 the bankrupt's obedience to all orders made
26 in reference thereto.
27 *(b) Removal.* Whenever any order to
28 bring the bankrupt before the court is issued
29 under this rule and he is found in a district
30 other than that of the court issuing the
31 order, he may be taken into custody under
32 such order and removed in accordance with
33 the following rules:
34 (1) If taken at a place less than 100 miles
35 from the place of issue of the order, the
36 bankrupt shall be brought forthwith before
37 the court that issued the order.
38 (2) If taken at a place 100 miles or more
39 from the place of issue of the order, the
40 bankrupt shall be brought without unneces-
41 sary delay before the nearest ~~bankruptcy~~ magistrate, referee in bankruptcy, or district
42 judge. If, after hearing, the ~~bankruptcy~~ magistrate, referee, or district
43 judge finds that an order has issued under
44 this rule and that the person in custody is
45 the bankrupt, or if the person in custody
46 waives a hearing, the ~~bankruptcy~~ magistrate, referee, or district judge shall
47 issue an order of removal and the person in
48 custody shall be released on conditions assur-
49 ing his prompt appearance before the court
50 which issued the order to compel his attend-
51 ance.
52 *(c) Conditions of Release.* In determining
53 what conditions will reasonably assure at-
54 tendance or obedience under subdivision (a)
55 of this rule or appearance under subdivision
56 (b) of this rule, the court shall be governed

57 by the provisions and policies of Title 18,
58 U.S.C., § 3146(a) and (b).

ADVISORY COMMITTEE'S NOTE

This rule is an elaboration of § 10 of the Act. Subdivision (a) is closely patterned on the corresponding subdivision of the statutory section, but the rule requires the bankrupt to be examined as soon as possible if allegations of the applicant for compulsory examination under this rule are found to be true after a hearing. Subdivision (b) is also derived from the corresponding subdivision of § 10 of the Act but includes in paragraphs (1) and (2) provisions adapted from subdivisions (a) and (b) of Rule 40 of the Federal Rules of Criminal Procedure, which governs the handling of a person arrested in one district on a warrant issued in another. Subdivision (c) incorporates by reference the features of subdivisions (a) and (b) of 18 U.S.C. § 3146, which prescribe standards, procedures and factors to be considered in determining conditions of release of accused persons in noncapital cases prior to trial. The word "bankrupt" as used in this rule includes the persons named in Rule 901(6).

An order issued under this rule need not be under seal or signed by the clerk of the district court. *In re Markel*, 195 F.Supp. 926 (E.D.Mich. 1961), holding warrants issued by a referee in bankruptcy for the Eastern District of Michigan for the arrest of bankrupts in California to be invalid for noncompliance with General Order 3, would not be authoritative after repeal of the general order and adoption of this rule.

Rule 207. Voting at Creditors' Meetings

1 *(a) Right to Vote; Temporary Allowance*
2 *for Voting Purposes.* Except as hereinafter
3 provided, a creditor is entitled to vote at a
4 meeting if he has filed a proof of claim at or
5 before the meeting, unless objection is made

6 or unless the proof of claim is insufficient on
7 its face. Notwithstanding objection to the
8 amount or allowability of a claim for the
9 purpose of voting, the court may temporar-
10 ily allow it for that purpose in such amount
11 as to the court seems proper.
12 *(b) Majority Vote; Creditors with Claims*
13 *of $100 or Less.* The trustee and the credi-
14 tors' committee, if any, shall be elected by a
15 majority vote in number and amount of
16 claims of all creditors who are present and
17 voting in person or by proxy. A claim of
18 $100 or less shall be included in computing
19 the amount, but the holder of such a claim
20 shall not be counted in computing the num-
21 ber of creditors voting.
22 *(c) Creditors with Secured or Priority*
23 *Claims.* A creditor holding a claim which is
24 secured or has priority shall be entitled to
25 vote such claim only to the extent the claim
26 exceeds the value of his security or the
27 amount of his priority.
28 *(d) Creditors Excluded from Voting.* The
29 following creditors shall not be entitled to
30 vote: a relative or affiliate of the bankrupt;
31 a director or trustee or a stockholder, mem-
32 ber, or officer of the bankrupt corporation; a
33 general partner, limited partner, or person
34 in control of the bankrupt partnership; or a
35 person having an interest materially adverse
36 to the estate.

ADVISORY COMMITTEE'S NOTE

This rule brings together provisions in §§ 44a, 56, and 57e of the Act dealing with voting and makes some changes.

Subdivision (a) accords any creditor who has filed a proof of claim not insufficient on its face a right to vote unless an objector overcomes the presumptive correctness attaching to the proof of claim under Rule 301(b). *Cf. In re Lenrick Sales, Inc.*, 369 F.2d 439, 442–43 (3d Cir.), cert. denied, 389 U.S. 822 (1967). The second sentence of subdivision (a) is adapted from, but goes beyond, § 57e of the Act. It recognizes the necessity for prompt disposition of objections to claims for the purpose of voting and vests discretion in the court to make a temporary allowance for that purpose without determining the amount or allowability of the claim for the purpose of distribution.

Subdivision (b) combines subdivisions a and c of § 56 of the Act but takes inflation into account by doubling the amount of the minimum claim to be counted in computing the majority in number of the creditors voting at a creditors' meeting. Creditors holding claims of $50 or less were first excluded from the numerical count of the majority by the Chandler Act in 1938 in order to restrict the power that could be exerted in creditors' meetings by those who had been able to acquire proxies from a large number of creditors with small claims. H.R.Rep. No. 1409, 75th Cong., 1st sess. 14 (1937). The increase in the minimum is in furtherance of the policy of the rules to protect bankruptcy administration against domination by those who solicit proxies for the ulterior purpose of controlling and participating in the administration.

Subdivision (c) is a revision of the wording of § 56b of the Act without change in the meaning.

Subdivision (d) is an adaptation of language in § 44 excluding certain classes of persons from participating in the election of a trustee. The rule adds to the list of excluded persons, partners and persons in control of bankrupt partnerships and persons in general who have interests materially adverse to the estate.

Rule 208. Solicitation and Voting of Proxies

1 *(a) Definitions.*

Proxy.

2 (1) A proxy includes a power of attorney,

3 proof of claim, or other writing authorizing
4 any person who does not then own a claim to
5 vote the claim or otherwise act as the owner's
6 attorney in fact in connection with the ad-
7 ministration of an estate in bankruptcy.

Solicitation of Proxy.

8 (2) The solicitation of a proxy is any com-
9 munication, other than one from an attorney
10 to a regular client who owns a claim or from
11 an attorney to the owner of a claim who has
12 requested the attorney to represent him, by
13 which a creditor is asked, directly or indi-
14 rectly, to give a proxy after or in contempla-
15 tion of the filing of a petition by or against
16 the bankrupt.

17 (*b*) *Authorized Solicitation.*

18 (1) A proxy may be solicited only by (A)
19 a creditor owning a provable claim against
20 the estate on the date of the filing of the pe-
21 tition; (B) a committee elected under Rule
22 214; (C) a committee of creditors ~~elected~~ selected by
23 a majority in number and amount of claims
24 of creditors whose claims are not contingent, or
25 unliquidated, ~~or disputed~~, who are not dis-
26 qualified from voting under Rule 207(c) and
27 (d), and who were present or represented at a meeting of
28 which all creditors having claims of over
29 ~~$100~~ $500, or the 100 creditors having the largest claims, had at least 5 days' notice in writing
30 and of which meeting written minutes were
31 kept and are available reporting the names
32 of the creditors present or represented and voting and the
33 amounts of their claims; or (D) a bona fide
34 ~~nonprofit~~ trade or credit association, but such
35 association may solicit only creditors who
36 were its members or subscribers in good standing and had

37 provable claims on the date of the filing of
38 the petition.
39 (2) A proxy may be solicited only in writ-
40 ing.
41 *(c) Solicitation Not Authorized.* This rule
42 shall not be construed to permit solicitation
43 (1) in any interest other than that of general
44 creditors; (2) by or on behalf of any person
45 who has taken charge of property of the
46 bankrupt as a receiver or trustee or an as-
47 signee for the benefit of creditors; (3) by or
48 on behalf of any person disqualified from
49 voting under Rule 207(c) and (d); (4) by or
50 on behalf of an attorney at law; or (5) by or
51 on behalf of a transferee of a claim for
52 collection only.
53 *(d) Data Required from Holders of Multi-*
54 *ple Proxies.* At any time ~~least 2 days~~ before the voting
55 commences at any meeting of creditors held
56 under Rule 204, or at such other time as the
57 court may direct, a holder of 2 or more prox-
58 ies must file with the court a verified list of
59 the proxies to be voted and a verified state-
60 ment of the pertinent facts and circum-
61 stances in connection with the execution and
62 delivery of the proxies, including with re-
63 spect to each of the proxies that was solic-
64 ited, whether by the proxyholder or by any other per-
65 son, the following:
66 (1) a copy of the solicitation;
67 (2) identification of the solicitor, the
68 forwarder, if he is neither the solicitor nor
69 the owner of the claim, and the proxyholder,
70 including their connections with the bank-
71 rupt and with each other, and if the solici-

72 tor, forwarder, or proxyholder is an associa-
73 tion, a statement that the creditors whose
74 claims have been solicited and the creditors
75 whose claims are to be voted were members
76 in good standing and had provable claims on
77 the date of the filing of the petition, or if the
78 solicitor, forwarder, or proxyholder is a com-
79 mittee of creditors, the date and place the
80 committee was organized, a statement that
81 the committee was organized in accordance
82 with clause (B) or (C) of paragraph (b)(1) of
83 this rule, the members of the committee, the
84 amounts of their claims, when the claims
85 were acquired, the amounts paid therefor,
86 and the extent to which the claims of the
87 committee members are secured or entitled
88 to priority;
89 (3) a statement that no consideration has
90 been paid or promised by the proxyholder
91 for the proxy;
92 (4) a statement as to whether there is
93 any agreement, and, if so, the particulars
94 thereof, between the proxyholder and any
95 other person for the payment of any consid-
96 eration in connection with voting the proxy,
97 or for the sharing of compensation with any
98 person other than a law partner which may
99 be allowed the trustee or any person for
100 services rendered in the case, or for the em-
101 ployment of any person as attorney, account-
102 ant, appraiser, auctioneer, or other employee
103 for the estate;
104 (5) if the proxy was solicited by a person
105 other than the proxyholder, a statement
106 signed and verified by the solicitor that no

107 consideration has been paid or promised by
108 him for the proxy, and a statement signed
109 and verified by him as to whether there is
110 any agreement, and, if so, the particulars
111 thereof, between the solicitor and any other
112 person for the payment of any consideration
113 in connection with voting the proxy, or for
114 the sharing of compensation with any person
115 other than a law partner which may be al-
116 lowed the trustee or any person for services
117 rendered in the case, or for the employment
118 of any person as attorney, accountant, ap-
119 praiser, auctioneer, or other employee for
120 the estate;
121 (6) if the proxy was forwarded to the
122 holder by a person who is neither a solicitor
123 of the proxy nor the owner of the claim, a
124 statement signed and verified by the for-
125 warder that no consideration has been paid
126 or promised by him for the proxy, and a
127 statement signed and verified by him as to
128 whether there is any agreement between the
129 forwarder and any other person for the pay-
130 ment of any consideration in connection with
131 the voting of the proxy, or for the sharing of
132 compensation with any person other than a
133 law partner which may be allowed the
134 trustee or any person for services rendered
135 in the case, or for the employment of any
136 person as attorney, accountant, appraiser,
137 auctioneer, or other employee for the estate;
138 and
139 (7) if the solicitor, forwarder, or proxy-
140 holder is a committee, a statement signed
141 and verified by each member as to the

142 amount and source of any consideration paid
143 or to be paid to such member in connection
144 with the case other than by way of dividend
145 on his claim.

Restrictions ... tation.

146 *(c) Enforcement of ~~Rule.~~* The court on its
147 own initiative or on application of any party
148 in interest may determine whether there has
149 been a failure to comply with the provisions
150 of this rule or any other impropriety in
151 connection with the solicitation or voting of
152 a proxy. After such hearing as may be ap-
153 propriate, the court may reject any proxy
154 for cause, vacate any order entered in conse-
155 quence of the voting of any proxy which
156 should have been rejected, or take any other
157 or further appropriate action.

or motion

Advisory Committee's Note

This rule is a comprehensive regulation of solicitation and voting of proxies in bankruptcy cases. Heretofore regulation has been a matter of patchwork: General Order 39 is a narrow proscription of the solicitation of a proof of claim, power of attorney, or other kind of proxy by a receiver or his attorney. Chapter X (in §§ 209–13) and § 77(p) of the Act contain provisions dealing with the solicitation and exercise of proxies only in reorganization proceedings. A body of judicial precedents has evolved which sustains the rejection of proxies because of impropriety in connection with their solicitation. Finally, a number of courts of bankruptcy have adopted local rules regulating solicitation and voting of proxies. The rule here proposed includes features drawn from all these sources. Most suggestive have been the local bankruptcy rules dealing with solicitation in effect in the Northern Districts of Illinois (Bankr. Rule 10) and Ohio (Bankr. Rule 4) and in the Southern and Eastern Districts of New York (Bankr. Rule 15).

Subdivision (a). The definition of proxy in the first paragraph of the rule is in large part a rephrasing of General Order 39. The definition of solicitation in the succeeding paragraph follows closely the definition found in Rule 4(g)(1) of the Bankruptcy Rules for the Northern District of Ohio.

Creditor control is a basic feature of the Bankruptcy Act. Creditor participation in administration is facilitated by the definition of "creditor" in the Act (§ 1(11)) to include the duly authorized agent, attorney, or proxy of the owner of a provable claim. Creditor democracy is perverted and the congressional objective frustrated, however, if control of administration falls into the hands of persons whose principal interest is not in what the estate can be made to yield to the unsecured creditors but in what it can yield to those involved in its administration or in other ulterior objectives.

Subdivision (b). The purpose of the rule is to protect creditors against loss of control of administration of their debtors' estates in bankruptcy to holders of proxies having interests that differ from those of the creditors. The rule does not prohibit solicitation but restricts it to those who were creditors at the commencement of the case or their freely and fairly selected representatives. The special role occupied by credit and trade associations in bankruptcy administration is recognized in the last clause of subdivision (b)(1). On the assumption that members or subscribers may have affiliated with ~~may have joined~~ an association in part for the purpose of obtaining its services as a representative in bankruptcy proceedings, an established association is authorized to solicit its own members, or its regular customers or clients, who were creditors on the date of the filing of the petition. Although the association may not solicit nonmembers or nonsubscribers for proxies, it may sponsor a meeting of creditors at which a committee entitled to solicit proxies may be ~~elected~~ selected in accordance with clause (B) or (C) of subdivision (b)(1). See Comment, 51 Yale L.J. 253, 266–68 (1941).

Subdivision (c). A creditor, creditors' committee, or association may, however, have such a relation to the estate or the case as to warrant rejection of any proxy solicited by such a person or group. Thus a person who is

forbidden by the Act to vote his own claim should be equally disabled to solicit proxies from creditors. Solicitation by or on behalf of the bankrupt has been uniformly condemned, *e.g.*, *In re White*, 15 F. 2d 371 (9th Cir. 1926), as has solicitation on behalf of a preferred creditor, *Matter of Law*, 13 Am.B.R. 650 (S.D. Ill. 1905). The prohibition on solicitation by a receiver or his attorney made explicit by General Order 39 has been collaterally supported by rulings rejecting proxies solicited by a receiver in equity, *In re Western States Bldg.-Loan Ass'n*, 54 F. 2d 415 (S.D. Cal. 1931), and by an assignee for the benefit of creditors, *Lines v. Falstaff Brewing Co.*, 233 F. 2d 927 (9th Cir. 1956).

Subdivision (c) negates a reading of the rule to authorize solicitation by any person or group standing in any of the relations described in the preceding paragraph. It also disavows any dispensation to attorneys or to transferees of claims for collection. The rule does not undertake to regulate communications between an attorney and his regular client or between an attorney and a creditor who has asked the attorney to represent him in a proceeding under the Act, but any other communication by an attorney or any other person or group requesting a proxy from the owner of a claim constitutes a regulated solicitation. Solicitation by an attorney of a proxy from a creditor who was not a client prior to the solicitation is not objectionable merely as unethical conduct, as recognized by such cases as *In re Darland*, 184 F. Supp. 760 (S.D. Iowa 1960); more importantly the practice carries a substantial risk that administration will fall into the hands of those whose interest is in the yields of administration to the administrators rather than to the rightful beneficiaries. The same risk attaches to solicitation by the holder of a claim for collection only.

Subdivision (d). The regulation of solicitation and voting of proxies is to be effectuated by the rule principally through the imposition of requirements of disclosure on the holders of 2 or more proxies. The disclosures must be made to the court ~~at least 2 days~~ before the meeting at which the proxies are to be voted to afford the court an opportunity to examine the circumstances accompanying

the acquisition of the proxies in advance of any exercise of the proxies. In the light of its examination the court may permit the proxies that comply with the rule to be voted and reject those that do not unless the holders can effect or establish compliance in such manner as the court shall prescribe. The holders of single proxies are excused from the disclosure requirements because of the insubstantiality of the risk that such proxies have been solicited, or will be voted, in an interest other than that of general creditors.

Every holder of 2 or more proxies must include in his submission to court a verified statement that no consideration has been paid or promised for the proxy, either by the proxy-holder or the solicitor or any forwarder of the proxy. Any payment or promise of consideration for a proxy would be conclusive evidence of a purpose to acquire control of the administration of an estate for an ulterior purpose. The holder of multiple proxies must also include in his submission a verified ~~disavowal of~~ statement as to whether there is any agreement by himself, the solicitor, or any forwarder of the proxy for the employment of any person in the administration of an estate or for the sharing of any compensation allowed in connection with the administration of the estate. The provisions requiring these statements implement the policy of the Act expressed in § 62c as well as the policy of this rule to deter the acquisition of proxies for the purpose of obtaining a share in the outlays for administration. Finally the facts as to any consideration moving or promised to any member of a committee which functions as a solicitor, forwarder, or proxyholder must be disclosed by the proxyholder. Such information would be of significance to the court in evaluating the purpose of the committee in obtaining, transmitting, or voting proxies.

Subdivision (e) has counterparts in the local rules referred to earlier in this Note. Courts have been accorded a wide range of discretion in the handling of disputes involving proxies. Thus the referee has been allowed to reject proxies and to proceed forthwith to hold a scheduled election at the same meeting. *E.g., In re Portage Wholesale Co.*, 183 F. 2d 959 (7th Cir. 1950); *In re McGill*, 106

Fed. 57 (6th Cir. 1901); *In re Deena Woolen Mills, Inc.*, 114 F. Supp. 260, 273 (D. Me. 1953); *In re Finlay*, 3 Am.B.R. 738 (S.D.N.Y. 1900). The bankruptcy judge may, of course, postpone an election to permit a determination of issues presented by a dispute as to proxies and to afford those creditors whose proxies are rejected an opportunity to give new proxies or to attend an adjourned meeting to vote their own claims. *Cf. In re Lenrick Sales, Inc.*, 369 F.2d 439, 442–43 (3d Cir.), cert. denied, 389 U.S. 822 (1967); *In re Construction Supply Corp.*, 221 F.Supp. 124, 128 (E.D.Va. 1963). This rule is not intended to restrict the scope of the court's discretion in the handling of disputes as to proxies.

Rule 209. Selection of Trustee

1 *(a) Election at First Meeting.* The credi-
2 tors of a bankrupt entitled to vote under
3 Rules 207 and 208 shall elect a trustee at the
4 first meeting, subject to approval by the
5 court and to the provisions of this rule.
6 *(b) Appointment by the Court.* Except as
7 provided in Rule 211, the court shall ap-
8 point a trustee if (1) the creditors do not
9 elect a trustee; (2) the trustee elected fails to
10 qualify; (3) a vacancy occurs in the office of
11 trustee; or (4) a trustee is needed in a re-
12 opened case. If an elected trustee is disap-
13 proved by the court for ineligibility or other
14 good cause, the court may appoint a trustee.
15 *(c) Notice to Trustee of His Election or*
16 *Appointment; Qualification.* The court shall
17 immediately notify the trustee of his election
18 or appointment. The court shall also inform
19 him ~~of~~ [as to how he may qualify, including] the penal sum of his bond [if required,] and of the
20 time fixed for the filing of a complaint ob-
21 jecting to the bankrupt's discharge, and

22 shall require him forthwith to notify the
23 court of his acceptance or rejection of the
24 office. A trustee shall qualify ~~by filing a bond~~
25 ~~in accordance with~~ Rule 212.

as provid

26 *(d) Eligibility.* A trustee shall have no in-
27 terest adverse to the estate and shall be com-
28 petent to perform the duties of his office. If
29 an individual, he shall have a residence or
30 office in the state in which the case is pend-
31 ing or in any adjacent state, and, if a corpo-
32 ration, it shall be authorized by its charter
33 or by law to act as trustee and have an office
34 in the state in which the case is pending.

ADVISORY COMMITTEE'S NOTE

Subdivisions (a) and (b). Subdivision (a) and the first sentence of subdivision (b) of this rule are derived from §§ 2a(17) and 44a of the Act. The option to elect 3 trustees of an estate authorized by § 44a is little used and is eliminated as unnecessary. The provision of § 44a for the appointment by the court of the trustee of a bankrupt face-amount certificate company, added to § 44a by the Investment Company Act of 1940, has likewise not been carried into the rule. It has not been applied in any reported case and appears to have had a transitional purpose. The second sentence of subdivision (b) clarifies the authority of the court to appoint a trustee whenever the creditors' choice of trustee is disapproved by the court, and follows the law as declared in *In re Eloise Curtis, Inc.*, 388 F.2d 416, 418–20 (2d Cir. 1967); 2 Collier ¶ 44.11 (1962). But *cf.* 2 Remington, *Bankruptcy* 562–63 (Henderson ed 1956). The court's discretion to disapprove a trustee elected by the creditors is circumscribed, however, by the consideration that it must be based on a substantial reason appearing in the record. See generally 2 Collier ¶¶ 44.06–44.11 (1962); MacLachlan, *Bankruptcy* § 96 (1956), 2 Remington, *Bankruptcy* §§ 1092–1103 (Henderson ed 1956).

Subdivisions (c) and (d). Subdivision (c) is derived from General Order 16, and subdivision (d) is a revision of § 45 of the Act. The requirement of the first sentence of subdivision (d) that the trustee have no interest adverse to the estate has been established by case law. MacLachlan, *supra.* Although § 45 of the Act has imposed a requirement of competence only in respect to an individual receiver or trustee, a corporation is neither to be excused from such a requirement nor to be conclusively presumed to be competent. See MacLachlan, *supra.* The requirement respecting a residence or office location for an individual trustee has been relaxed by the rule. The requirement of § 45(1) of the Act that an individual trustee be a resident or have an office in the judicial district within which he is appointed is unnecessarily restrictive in light of the development of metropolitan and suburban communities that cross district and state boundaries. This development does not appear to warrant a comparable relaxation respecting corporate trustees, however. Rule 213 continues the policy of the Act of June 7, 1934, 48 Stat. 923, against undue concentration of appointments of trustees, and Rule 505 contains safeguards against nepotism undue influence, and conflict of interest in such appointments. Rule 503 incorporates the disqualification, by § 39b(2) of the Act, of a referee to act as trustee in any case.

Eligibility of receiver. The requirements of § 45 of the Act pertaining to receivers are preserved as provided in Rule 201(f).

Rule 210. Trustees for Estates When Joint Administration Ordered

1 *(a) Election of Single Trustee for Estates*
2 *Being Jointly Administered.* If the court or-
3 ders a joint administration of 2 or more es-
4 tates pursuant to Rule 117(b), it may ap-
5 prove election of a single trustee by the
6 creditors of one or more of the bankrupts for
7 the estates being jointly administered, ~~hav-~~

(d) Potential Conflicts of Interest. Before approving the election or appointment of one trustee for estates being jointly administered as provided in subdivision (a) or (c) of this rule, the court must be satisfied that the creditors of the different estates will not be prejudiced by conflicts of interest of the trustee.

8 ~~ing regard for the protection of creditors of~~
9 ~~the different estates against conflicts of in-~~
10 ~~terest on the part of the trustee so elected.~~
11 *(b) Right of Creditors to Elect Separate*
12 *Trustee.* Notwithstanding entry of an order
13 for joint administration pursuant to Rule
14 117(b) the creditors of any bankrupt may
15 elect a separate trustee for his estate as pro-
16 vided in Rule 209(a).
17 *(c) Appointment of Trustees for Estates*
18 *Being Jointly Administered.* If the creditors
19 do not elect a trustee under subdivision (a)
20 or (b) of this rule, the court may appoint one
21 or more trustees for the estates being jointly
22 administered. ~~having regard for the protec-~~
23 ~~tion of creditors of the different estates~~
24 ~~against conflicts of interest on the part of~~
25 ~~the trustee or trustees so appointed.~~
26 (e) ~~(d)~~ *Trustee for Partnership and Partners'*
27 *Individual Estates.* Notwithstanding the
28 foregoing provisions of this rule, the trustee
29 of a bankrupt partnership shall also be the
30 trustee of the individual estate of any gen-
31 eral partner ordered pursuant to Rule
32 117(b) to be administered jointly, unless the
33 court, for cause shown, either (1) permits
34 the creditors of a general partner to elect a
35 separate trustee or (2) appoints a separate
36 trustee for the individual estate.
37 (f) ~~(e)~~ *Separate Accounts.* The trustee or
38 trustees of estates being jointly adminis-
39 tered shall nevertheless keep separate ac-
40 counts of the property and distribution of
41 each estate.

ADVISORY COMMITTEE'S NOTE

This rule recognizes that economical and expeditious administration of 2 or more estates may be facilitated not only by the selection of a single trustee for a partnership and its partners, as now authorized by § 5c of the Act, but by such selection whenever estates are being jointly administered pursuant to Rule 117. See *In re International Oil Co.*, 427 F.2d 186, 187 (2d Cir. 1970). The premise of § 5c of the Act is that, notwithstanding the potentiality of conflict between the interests of the creditors of the partners and those of the creditors of the partnership, the conflict is not sufficiently serious or frequent in most cases to warrant the selection of separate trustees for the firm and the several partners. Even before the proviso was added to § 5c of the Act in 1938 to permit the creditors of a general partner to elect their separate trustee for his estate, it was held that the court had discretion to permit such an election or to make a separate appointment when a conflict of interest was recognized. *In re Wood*, 248 Fed. 246, 249–50 (6th Cir.), cert.denied, 247 U.S. 512 (1918); 1 Collier ¶ 5.18 (1962). The rule retains in subdivision (d) the features of the practice respecting the selection of a trustee that has developed under § 5 of the Act. Subdivisions (a) and (c) permit the court to authorize election of a single trustee or to make a single appointment when joint administration of estates of other kinds of bankrupts is ordered, but requires the court to make a preliminary evaluation of the risks of conflict of interest.

If after the election or appointment of a common trustee a conflict of interest materializes, the court must take special and appropriate action to deal with it.

e

subdivision (d)

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

Rule 211. Trustee Not Appointed in Certain Cases

1 If, after examination of the bankrupt, the
2 court determines that there is no property in
3 the estate other than that which can be
4 claimed as exempt and that no other circum-

5 stances indicate the need for a trustee, and
6 if the creditors do not elect a trustee, the
7 court may order that no trustee be ap-
8 pointed. At any time thereafter, for cause
9 shown, a trustee may be appointed by the
10 court.

ADVISORY COMMITTEE'S NOTE

This rule is a revision of General Order 15 to spell out more fully the circumstances that may warrant proceeding with the administration of an estate without a trustee. The last sentence of General Order 15 is deleted as unnecessary. See Rule 204.

Rule 212. Qualification by Trustee and Receiver

1 *(a) Qualifying Bond or Security.* Except
2 as provided hereinafter, every trustee and
3 every receiver shall, before entering upon
4 the performance of his official duties and
5 within 5 days after his election or appoint-
6 ment, qualify by filing a bond in favor of the
7 United States conditioned on the faithful
8 performance of his official duties or by giv-
9 ing such other security as may be approved
10 by the court.
11 *(b) Blanket Bond.* The court may author-
12 ize a blanket bond in favor of the United
13 States conditioned on the faithful perform-
14 ance of official duties by a trustee or receiver
15 in more than one case or by more than one
16 trustee or receiver.
17 *(c) Bond Excused in Certain Cases.* The

the filing of | (1) by a trustee or receiver

the | 18 court may excuse ~~a trustee or receiver from~~

19 ~~filing~~ a bond or giving other security when | of

20 there appears to be an insufficient amount of

21 property in the estate to justify the require-

he | 22 ment of a bond or security, or when ~~the re-~~ | (2) by a receiver

23 ~~ceiver~~ will not be a custodian of any prop-

24 erty.

25 *(d) Qualification by Filing Acceptance.* A

26 trustee or receiver for whom a blanket bond

27 has been filed pursuant to subdivision (b) or | of this rule

28 who is excused from filing a bond or giving

29 security pursuant to subdivision (c) shall | hereof

30 qualify by filing his acceptance of his elec-

31 tion or appointment in lieu of the bond.

32 *(e) Amount of Bond and Sufficiency of*

33 *Surety.* The court shall determine the

34 amount of the bond and the sufficiency of the

35 surety for each bond filed under this rule.

36 *(f) Filing of Bond; Proceeding on Bond.*

37 Unless otherwise provided by local rule, a

38 bond given under this rule shall be filed with

39 the referee. A proceeding on the bond of a

40 trustee or receiver may be brought by any

41 party in interest in the name of the United

42 States for the use of the person injured by

43 the breach of the condition. No proceeding

44 shall be brought on a trustee's or receiver's

45 bond more than 2 years after his discharge.

46 *(g) Evidence of Qualification.* A certified

47 copy of the order approving the bond or

48 other security given by a trustee or receiver

49 under subdivision (a) or of his acceptance

50 filed under subdivision (d) of this rule shall

51 constitute conclusive evidence of his ~~appoint-~~

52 ~~ment and~~ qualification.

ADVISORY COMMITTEE'S NOTE

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

Subdivisions (b), (c), and (d). Subdivision (b), which is new, gives explicit authority for approval by the court of a single bond to cover (1) a person who qualifies as trustee (or receiver) in a number of cases, and (2) a number of trustees (or receivers) each of whom qualifies in a different case. The cases need not be related in any way. Substantial economies can be effected if a single bond covering a number of different cases can be issued and approved at one time. The interests of economy and expeditious administration can also be served by eliminating pursuant to subdivision (c) the necessity for a bond in no-asset cases and those in which the property in the estate is so insubstantial in amount and value as to make the bond a needless expense. When a blanket bond is filed or the giving of a bond or other security is waived altogether, the trustee or receiver qualifies under subdivision (d) of the rule by filing an acceptance of the office.

Subdivision (e) vests general authority and responsibility in the court for determining the adequacy of the bond and the sufficiency of the sureties thereon in lieu of the detailed provisions in subdivisions b, c, d, e, f, and g of § 50 of the Act that deal with these matters.

Subdivision (f) is derived from § 50h and m of the Act. The sentence requiring the bond generally to be filed with the referee, rather than the clerk of the court as provided in § 50h, is consonant with the provision in Rule 509(a) that after reference all papers shall be filed with the referee. A bond filed under this rule should conform to Official Form No. 19. A proceeding on the bond of a trustee or receiver is governed by the rules in Part VII. See the Note accompanying Rule 701. See also Rule 925.

Subdivision (g) is a revision of § 21e of the Act to prescribe the evidentiary effect of a certified copy of an order approving any security given by a trustee or receiver under this rule or, when a blanket bond has been

authorized, of a certified copy of his acceptance. This rule supplements the Federal Rules of Evidence, which apply in bankruptcy cases. See Rule 917. A certified copy of the order approving the trustee's bond may be recorded in accordance with Rule 602(a) and given the effect of constructive notice of the pendency of the bankruptcy case as provided in § 21g of the Act. The order of approval should conform to Official Form No. 20.

Omitted provisions of § 50 of Act. The requirement of a referee's bond ~~is abolished by Rule 502~~ has been abolished (see Rule 502), and the numerous references to the referee's bond in § 50 of the Act are no longer necessary. The provision for joint and several bonds in § 50j of the Act has not been retained since joint receivers and joint trustees are not authorized in the rules. The bond of a designated depository is dealt with in Rule 512. The provision in § 50k of the Act stating the effect of a failure to file a bond is omitted from the rules as unnecessary.

Rule 213. Limitation on Appointment of Receivers and Trustees

1 No standing receiver or trustee may be
2 appointed. Appointments of receivers and
3 trustees by the court shall be apportioned so
4 that the aggregate compensation of any one
5 appointee shall not be excessive.

Advisory Committee's Note

This rule is an elaboration of General Order 14. Its prohibition on the appointment of "official" and "general" trustees is revised to extend to "standing receivers and trustees." The latter term comprehends both official and general trustees and is a more familiar description of such officers. The policy underlying the general order is as much opposed to standing receivers as to standing trustees.

The rule also reflects the policy of the Act of June 7, 1934, 48 Stat. 923, 11 U.S.C. § 76a (1964), in requiring

an apportionment of appointments of receivers and trustees to keep compensation of such appointees from becoming excessive. The rule does not restrict the election of trustees by creditors under ~~Bankruptcy~~ Rule 209.

Rule 214. Creditors' Committee

1 The creditors entitled to vote for a trustee
2 may, at the first meeting or at any special
3 meeting called for that purpose, elect a com-
4 mittee of 3 or more creditors. The committee
5 may consult with the trustee in connection
6 with the administration of the estate, make
7 recommendations to the trustee respecting
8 the performance of his duties, and submit to
9 the court any question affecting the adminis-
10 tration of the estate.

of creditors

Advisory Committee's Note

This rule is derived from § 44b of the Act. The provision for election of the committee at a special meeting of creditors is new.

Rule 215. Employment of Attorneys and Accountants

1 *(a) Conditions of Employment of Attor-*
2 *neys and Accountants.* No attorney or ac-
3 countant for the trustee or receiver shall be
4 employed except upon order of the court.
5 The order shall be made only upon applica-
6 tion of the trustee or receiver, stating the
7 specific facts showing the necessity for such
8 employment, the name of the attorney or ac-
9 countant, the reasons for his selection, the
10 professional services he is to render, and to

11 the best of the applicant's knowledge all of
12 the attorney's or accountant's connections
13 with the bankrupt, the creditors, or any
14 other party in interest, and their respective
15 attorneys and ~~accounts~~ accountants. If the attorney or
16 accountant represents or holds no interest
17 adverse to the estate in the matters upon
18 which he is to be engaged, and his employ-
19 ment is in the best ~~interests~~ interest of the estate, the
20 court may authorize his employment. Not-
21 withstanding the foregoing sentence, the
22 court may authorize the employment of an
23 attorney or accountant who has been em-
24 ployed by the bankrupt when such employ-
25 ment is in the best interest of the estate. The
26 employment of any attorney or accountant
27 shall be only for the purposes specified in the
28 order, but the court may authorize a general
29 retainer of an attorney when necessity there-
30 for is shown.
31 *(b) Employment of Attorney or Account-*
32 *ant with Adverse Interest.* If without dis-
33 closure any attorney or accountant employed
34 by the trustee or receiver shall represent or
35 hold, or shall have represented or held, any
36 interest adverse to the estate in any matter
37 upon which he is so employed, the court may
38 deny the allowance of any compensation to
39 such attorney or accountant, or the reim-
40 bursement of his expenses, or both, and may
41 also deny any allowance to the trustee or re-
42 ceiver if it shall appear that he failed to
43 make diligent inquiry into the connections of
44 such attorney or accountant.

45 *(c) Employment by a General Creditor.*
46 An attorney or accountant shall not be dis-
47 qualified to act as attorney or accountant for
48 the trustee or the receiver merely because of
49 his employment by a general creditor. in the case.
50 *(d) Employment of Attorney or Account-*
51 *ant on Salary.* A trustee or receiver author-
52 ized to operate the business and manage the
53 property of the bankrupt may, without spe-
54 cific authorization under subdivision (a) of
55 this rule, continue or engage any attorney or
56 accountant as a salaried employee if such
57 employment is necessary in the operation of
58 the business and management of the prop-
59 erty of the bankrupt.
60 *(e) Employment of Trustee or Receiver as*
61 *Attorney or Accountant.* The court may au-
62 thorize the trustee or receiver to act as an
63 attorney or accountant for the estate if such
64 authorization is in the best interest of the es-
65 tate.
66 *(f) Services Rendered by Member or As-* s
67 *sociate of* Firm of *Attorney or Accountant.* If, under s
68 this rule, a law partnership or corporation is
69 employed as an attorney, or an accounting
70 partnership or corporation is employed as an
71 accountant, or if a named attorney or ac-
72 countant is employed on behalf of a profes-
73 sional partnership or corporation, any mem-
74 ber or regular associate of the firm may act
75 for the attorney or accountant so employed,
76 without further order of the court, and his
77 services may be compensated as services of
78 the attorney or accountant in accordance
79 with Rule 219.

ADVISORY COMMITTEE'S NOTE

Subdivisions (a) and (b) of this rule are a revision of General Order 44. Subdivision (c) is an adaptation of § 44c of the Act. Subdivisions (d), (e), and (f) are new. The rule assimilates the employment of accountants and attorneys in cases under the Act. The premise of this change is that the same standards for determining disinterestedness, qualifications, and the need for professional services should be applied with respect to accountants as are now applicable to attorneys.

The rule recognizes that the holding as well as the representation of an interest adverse to the estate may have a disqualifying effect on an attorney or accountant and should therefore be disclosed to the court before his employment is authorized. The sanction of disallowance for nondisclosure of an adverse interest is also extended so as to apply to the situation where an attorney or accountant, after his employment has been duly authorized under this rule, represents or acquires an interest adverse to the estate in a matter on which he is employed.

Subdivision (a). The verification heretofore required by the first sentence of General Order 44 has been deleted in accordance with the policy expressed in Rule 911. The word "application" in the same sentence of the general order is substituted for "petition" in recognition of the statutory definition of petition in § 1(24) to mean a document initiating proceeding under the Act. A new sentence in subdivision (a) authorizes re-employment of an attorney in certain cases, notwithstanding his prior connection with the bankrupt, in order to permit the utilization of special knowledge and experience which may be of substantial benefit to the estate.

Subdivision (b) is an adaptation of the third sentence of General Order 44. The word "estate" has been substituted in lieu of the reference in this sentence of the general order to "the receiver, trustee, creditors or stockholders." The interests of stockholders may not be identical to those of the receiver, trustee, or creditors, but insofar as the interests of the estate may not embrace those of stockholders, the substitution of the less

comprehensive term is not objectionable. The representation or holding of an undisclosed interest in no way adverse to the estate should afford the court no basis for denying compensation to an attorney or accountant because the interest is adverse to the stockholders. Indeed, effective representation of a trustee or receiver by an attorney seems likely to run counter to the interests of the stockholders in a considerable number of cases, and such representation should not be discouraged by these rules.

Subdivision (c), like § 44c of the Act, rests on the premise that the interests of all general creditors of a bankrupt are identical Thus an attorney who has previously represented a general creditor, or is representing him in connection with the bankruptcy of his client's debtor, is not ordinarily subject to any conflict of interest. The term "general creditor" is used in the same sense here as in § 44c, *viz.,* a creditor without security and without any priority under § 64 of the Act. Analysis of H.R. 12889, 74th Cong., 2d Sess. 158 (1936). Of course, if there is a question as to the validity or the amount of a general creditor's claim, his attorney would be subject to a disqualifying interest. See 2 Collier 1681 n.5 (1962).

Subdivision (d) is added to negative any inference that this rule is intended to require a specific court authorization of the employment of salaried attorneys or accountants when such employment is usual and necessary in the operation of the bankrupt's business when continued by order of the court. A general authorization to conduct a bankrupt's business implies the grant of authority to hire employees reasonably required for such operation, without specific prior approval of each employment by the court. 3A Collier ¶ 62.15 (1961); 6A *id.* ¶ 8.14[1] (1965); 8 *id.* ¶ 6.35 (1963). A court may nevertheless particularize in an order approving the continued operation of a bankrupt's business the extent of authority granted with respect to the employment of personnel.

Subdivision (e) recognizes the propriety of an order of the court authorizing a trustee or receiver to act as his own attorney or accountant but requires the court to find that such an authorization is in the best interest of the

estate. In conjunction with Rule 219 subdivision (e) establishes the necessity of an order of authorization as a condition of any allowance of compensation for professional services rendered as an attorney or accountant for the estate. See *In re Mabson Lbr. Co.*, 394 F.2d 23, 24 n.3 (2d Cir. 1968). It is not intended that such an authorization should be required or compensation allowed for the performance of the ordinary duties of a trustee, including the collection of accounts, preparation of required records and reports, protection of the estate against unfounded claims, etc.

Subdivision (f), together with the definitions of "attorney" and "accountant" in Rule 901, recognizes the propriety of the employment of a professional corporation or partnership as an attorney or accountant under this rule. The subdivision clarifies the effect of an order authorizing the employment of a firm, or of an attorney or accountant on behalf of a firm, so that members or regular associates of the firm may perform compensable services for the attorney or accountant employed by the court without the necessity of a particular court order identifying each such member or regular associate authorized to render such services.

Rule 216. Authorization of Trustee To Conduct Business of Bankrupt

1 The court may authorize the trustee to
2 conduct the business [and manage the property] of the bankrupt for
3 such time [and on such conditions] as may be in the best ~~interests~~ [interest] of
4 the estate and consistent with orderly liqui-
5 dation thereof.

Advisory Committee's Note

This rule, together with Rules 201(a)(2) and 202, permits continuation of the bankrupt's business on authorization of the court as heretofore provided in § 2a(5) of the Act. The business of a bankrupt should not be con-

tinued indefinitely nor for a term longer than is consistent with the bankruptcy objective of orderly liquidation of the estate. See *In re Airlines Transport Carriers, Inc.*, 129 F.Supp. 679, 683 (S.D.Cal. 1955); *In re Lisk Mfg. Co.*, 167 Fed. 411, 413–14 (W.D.N.Y. 1908); 1 Collier ¶ 2.34 (1968).

Rule 217. Ancillary Proceedings

1 *(a) Ancillary Receivership Abolished.* No
2 ancillary receiver may be appointed in a
3 bankruptcy case. Unless it is inconsistent
4 with the order appointing him, a receiver ap-
5 pointed in a bankruptcy case has capacity to
6 represent the bankrupt estate in any court.
7 *(b) Reference of Ancillary Proceeding.*
8 Any complaint, motion, or application for
9 ancillary relief in a court of bankruptcy
10 shall be referred by the clerk of the court in
11 which it is filed to a referee of that court.

Advisory Committee's Note

Subdivision (a). In abolishing ancillary receiverships in bankruptcy, this rule adopts the practice for straight bankruptcy that has already been established for debtor relief proceedings. See MacLachlan, *Bankruptcy* 80 (1956). In recognizing the capacity of a receiver in bankruptcy to act outside the district of his appointment, it also conforms to the usual rule respecting the capacity of receivers appointed in United States courts. See Rule 17(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 751, recognizing the capacity of any nonbankruptcy receiver appointed by a United States district court "to sue in any district without ancillary appointment." *Cf.* Rule 717. The second sentence of subdivision (a) is not intended, however, to declare a rule binding on the courts of a foreign jurisdiction.

Subdivision (b). The availability of nationwide service

of process under Rule 704(f)(1) should substantially reduce the need for ancillary proceedings, and elimination of the necessity for the appointment of an ancillary receiver should simplify significantly the procedure when ancillary proceedings are necessary. The rule will supersede § 69c of the Act as well as General Order 51. *Cf.* § 2a(20) of the Act. The provision for automatic reference of any complaint, motion, or application for ancillary relief consists with provisions for automatic reference of cases and adversary proceedings transferred pursuant to Rules 116(d) and 782 respectively. *Cf.* Rule 515.

Subdivision (b) has no application to complaints commencing plenary actions in the United States district courts by or against trustees and receivers. See 1 Collier ¶ 2.74 (1968).

Rule 218. Duty of Trustee to Keep Records, Make Reports, and Furnish Information

1 A trustee shall: (1) within a reasonable
2 time after entering upon his duties file a
3 complete inventory of the property of the
4 bankrupt unless such an inventory has al-
5 ready been filed or unless the court other-
6 wise directs; (2) keep a record of receipts
7 and the disposition of money and property
8 received; (3) furnish information concerning
9 the estate and its administration when rea-
10 sonably requested by a party in interest, ex-
11 cept as otherwise directed by the court; (4)
12 make a written report to the court of the fi-
13 nancial condition of the estate and the prog-
14 ress of its administration within a month
15 after his qualification and every 3 months
16 thereafter, unless the court by local rule or
17 order otherwise directs; and (5) file a final
18 report and account containing a detailed

19 statement of receipts and disbursements. If
20 a final meeting of creditors is ordered, the
21 final report and account of the trustee shall
22 be filed at least 15 days before the meeting.

ADVISORY COMMITTEE'S NOTE

This rule combines provisions from General Order 17 and §§ 47a and 49 of the Act into a catalogue of duties of a trustee in respect to record-keeping, making reports, and providing information concerning the estate he is administering. Clause (1) of the rule is substantially a restatement of General Order 17(1) but gives the trustee a reasonable time for filing a complete inventory of the bankrupt's property. Clauses (2), (3), (4), and (5) are derived from clauses (5), (10), (12), and (13) of § 47a of the Act. The duty to report to the court the exemptions to which the bankrupt is entitled, heretofore prescribed by § 47a(6) of the Act and General Order 17(2), is set forth in Rule 403(b).

The trustee's duty to furnish information is limited to that of responding to reasonable requests and is subject to the court's authority to enter protective orders under Rules 726 and 918. Thus a party to litigation against the trustee may be required to make the kind of showing specified in Rule 26(b)(3) of the Federal Rules of Civil Procedure in order to obtain discovery of documents and tangible things prepared by or for the trustee in anticipation of litigation or for trial. The trustee may also be entitled to one of the kinds of protective orders set out in Rule 26(b)(4) of the Federal Rules of Civil Procedure or in Rule 918 of these rules. Criminal sanctions are imposed by 18 U.S.C. § 154 for a knowing refusal by a trustee or other bankruptcy officer "to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so." See 2 Collier ¶ 29.13 (1961). The trustee's duty of providing information under this rule may be adequately performed when he makes available to a party in inter-

est the books and records containing the information sought. *In re Berneddy's, Inc.*, 108 F.Supp. 183, 185 (D.Mass. 1952), aff'd sub nom. *Massachusetts v. Widett*, 204 F.2d 512 (1st Cir. 1953). The provision in § 49 of the Act for accessibility of the accounts and papers of the trustee and receiver is covered by clause (3) of this rule and by Rule 201(i), which requires receivers generally to perform the duties prescribed by Rule 218. See also Rules 508 and 510.

The rule follows the statute in requiring the first financial report to be made by the trustee within the first month after his qualification but prescribes quarterly rather than bimonthly reports thereafter in the interest of reducing requests for extension and paperwork not necessary in the typical case. The rule recognizes that the court may, by a local rule generally applicable or an order entered in a particular case, require more frequent reports. The last sentence of the rule is correlated with Rule 204(c), which requires a final meeting to be held only when the net proceeds realized exceed a prescribed amount. Official Form No. 30 is prescribed for use by the trustee in a no-asset case.

The provisions in General Order 17(3) for a procedure to be followed when a trustee fails to perform his duty to file a report or statement and in General Order 17(4) for reference of all accounts of trustees and receivers to the referee for audit are eliminated as unnecessary. See Rule 221(a) in regard to proceedings to remove a trustee and Rule 514 in regard to passing on the final account.

Rule 219. Compensation ~~of Trustees, Receivers, Marshals, Attorneys, and Accountants~~ for Services Rendered and Reimbursement of Expenses Incurred in a Bankruptcy Case

1 (a) *Application for Compensation* and Reimbursement. A
2 person ~~trustee, receiver, marshal, attorney, or ac-~~
3 ~~countant~~ seeking compensation for services
4 ~~rendered by him in a bankruptcy case~~ , or reimbursement of necessary expenses, from the estate shall
5 file with the court ~~his~~ an application setting
6 forth a detailed statement of (1) ~~the nature, extent, and value of~~ the
7 services rendered and expenses incurred, and (2) ~~and~~ the ~~amount~~ amounts requested.

8 The application shall include a statement by
9 the applicant as to what payments have
10 theretofore been made or promised to him for
11 services rendered or to be rendered in any
12 capacity whatsoever in connection with the
13 case, the source of the compensation so paid
14 or promised, whether any compensation he
15 has previously received has been shared and
16 whether an agreement or understanding ex-
17 ists between the applicant and any other
18 person for the sharing of compensation re-
19 ceived or to be received for services rendered
20 in or in connection with the case, and the
21 particulars of any such sharing of compen-
22 sation or agreement or understanding there-
23 for, except that the details of any agreement
24 by the applicant for the sharing of his com-
25 pensation as a member [or regular associate] of a firm of lawyers
26 or accountants shall not be required. The re-
27 quirements of this subdivision shall apply to
28 an application for compensation for services
29 rendered by an attorney or accountant even
30 though the application is filed by a creditor
31 or other person on his behalf.
32 *(b) Disclosure of ~~Arrangements Regard-~~*
33 *~~ing~~ Compensation [Paid or Promised to] ~~by~~ Attorney for Bank-*
34 *rupt.* Every attorney for a bankrupt,
35 whether or not he applies for compensation,
36 shall file with the court on or before the first
37 date set for the first meeting of creditors, or
38 at such other time as the court may direct, a
39 statement setting forth the compensation
40 paid or promised him for the services ren-
41 dered or to be rendered in connection with
42 the case, the source of the compensation so

43 paid or promised, and whether the attorney
44 has shared or agreed to share such compen-
45 sation with any other person. The statement
46 shall include the particulars of any such
47 sharing or agreement to share by the attor-
48 ney, but the details of any agreement for the
49 sharing of his compensation with a member or regular associate
50 of his law firm shall not be required.
51 *(c) Factors in Allowing Compensation.*
52 *(1) General.* The compensation ~~allowed~~ allowable by
53 the court to a trustee, receiver, marshal, at-
54 torney, accountant, or other person entitled
55 ~~thereto~~ to compensation for services rendered in the adminis-
56 tration of a bankrupt estate shall be reason-
57 able, and in making allowances the court
58 shall give due consideration to the nature,
59 extent, and value of the services rendered as
60 well as to the conservation of the estate and
61 the interests of creditors.
62 *(2) Trustee, Receiver, or Marshal.* The
63 compensation allowed by the Act to a trustee,
64 receiver, or marshal shall be in full com-
65 pensation for the services performed by him
66 as required by the Act and by these rules,
67 but shall not be deemed to cover expenses
68 necessarily incurred in the performance of
69 his duties and allowed upon the settlement of
70 his accounts. Additional compensation may
71 be allowed for legal or other services not re-
72 quired of him by the Act or by these rules,
73 but only if such services were authorized by
74 order of the court before they were rendered.
75 *(3) Attorney or Accountant.* Compensa-
76 tion may be allowed an attorney or an ac-
77 countant only for professional services.

78 *(d) Restriction on Sharing of Compensa-*
79 *tion.* Except as herein provided, a [person] ~~trustee,~~
80 ~~receiver, marshal, attorney, or accountant~~
81 rendering services in a bankruptcy case or
82 in connection with such a case shall not in
83 any form or guise share or agree to share
84 the compensation paid or allowed him [from the estate] for
85 such services with any [other] person, nor shall he
86 share or agree to share in the compensation
87 of any other person rendering services in a
88 case under the Act or in connection with such
89 a case. This rule does not prohibit an attorney
90 or accountant from sharing his compensa-
91 tion as trustee, receiver, attorney, or ac-
92 countant with a member [or regular associate] of his firm, or from
93 sharing in the compensation received by his
94 firm or by any other member [or regular associate] thereof, and
95 does not prohibit an attorney for a bankrupt
96 or for a petitioning creditor from sharing
97 his compensation for services rendered with
98 any other attorney contributing thereto. If a
99 person violates this subdivision, the court
100 may deny him compensation, may hold in-
101 valid any transaction subject to examination
102 under Rule 220 to which he is a party, or
103 may enter such other order as may be appro-
104 priate.

Advisory Committee's Note

Authority for the allowance and payment of compensation [and reimbursement of expenses] to officers, except referees, and employees out of an estate undergoing administration in bankruptcy is found in §§ 48a, 52b, [62a(1),] and 64a(1) of the Act. This rule prescribes the procedure for making application for compensation [and reimbursement of necessary expenses] of trustees, receivers, marshals, attorneys, and

accountants and provides guides for the court in making allowances. The rule is derived from subdivisions c and d of § 62 and the first paragraph of § 72 of the Act, the last sentence of 11 U.S.C. § 76a, and General Orders 35(3) and 42. All of the provisions cited in the preceding sentence are superseded by these rules.

The premise for including in these rules provisions governing the allowance of compensation to officers, attorneys, and accountants is that it is peculiarly a judicial responsibility to supervise the administration of estates and in particular to assure that allowances for compensation to those rendering services in connection therewith are fair but not excessive. 3A Collier ¶ 62.05[3] (1961). The costs of bankruptcy administration have been a matter of continuing concern in the history of American bankruptcy law. *Id.* ¶ 62.02. This concern has led to an increasing recognition of the necessity for close judicial control of these costs. The General Orders have contained numerous provisions regulating compensation of officers, attorneys, and accountants in bankruptcy 43, 44, and 45. See also 3A Collier, *supra* ¶ 62.02[4].

cases. See particularly General Orders 35(1)-(3), 40, 42,

Applications for compensation. This rule assimilates the practice in respect to applications for and allowance of compensation to accountants to that which has developed under § 62 of the Act in respect to applications for and allowance of compensation to attorneys. This treatment is a corollary of the conformation by Rule 215 of the procedure for employing accountants to that prescribed for employing attorneys. All allowances of compensation under this rule are exercises of the court's discretion, but inasmuch as allowances to attorneys and accountants are not subject to the limitations imposed by § 48 of the Act on the compensation of receivers, marshals, and trustees, there is special need for detail in applications for compensation of attorneys and accountants. Such applications should indicate all relevant information having a bearing on the compensation to be allowed. See *Report of the Proceedings of the Judicial*

Conference of the United States, March 30–31, 1967, p. 31. ~~In respect to an attorney's compensation, it has been said that~~

> ~~"The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results obtained and the 'economic spirit' of the Bankruptcy Act to curtail unnecessary expenses." *In re Paramount-Merrick, Inc.*, 252 F.2d 482, 485 (2d Cir. 1958).~~

The disclosure requirements of § 62d of the Act have been extended by subdivision (a) to cover all payments for services in connection with the case, whether or not made pursuant to previous allowances, and the source of such payments. Requiring such disclosures will strengthen the court's hand in dealing with the evils of fee-splitting and in discovering arrangements and relationships which may exert an adverse influence on administration of the estate. Consistently with the recognition in subdivision (d) of the propriety of the sharing of professional compensation by the members [and regular associates] of a firm, an applicant for an allowance of compensation is excused from disclosing the details of the partnership agreement or other arrangement for the distribution of compensation among members [and regular associates] of a firm of lawyers or accountants. The provisions of the rule regarding the sharing of professional compensation continue the policy of the Act as expressed in the proviso to § 62c but extend it ~~not merely to law partners but~~ to [regular associates as well as] ~~associate~~ members of a law partnership, to ~~associate~~ members and ~~partners~~ [regular associates] of an accounting partnership, and to the professional members [and regular associates] of an incorporated firm of attorneys or accountants. The last sentence of subdivision (a) makes it clear that the disclosures required to be made by an attorney or an accountant when he applies for an allowance of compensation are equally necessary when local practice permits a creditor or any other person to apply ~~on behalf of the attorney or accountant~~ for ~~compensation~~ [reimbursement of expenses incurred] for professional services. See 3A Collier ¶ 62.29[1] (1961).

Disclosure by bankrupt's attorney. Subdivision (b) of this rule is new and facilitates examination pursuant to

Rule 220 of payments and arrangements for payment of his attorney by the bankrupt. Rule 220(a) authorizes the court to examine transactions whereby the debtor directly or indirectly pays money or transfers property to his attorney for services, and the disclosure required by subdivision (b) covers divisions of compensation and agreements therefor, however received and whatever its source, so long as the compensation is for services rendered in contemplation of or in connection with the bankruptcy case. Such disclosure is a safeguard against roundabout depletions of the estate and impositions on the bankrupt contrary to the purpose underlying Rule 220.

Factors in allowing compensation. The measure of compensation to receivers, marshals, and trustees in bankruptcy is governed by subdivisions a–c of § 48 of the Act and by subdivisions (c) and (d) of this rule. The requirement of § 48d of the Act that the court apportion compensation of officers under certain circumstances is omitted from the rules as unnecessary. The abolition of ancillary receiverships by Rule 217(a) and of multiple trustees by Rule 209 eliminates many of the occasions for apportionment. When different persons serve as receiver and trustee or when more than one person serve as successive receivers or successive trustees, the guides embodied in paragraph (1) of subdivision (c) govern. The number of officers required to complete the administration of an estate should not be a factor augmenting its costs.

INSERT ATTACHED
BEGIN NEW PARAGRAPH

Paragraphs (2) and (3) of subdivision (c) of this rule require the court when making allowances to distinguish professional legal and accounting services from other kinds of services, including those required of a trustee, receiver, or marshal. A trustee or receiver may be authorized pursuant to Rule 215(d) to perform professional services for the estate when such an authorization is in the best interest of the estate. The words, "as required by the Act," have been inserted in the first sentence of paragraph (2) of subdivision (c) of this rule (as they were inserted in § 72 of the Act) as a qualification of the

NO PARAGRAPH

In respect to an attorney's compensation, it has been said that

"The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results obtained and the 'economic spirit' of the Bankruptcy Act to curtail unnecessary expenses." In re Paramount Merrick, Inc., 252 F.2d 482, 485 (2d Cir. 1958).

word "services" to make it clear that the limitations on compensation allowable to officers do not prevent the allowance of compensation for services rendered beyond those required of them by the Act and by the rules. See *Matter of Balsa Wood Co., Inc.*, 46 Am.B.R. (n.s.) 661 (S.D.N.Y. 1940). The last sentence of paragraph (2) makes clear the impropriety of any additional allowance for such services, however, unless they were authorized by the court in advance of their performance. Rule 215(4) permits such an authorization only if it is in the best interest of the estate.

Paragraph (3) of subdivision (c) is an extension of the rule of General Order 42, which has been viewed as an implementation of the first sentence of § 72 of the Act. See *In re Mabson Lumber Co.*, 394 F.2d 23, 24 (2d Cir. 1968); 3A Collier ¶ 62.09[2] (1961). The fees authorized by § 64a(1) of the Act to be paid to attorneys for bankrupts and for petitioning creditors as an administrative expense are likewise limited to compensation for "the professional services actually rendered." See *In re Lane Lumber Co.*, 30 Am.B.R. 749, 753–55 (D. Idaho 1913), aff'd, 213 Fed. 587, 590 (9th Cir. 1940); *In re Sage*, 225 Fed. 397, 398 (S.D. Iowa 1915); *cf. In re Charles Ray Glass, Inc.*, 47 F.Supp. 428, 430 (S.D. Cal. 1942) (requiring refund by bankrupt's attorney under § 60d of the Act).

Sharing of Compensation. The sharing of compensation allowed to an attorney with a forwarding attorney, heretofore permitted under § 62c of the Act, is no longer authorized unless the attorney sharing in the compensation has contributed to the services for which the compensation is allowed. This change in the law harmonizes the practice in respect to the sharing of fees with Canon 34 of the Canons of Professional Ethics and Disciplinary Rule 2–107 of the Code of Professional Responsibility adopted by the American Bar Association. See Drinker, *Legal Ethics* 186–88 (1953); Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available,"* 48 Tex.L.Rev. 285, 297 (1970). The rule prohibits division of compensation

paid or agreed to be paid before bankruptcy as well as afterward. As Chief Justice Taft pointed out in *Weil v. Neary*, 278 U.S. 160, 173 (1929), arrangements for division of compensation are contrary to public policy not only because of "actual evil results but their tendency to evil in other cases."

> "Any division of fees or other compensation represents, above all, an incentive for the applicant to claim a compensation high enough to make his own share in it a worthwhile remuneration. It thereby tends toward extravagance of expenditure. Another evil is that it subjects the officer or attorney entitled to compensation to outside influences, over which the court has no control and which may affect the administration by depriving the court's functionaries of their requisite independence of judgment. Finally, it results in a clear transfer of judicial power over expenditure and allowances from the court to persons who, at best, have a distinctly lesser degree of public responsibilities." 3A Collier 1637 (1961).

The second sentence of subdivision (d) resolves a doubt existing under § 62c of the Act as to whether an attorney or accountant may share compensation allowed him as trustee or receiver with a member of a professional firm to which he belongs. See *In re Ira Haupt & Co.*, 361 F.2d 164, 167–68 (2d Cir. 1966), and *In re Street Railways Advertising Co.*, 54 F.Supp. 577, 578 (S.D.N.Y. 1940); compare 3A Collier, *supra* 1639.

or regular associate

Neither denial of compensation nor invalidation of an arrangement for compensation pursuant to subdivision (d) of this rule is an exclusive sanction for violation of the subdivision. A person may be removed from office or dismissed from his employment for such a violation. 3A Collier, *supra* 1639 n. 8. The provision in § 48e of the Act authorizing all compensation to be withheld from any receiver, trustee, attorney, or other person ousted from his position because of unlawful sharing of compensation is omitted from the rule because it only partially covers the grounds for withholding compensation and is unnecessary. See 2 Collier ¶ 48.11 (1962); 3A *id.* ¶ 62.29[1] (1961). General Order 43, authorizing denial of any allowance to an attorney for petitioning creditors, is omitted from the rules for like reasons. See 3A Collier, *supra* ¶ 62.29[4].

Rule 220. Examination of Bankrupt's Transactions With His Attorney

1 *(a) Payment or Transfer to Attorney in*
2 *Contemplation of Bankruptcy.* [On] ~~Upon~~ mo-
3 tion by [any party in interest] ~~the trustee or any creditor~~ or ~~upon~~ [on]
4 the court's own initiative, the court may ex-
5 amine any payment of money or any trans-
6 fer of property by the bankrupt, made di-
7 rectly or indirectly and in contemplation of
8 the filing of a petition by or against him, to
9 an attorney for services rendered or to be
10 rendered.
11 *(b) Payment or Transfer to Attorney, or*
12 *Agreement Therefor, After Bankruptcy.*
13 [On] ~~Upon~~ motion by the bankrupt or ~~upon~~ [on] the
14 court's own initiative, the court may exam-
15 ine any payment of money or any transfer
16 of property [,] ~~by the bankrupt,~~ or any agree-
17 ment therefor, by the bankrupt to an attor-
18 ney after bankruptcy, whether the payment
19 or transfer is made or is to be made directly
20 or indirectly, if the payment, transfer, or
21 agreement therefor is for services in any
22 way related to the bankruptcy.
23 *(c) Invalidation of Unreasonable Pay-*
24 *ment, Transfer, or Obligation.* Any pay-
25 ment, transfer, or obligation examined
26 under subdivision (a) or (b) of this rule shall
27 be held valid only to the extent of a reason-
28 able amount as determined by the court. The
29 amount of any excess found to have been
30 paid or transferred under subdivision (a) or
31 (b) may be recovered for the benefit of the
32 estate or the bankrupt, as their interests

33 may appear, and any obligation found to be
34 excessive may be cancelled to the extent of
35 the excess.
~~36 (d) *Recovery of Excessive Payment or*~~
~~37 *Transfer*. Any proceeding commenced by the~~
~~38 trustee or other party in interest to recover~~
~~39 an excessive payment or transfer of prop-~~
~~40 erty or avoid an obligation made pursuant to~~
~~41 a transaction examined under this rule is~~
~~42 governed by the rules in Part VII.~~

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 60d of the Act. The rationale for the exercise of the rule-making power in this area is stated in the second paragraph of the Note to Rule 219. Information required to be disclosed by the attorney for a bankrupt by Rule 219(b) and by the bankrupt in his Statement of Affairs (Item #15 of Form No. 7, Item #20 of Form No. 8) will assist the court in determining whether to proceed under this rule. Section 60d was enacted in recognition of "the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure." *In re Wood & Henderson*, 210 U.S. 246, 253 (1908). This rule, like § 60d of the Act, is premised on the need for and appropriateness of judicial scrutiny of arrangements between a bankrupt and his attorney to protect the creditors of the estate and the bankrupt against overreaching by an officer of the court who is in a peculiarly advantageous position to impose upon both the creditors and his client. 3 Collier 1141, 1153 (1964); MacLachlan, *Bankruptcy* 318 (1956).

Rule 914 applies to any contested matter arising under this rule.

Rule 221. Removal of Trustee or Receiver; Substitution of Successor

1 (a) *Removal for Cause*. On application of
2 any party in interest or on the court's own

3 initiative and after hearing on notice, the
4 court may remove a trustee or receiver for
5 cause. [and appoint a successor.]
6 (b) *Substitution of Successor*. When a
7 trustee or receiver dies, resigns, is removed,
8 or otherwise ceases to hold office during the
9 pendency of a bankruptcy case, his successor
10 is automatically substituted as a party in
11 any pending action, proceeding, or matter
12 without abatement.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is derived from § 2a(17) of the Act. It may be appropriate in a proceeding under this subdivision, especially one initiated by the court, to appoint a receiver under Rule 201(a) to represent the estate for the limited purposes of the proceeding.

Subdivision (b) is an elaboration of § 46 of the Act. *Cf.* § 1(22) of the Act. The references in § 46 to a "joint receiver" and "joint trustee" are omitted from this rule by virtue of the fact that no more than one trustee at a time is authorized to be elected or appointed under Rule 209. Rule 725, which governs the substitution of parties in adversary proceedings, is correlated with this rule.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS

Rule 301. Proof of Claim

1 *(a) Form and Content; Who May Exe-*
2 *cute.* A proof of claim shall consist of a
3 statement in writing setting forth a credi-
4 tor's claim and, except as provided in Rules
5 303 and 304, shall be executed by the credi-
6 tor or by his ~~duly~~ authorized agent. A proof
7 of claim for wages, salary, or commissions
8 shall conform substantially to Official Form
9 No. 16 or No. 16A; any other proof of claim shall con-
10 form substantially to Official Form No. 15.
11 *(b) Evidentiary Effect.* A proof of claim
12 executed and filed in accordance with these
13 rules shall constitute prima facie evidence of
14 the validity and amount of the claim.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of § 57a of the Act. The Federal Rules of Evidence, made applicable to bankruptcy cases by Rule 917, do not prescribe the evidentiary effect to be accorded particular documents. As indicated in the Note accompanying Rule 917, subdivision (b) of this rule supplements the Federal Rules of Evidence as they apply to bankruptcy cases.

Rule 302. Filing Proof of Claim

1 *(a) Manner of Filing.* In order for his
2 claim to be allowed, every creditor, including
3 the United States, any state, or any subdivi-

4 sion thereof, must file a proof of claim in ac-
5 cordance with this rule, except as provided
6 in Rules 303 and 304.
7 *(b) Place of Filing.* A proof of claim shall
8 be filed in the place prescribed by Rule 509.
9 *(c) Claim Founded upon a Writing.* When
10 a claim is founded upon a writing, the origi-
11 nal or a duplicate shall be filed with the
12 proof of claim unless the writing has been
13 lost or destroyed. If lost or destroyed, a
14 statement of the circumstances of the loss or
15 destruction shall be filed with the claim.
16 *(d) Transferred Claim.*
17 *(1) Unconditional Transfer Before Proof*
18 *Filed.* If a claim has been unconditionally
19 transferred before proof of the claim has
20 been filed, the proof of such claim may be
21 filed only by the transferee. If such claim
22 has been transferred after the filing of the
23 petition, it shall be supported by (A) a state-
24 ment of the transferor acknowledging the
25 transfer and stating the consideration there-
26 for or (B) a statement of the transferee why
27 it is impossible to obtain such a statement
28 from the transferor.
29 *(2) Unconditional Transfer After Proof*
30 *Filed.* If a claim has been unconditionally
31 transferred after proof thereof has been
32 filed, proof of the terms of the transfer shall
33 be filed, and the court shall immediately no-
34 tify the original claimant by mail of the
35 filing of such proof of transfer and that
36 objection thereto, if any, must be made
37 within 10 days of the mailing of the notice
38 or within such further time as the court may

, or an interest in property of the bankrupt securing the claim,

If a security interest in property of the bankrupt is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected.

39 allow. If the court finds, after hearing if
40 necessary, that the claim has been uncondi-
41 tionally transferred, it shall make an order
42 substituting the transferee for the original
43 claimant. If it does not so find, the court
44 shall make such order as may be appropri-
45 ate.
46 *(3) Transfer of Claim for Security Before*
47 *Proof Filed.* If a claim has been transferred
48 for security before proof of the claim has
49 been filed, the transferor or transferee or
50 both may file a proof of claim for the full
51 amount. The proof shall be supported by a
52 statement setting forth the terms of the
53 transfer and, if the claim was so transferred
54 after the filing of the petition, by (A) a
55 statement of the transferor acknowledging
56 the transfer and stating the consideration
57 therefor, or (B) a statement of the trans-
58 feree why it is impossible to obtain such a
59 statement from the transferor. If either the
60 transferor or the transferee files a proof of
61 claim, the court shall immediately notify the
62 other by mail that he may join in the claim
63 so filed. If both transferor and transferee
64 file proofs of the same claim, the proofs shall
65 be consolidated. After hearing if necessary,
66 the court shall make such orders respecting
67 allowance and voting of the claim, payment
68 of dividends thereon, and participation in
69 the administration of the estate as may be
70 appropriate.
71 *(4) Transfer of Claim for Security After*
72 *Proof Filed.* If a claim has been transferred
73 for security after proof thereof has been

74 filed, proof of the terms of the transfer shall
75 be filed, and the court shall immediately no-
76 tify the original claimant by mail of the
77 filing of such proof of transfer and that
78 objection thereto, if any, must be made
79 within 10 days of the mailing of the notice
80 or within such further time as the court may
81 allow. After hearing if necessary, the court
82 shall make such orders respecting allowance
83 and voting of the claim, payment of divi-
84 dends thereon, and participation in the ad-
85 ministration of the estate as may be appro-
86 priate.
87 *(e) Time for Filing.* A claim must be filed
88 within 6 months after the first date set for
89 the first meeting of creditors, except as fol-
90 lows:
On 91 (1) ~~Upon~~ application before the expira-
92 tion of such period and for cause shown, the
93 court may grant a reasonable, fixed exten-
94 sion of time for the filing of a claim by the
95 United States, a state, or a subdivision
96 thereof.
97 (2) In the interest of justice the court
98 may grant an infant or incompetent person
99 without a guardian up to an additional 6
100 months for filing a claim.
101 (3) A claim which arises in favor of a
102 person or becomes allowable because of a
103 judgment for the recovery of money or prop-
104 erty from such person or because of a judg-
105 ment denying or avoiding a person's ~~rights~~ interest
106 in property may be filed within 30 days
107 after such judgment becomes final, but if the
108 judgment imposes a liability which is not

109 satisfied, or a duty which is not performed,
110 within such period or such further time as
111 the court may permit, the claim shall not be
112 allowed.
113 (4) If notice of no dividend was given to
114 creditors pursuant to Rule 203(b), and sub-
115 sequently the payment of a dividend appears
116 possible, the court shall notify the creditors
117 of that fact and shall grant them a reasona-
118 ble, fixed time for filing their claims of not
119 less than 60 days after the mailing of the no-
120 tice or 6 months after the first date set for
121 the first meeting of creditors, whichever is
122 the later.
123 (5) If all claims ~~duly~~ allowed have been
124 paid in full, the court may grant a reasona-
125 ble, fixed extension of time for the filing of
126 claims not filed within the time hereinabove
127 prescribed against any remaining surplus.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is substantially a restatement of the general requirement that claims be proved and filed as set out in the first sentence of § 57n of the Act. The exceptions refer to a new rule authorizing certain claims to be filed by the bankrupt and to a revised provision for the filing of a claim by a contingent creditor of the bankrupt.

Subdivision (b) and Rule 509~~(a)~~, to which the subdivision refers, are adapted from § 57c of the Act.

The first two sentences of subdivision (c) are *Subdivision (c)* ~~is~~ derived from § 57b of the Act and the fifth sentence of General Order 21(1), but add a requirement for the filing of any written security agreement and provide that the filing of a duplicate of a writing underlying a claim authenticates the claim with the same effect as the filing of the original writing. *Cf.* Rules 1001(4) and 1003 of the ~~proposed~~ Federal Rules of Evidence. The statutory requirement of an oath is dispensed with in accordance with the

policy of the rules to simplify procedures and reduce costs. *Cf.* Rule 911(b) and Rule 11 of the Federal Rules of Civil Procedure. The provision of § 57b of the Act allowing withdrawal of an instrument on permission of the court is deleted as unnecessary in view of the authorization given by the rule to the filing of a duplicate in lieu of the original.

The last sentence of subdivision (c) is new and, with the requirement in the first sentence for the filing of any written security agreement, is designed to facilitate the determination whether the claim is secured and properly perfected so as to be valid against the trustee. "Satisfactory evidence" of perfection, which is to accompany the proof of claim, would include a duplicate of an instrument filed or recorded, a duplicate of a certificate of title when a security interest is perfected by notation on such a certificate, a statement that pledged property has been in the possession of the secured party since a specified date, or a statement of the reasons why no action was necessary for perfection. A secured creditor is not required to file a proof of claim under this rule if he is not seeking the allowance of a claim for a deficiency. See Rule 306(d).

Subdivision (d) is an elaboration of General Order 21(3). The rule recognizes the differences between an unconditional transfer of a claim and a transfer for the purpose of security and prescribes a procedure for dealing with the rights of the transferor and transferee when the transfer is for security. The rule clarifies the procedure to be followed when a transfer precedes the filing of the petition as well as that required when the transfer occurs afterward. When a claim is assigned after bankruptcy but before a proof of the claim is filed, General Order 21(3) has required the proof to be accompanied by an affidavit of the assignor who owned the claim at the date of bankruptcy. The affidavit duplicates in considerable part the information required to be included in the proof of claim. The interests of sound administration are adequately served by requiring the post-bankruptcy transferee to file with his proof of claim a statement of the transferor acknowledging the transfer and the consideration for the transfer. Such a disclosure will assist the court in dealing with evils that may arise out of post-bankruptcy traffic in claims against a bankrupt estate. *Monroe v. Scofield*, 135 F.2d 725 (10th Cir. 1943); *In re Philadelphia & Western Ry.*, 64 F.Supp. 738 (E.D.Pa. 1946); *cf. In re Latham Lithographic Corp.*, 107 F.2d 749 (2d Cir. 1939). Both paragraphs (1) and (3) of this subdivision, which deal with a transfer before the filing of a proof of claim, recognize that it may be impossible to obtain the required statement from the transferor, but in that event the reason for the impossibility must accompany the proof of claim filed by the transferee.

Paragraphs (3) and (4), which are new, clarify the doubtful status of a claim transferred for the purpose of security. An assignee for security has been recognized as

a rightful claimant in bankruptcy. *Feder v. John Engelhorn & Sons*, 202 F.2d 411 (2d Cir. 1953). An assignor's right to file a claim notwithstanding the assignment was sustained in *In re R & L Engineering Co.*, 182 F.Supp. 317 (S.D.Cal. 1960). Apparently neither the assignor nor the assignee was accorded the right to file a claim assigned for security in *In re Eagles*, 99 Fed. 695 (E.D.N.C. 1900), but the facts of the case are obscure. Facilitation of the filing of proof by both claimants as holders of interests in a single claim is consonant with equitable treatment of the parties and sound bankruptcy administration. See *In re Latham Lithographic Corp.*, 107 F.2d 749 (2d Cir. 1939).

Paragraphs (2) and (4) of subdivision (d) deal with the transfer of a claim after proof thereof has been filed and are an adaptation of the second sentence of General Order 21(3). The proof of the terms of the transfer required to be disclosed to the court will facilitate the court's determination of the appropriate order to be entered on account of the transfer. The requirement of General Order 21(5) that assignments of claims after proof has been filed be "proved or acknowledged" before an officer enumerated in § 20 of the Act has been deleted as needless.

Subdivision (e) is adapted from § 57n of the Act and retains the time limits on the filing of claims established by the statutory provisions. Although the claim of a secured creditor against the bankrupt may have arisen before bankruptcy, a judgment avoiding his security may make his claim allowable for the first time after the time for filing claims generally has expired. In according the creditor in such a case a right to file his claim 30 days after the judgment against him becomes final, clause (3) of the subdivision clarifies the applicability of this exception from the 6-month limitation to a situation entirely within the ambit of the purpose of the third proviso of § 57n, from which the clause is derived. A judgment does not become final for the purpose of starting the 30-day period provided for by clause (3) until the time for appeal has expired or, if an appeal is taken, until the ap-

peal has been disposed of. *In re Tapp*, 61 F.Supp. 591 (W.D.Ky. 1945).

Clause (4) of subdivision (e) is new and is correlated with the provision in Rule 203(b) authorizing notification to creditors of estates from which no dividends are to be anticipated. The new clause permits creditors who have refrained from filing claims after receiving such a notification to be given an additional opportunity to file when subsequent developments during the administration indicate the possibility of a dividend. The notice required by this clause shall be given in the manner provided in Rule 203.

Provision is made in Rule 203(a) and (d) for notifying all creditors of the fixing of a time for filing claims against a surplus under clause (5). This clause, which is derived from the last sentence of § 57n of the Act, does not deal with the distribution of the surplus.

See also Rule 122(9).

Rule 303. Filing of Tax and Wage Claims by Bankrupt

1 If a creditor having a provable claim for
2 taxes or wages fails to file his claim on or be-
3 fore the first date set for the first meeting of
4 creditors, the bankrupt may execute and file
5 a proof of such claim in the name of the
6 creditor. The court shall forthwith mail no-
7 tice of such filing to the creditor and to the
8 trustee.

Such claim shall be treated as a filed claim only for purposes of allowance and distribution.

The creditor may nonetheless file a proof of claim pursuant to Rule 302, which proof when filed shall supersede the proof filed by the bankrupt.

ADVISORY COMMITTEE'S NOTE

It is the policy of the Act that debtors' estates should be administered for the benefit of creditors without respect to the dischargeability of their claims. After their estates have been closed, however, discharged bankrupts may find themselves saddled with liabilities, particularly for taxes, which remain unpaid because of the failure of creditors holding nondischargeable claims to file proofs of claim and receive distributions thereon. The result is

that the bankrupt is deprived of an important benefit of the Act without any fault or omission on his part and without any objective of the Act being served thereby.

This rule authorizes a bankrupt to file a proof of claim for any holder of a provable tax or wage claim. Although tax claims are not expressly included in the list of provable claims set out in § 63a of the Act, the provability of those that are due and owing at the time of bankruptcy has never been doubted. See 3 Collier ¶ 57.30 (1964); 3A *id.* ¶ 63.26 (1961). Not all tax and wage claims are nondischargeable, but it may be particularly difficult to determine whether tax claims survive discharge. See Plumb, *Federal Tax Liens and Priorities in Bankruptcy*, 43 Ref.J. 37, 43–44 (1969); 1 Collier ¶ 17.14 (1967). In order to eliminate the necessity of his resolution of this troublesome issue, the option extended the bankrupt by this rule does not depend on nondischargeability. No serious administrative problems and no unfairness to creditors are foreseen as likely to develop from adoption of this rule. The bankrupt's authority to file is conditioned on the creditor's failure to file his own proof of claim on or before the first date set for the first meeting of creditors, which is the date a claim must ordinarily be filed in order to be voted. Notice to the creditor is provided to enable him to file a proof of claim pursuant to Rule 302, which proof, when filed, would supersede the proof filed by the bankrupt. Notice to the trustee, if one has been elected or appointed, would serve to alert the trustee to the special character of the proof and the possible need for supplementary evidence of the validity and amount of the claim. If the trustee does not qualify until after a proof of claim is filed by the bankrupt pursuant to this rule, he should be notified as soon as practicable thereafter.

This rule is not intended to subject the creditor in whose name a claim is filed thereunder to the jurisdiction of the court of bankruptcy. To the extent the claim is allowed and dividends paid on it, it will be reduced or perhaps paid in full. If the claim is also filed pursuant to Rule 304, only one distribution on it may be made. As required expressly by Rule 304 and by the purpose of this rule, such distribution must diminish the claim.

Rule 301. Claim by ~~Surety for Bankrupt~~ Codebtor

1 A person who is or may be liable with ~~on a debt~~
2 ~~of~~ the bankrupt, or who has secured a credi-

3 tor of the bankrupt, may, if the creditor
4 fails to file his ~~proof of~~ claim ~~at~~ on or before
5 the date set for the first meeting of creditors, ~~execute and~~
6 file a proof of claim pursuant to Rule 302 in the name of the credi-
7 tor, if known, or, if unknown, in his own
8 name. No distribution ~~dividend~~ shall be made ~~paid~~ upon the
9 claim except upon satisfactory proof that the
10 original debt will be diminished by the
11 amount ~~so paid.~~ of the distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 302, and such proof of claim shall supersede the proof of claim filed pursuant to the first sentence of this rule.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 57i of the Act and General Order 21(4). The Act, however, authorizes a filing procedure only by a person who has secured a creditor of the bankrupt by his "individual undertaking." The rule goes further by authorizing the same procedure to be followed when the person has secured a creditor of the estate by pledging collateral or otherwise creating a security interest in his own property, without assuming any personal obligation to the creditor. The rule also makes clear that anyone who may be liable on a debt of the bankrupt, including a surety, guarantor, indorser, or other codebtor, is authorized to file in the name of the creditor of the bankrupt. See 3 Collier ¶ 57.21 (1961); Countryman, *Cases and Materials on Debtor and Creditor* 686–89 (1961). The rule assures a fair opportunity to the surety or other contingent claimant to exercise the right of filing in the name of the creditor (or in his own name if that of the creditor is unknown) by recognizing that he should not be required to wait until the last minute before the expiration of the period allowed for the filing of claims. Since filing his claim ~~at~~ on or before the date set for the first meeting of creditors is ordinarily necessary in order for a creditor to participate in the election of the trustee and the other business conducted at the meeting, conditioning the right to file under this rule on the creditor's nonfiling at or before the meeting is a reasonable accommodation of the interests of the parties and administrative convenience.

Rule 305. Withdrawal of Claim

1 A creditor may withdraw a claim as of
2 right by filing a notice of withdrawal, except
3 as provided in this rule. If, after a creditor
4 has filed a ~~proof of~~ claim, an objection is
5 filed thereto or a complaint is filed against
6 him in an adversary proceeding or the credi-
7 tor participates significantly in the case or
8 receives a dividend, he may not withdraw
9 the claim save ~~up~~on application or motion,
10 with notice to the trustee or receiver, and
11 ~~up~~on order of the court containing such
12 terms and conditions as the court deems
13 proper.

ADVISORY COMMITTEE'S NOTE

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

The filing of a claim does not commence an adversary proceeding under these rules, but the filing of an objection ~~against the claimant~~ to the claim initiates a contest that must be disposed of by the court. This rule recognizes the applicability of the considerations underlying Rule 41(a) of the Federal Rules of Civil Procedure to the withdrawal of a

claim after it has been put in issue by an objection. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides for a bar to dismissal over the objection of a defendant who has pleaded a counterclaim prior to the service of the plaintiff's motion to dismiss. Although the applicability of this provision to the withdrawal of a claim was assumed in *Conway v. Union Bank of Switzerland*, 201 F.2d 603, 608 (2d Cir. 1953), *Kleid v. Ruthbell Coal Co.*, *supra*, *Kelso v. Maclaren*, *supra*, and *In re Hills*, *supra*, this rule vests discretion in the court to grant, deny, or condition the request of a creditor to withdraw, without regard to whether the trustee has filed a merely defensive objection or a complaint seeking an affirmative recovery of money or property from the creditor.

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

drawal of a claim by a creditor on the ground of estoppel or election of remedies. While purely formal or technical participation in a case by a creditor who has filed a claim should not deprive him of a right to withdraw his claim, a creditor who has accepted a dividend or who has voted in the election of a trustee or otherwise participated actively in proceedings in a case should be permitted to withdraw only with the approval of the court on terms deemed appropriate by it after notice to the trustee or receiver. 3 Collier 205–06 (1964).

Rule 306. Objections to and Allowance of Claims for Purpose of Distribution; Valuation of Security

1 *(a) Trustee's Duty to Examine and Object*
2 *to Claims.* The trustee shall examine proofs
3 of claim and object to the allowance of im-
4 proper claims, unless no purpose would be
5 served thereby.
6 *(b) Allowance When No Objection Made.*
7 Subject to the provisions of subdivision (d)
8 of this rule, a claim filed in accordance with
9 Rule 302, 303, or 304 shall be deemed al-
10 lowed for the purpose of distribution unless
11 objection is made by a party in interest.
12 *(c) ~~Objections~~* [Objection] *to Allowance.* An objection
13 to the allowance of a claim for the purpose
14 of distribution shall be in writing. A copy of
15 the objection and notice of a hearing thereon
16 shall be mailed or delivered to the claimant.
17 If ~~the trustee joins with his~~ [an] objection [to] a claim [is joined with a demand]
18 for relief of the kind specified in Rule 701,
19 the proceeding thereby becomes an adver-
20 sary proceeding.
21 *(d) Secured Claims.* If a secured creditor
22 files a proof of claim, the value of the secu-

interest

23 rity held by him as collateral for his claim
24 shall be determined by the court, and the
25 claim shall be allowed only to the extent it
26 is enforceable for any excess of the claim
27 over such value.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is derived from § 47a(8) of the Act. The last clause recognizes that the trustee and the court should not be burdened by the making and consideration of objections to claims when the disposition of the objection can have no consequence in the administration of the estate.

Subdivision (b) relieves the court of the substantial burden of making formal orders of allowance of claims to which no objection is made. The automatic allowance effected by the rule is only for the purpose of distribution and does not constitute a determination as to the amount or validity of the claim for any other purpose.

Subdivision (c) prescribes the manner in which an objection to a claim shall be made and notice of the hearing thereon given to the claimant. The contested matter initiated by an objection to a claim is governed by Rule 914, unless a counterclaim by the trustee is joined with the objection to the claim. The filing of a counterclaim ordinarily commences an adversary proceeding subject to the rules in Part VII. While the bankrupt's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally centered in the trustee as provided in subdivision (a). 3 Collier ¶ 57.17 [2.2] (1961). Section 57f of the Act, requiring objections to claims to be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit, is omitted since these considerations govern all proceedings and matters in bankruptcy cases. See Rule 903.

for the purpose of distribution

such

By virtue of the automatic allowance a dividend may be paid on a claim which may thereafter be disallowed

on objection made pursuant to subdivision (c). The amount of the dividend paid before the disallowance in such event would be recoverable by the trustee in an adversary proceeding brought pursuant to § 57l of the Act.

Subdivision (d) is a restatement of § 57h of the Act. The court may utilize any of the modes for determining the value of security specified in that subdivision or any other method it deems appropriate.

Rule 307. Reconsideration of Claims

1 A party in interest may move for recon-
2 sideration of an order allowing or disallow-
3 ing a claim against the estate. If the motion
4 is granted, the court may after hearing ~~upon~~ on
5 notice make such further order as may be
6 appropriate.

Advisory Committee's Note

This rule is a substantial revision of § 57k of the Act and General Order 21(6). Because these provisions have spoken only of the reconsideration of claims that have been allowed, it has sometimes been held that a referee has no jurisdiction to reconsider a disallowed claim, or the amount or priority of an allowed claim, at the instance of the claimant himself. See, *e.g., In re Gouse,* 7 F.Supp. 106 (M.D.Pa. 1934); *In re Tomlinson & Dye, Inc.,* 3 F.Supp. 800 (N.D. Okla. 1933). This view disregarded § 2a(2) of the Act and the "ancient and elementary power" of a referee as a court to reconsider any of his orders. *In re Pottasch Bros. Co., Inc.,* 79 F.2d 613, 616 (2d Cir. 1935); *Castaner v. Mora,* 234 F.2d 710 (1st Cir. 1956). This rule recognizes the power of the court, including a referee, to reconsider an order of disallowance on appropriate ~~application~~ motion.

Reconsideration of a claim which has been previously allowed or disallowed after objection is discretionary with the court. The right to seek reconsideration of an

allowed claim, like the right to object to its allowance, should be recognized to rest in the trustee if one has qualified and is performing the duties of his office with reasonable diligence and fidelity. A request for reconsideration of a disallowance would, on the other hand, ordinarily come from the claimant, the only party likely to have a sufficient interest to make the motion.

A proof of claim executed and filed in accordance with the rules in this Part III is prima facie evidence of the validity and the amount of the claim notwithstanding a motion for reconsideration of an order of allowance. Failure to respond constitutes no admission, though it may be deemed a consent to a reconsideration. *In re Goble Boat Co.*, 190 Fed. 92 (N.D.N.Y. 1911). The court may decline to reconsider an order of allowance or disallowance without notice to any adverse party and without affording any hearing to the movant. If a motion to reconsider is granted, notice and hearing must be afforded to parties in interest before the previous action taken in respect to the claim may be vacated or modified. After reconsideration, the court may allow or disallow the claim, increase or decrease the amount of a prior allowance, accord the claim a priority different from that originally assigned it, or enter any other appropriate order.

The rule does not retain the limitation imposed by § 57k of the Act that apparently forecloses reconsideration after the case has been closed. Authorities have disagreed as to whether reconsideration may be had after a case has been reopened. Compare 3 Collier, 364 (1964), with 2 Remington, *Bankruptcy* 498 (Henderson ed. 1956). If a case is reopened as provided in Rule 515, reconsideration of the allowance or disallowance of a claim may be sought and granted in accordance with this rule. With respect to a distribution previously made, the allowance of a claim on such reconsideration would have the effect prescribed by § 65c of the Act. On disallowance after reconsideration the trustee may recover dividends previously paid on the claim, as provided in § 57l of the Act.

Rule 308. Declaration and Payment of Dividends

1 Dividends to creditors shall be paid as
2 promptly as practicable in such amounts and
3 at such times as the court may order. Divi-
4 dend checks shall be made payable and
5 mailed to each creditor whose claim has been
6 allowed, unless a power of attorney authoriz-
7 ing another person to receive dividends has
8 been executed and filed in accordance with
9 Rule 910. In that event, unless a local rule or
10 court order provides otherwise, dividend
11 checks shall be made payable to the creditor
12 and to such other person and shall be mailed
13 to such other person.

Advisory Committee's Note

The first sentence of this rule consolidates and considerably simplifies provisions found in §§ 39a(5), 47a(11), and 65b of the Act. The preparation of records showing dividends declared and to whom payable is subject to prescription by the Director of the Administrative Office pursuant to Rule 504(a). The rule, like the statutory provisions from which it is derived, governs distributions to creditors having priority as well as to general unsecured creditors. See 3A Collier ¶ 65.02 (1964). Notwithstanding the detailed statutory provisions regulating the declaration of dividends, a necessarily wide discretion over this matter has been recognized to reside in the court ~~in view of the fact that the amount of many administrative expense claims cannot be determined until the case is ready to be closed, that proofs of claim may be amended after they have been filed, and the existence of disputed, unliquidated, and contingent claims frequently dictates caution to avoid premature and excessive distributions that may have to be recovered~~. See 3A Collier, *supra* ¶ 65.03; 1 *Proceedings of Seminar for Newly Appointed Referees*

in Bankruptcy 173 (1964). Although the rule leaves to the discretion of the court the amounts and the times of dividend payments, it recognizes the creditors' right to as prompt payment as practicable.

The second and third sentences of the rule make explicit the method of payment of dividends and afford protection of the interests of the creditor and the holder of a power of attorney authorized to receive payment.

Rule 309. Small Dividends

1 The court may by local rule or order di-
2 rect that no dividend for less than $1 shall
3 be distributed by the trustee to any creditor. Any such divi-
4 dend shall be treated in the same manner as
5 unclaimed money as provided in Rule 310.

ADVISORY COMMITTEE'S NOTE

This rule permits a court to eliminate the disproportionate expense and inconvenience incurred by the issuance of a dividend check of less than $1. Creditors are typically more irritated than pleased to receive such small dividends, but the money is held subject to their specific request as are unclaimed dividends under § 66 of the Act. At the same time the trustee makes payment of undistributed dividends to the clerk of the district court pursuant to a direction in accordance with this rule, he should file with the clerk a list of the names and addresses, so far as known, of the persons entitled to the money so paid in and the respective amounts payable to them.

Rule 310. Unclaimed Funds

1 Sixty days after the distribution of the
2 final dividend, the trustee shall stop pay-
3 ment of all checks then unpaid and file with
4 the clerk of the district court a list of the

5 names and addresses, so far as known, of the
6 persons entitled to such payments and the
7 amounts thereof. The unclaimed funds shall
8 thereupon be deposited in the registry of the
9 United States district court and shall be
10 withdrawn as provided in Title 28, U.S.C., §
11 2042.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 66 of the Act. The provision of the Act that the unclaimed money so deposited shall not be subject to escheat under the laws of any state is a rule of substantive law not appropriate for inclusion in the rule.

PART IV. THE BANKRUPT: DUTIES AND BENEFITS

Rule 401. ~~Adjudication~~ Petition as Automatic Stay of Certain Actions on Unsecured Debts

1 (a) *Stay of Actions.* ~~An adjudication~~ The filing of a petition shall
2 operate as a stay of the commencement or continuation of any action ~~then pending~~
3 ~~or thereafter commenced~~ against the bank-
4 rupt, or the enforcement of any judgment
5 against him, if the action or judgment is
6 founded on an unsecured provable debt other
7 than one not dischargeable under clause (1),
8 (5), (6), or (7) of § 17a of the Act.
9 (b) *Duration of Stay.* Except as it may be
10 terminated, annulled, or modified by the
11 bankruptcy court under subdivision (c), (d),
12 or (e) of this rule, the stay shall continue
13 until the bankruptcy case is dismissed or the
14 bankrupt is denied a discharge or waives or
15 otherwise loses his right thereto.
16 (c) *Annulment of Stay ~~Against Unsched-~~*
17 *~~uled Creditor~~.* At the expiration of 30 days
18 after the first date set for the first meet-
19 ing of creditors, the stay provided by this
20 rule shall be deemed annulled as against any
21 creditor whose debt has not been duly sched-
22 uled and who has not filed his claim by that
23 time.
24 (d) *Relief from Stay.* Upon the filing of a
25 complaint by a creditor seeking relief from a
26 stay provided by this rule, the bankruptcy
27 ~~judge~~ court shall set the trial ~~date~~ for the earliest
28 possible ~~time~~ date, and it shall take precedence

29 over all matters except older matters of the
30 same character. The court may, for cause
31 shown, terminate, annul, ~~or~~ modify, such
32 stay.
33 (e) *Availability of Other Relief.* Nothing
34 in this rule precludes the issuance of, or re-
35 lief from, any stay, ~~injunction, or~~ restrain-
36 ing order when otherwise authorized.

, or condition

,or injunction

ADVISORY COMMITTEE'S NOTE

This rule supplements and reinforces the policy of §§ 11a, 14f(2), and 17c(4) of the Act. Section 11a provides in terms for a mandatory stay until adjudication or dismissal of the petition of all actions founded on dischargeable debts which are pending against the bankrupt when the petition is filed. This statutory provision has been further held to authorize stay of the enforcement by levy of execution or otherwise of a judgment on a dischargeable debt against the bankrupt. 1 Collier ¶ 11.03 (1960). As a matter of comity application for the stay has frequently been made heretofore to the court where the action is pending, but the Act and the case law do not recognize any discretion in the court to deny or condition the stay against creditors holding dischargeable debts. *Id.* ¶¶ 11.05, 11.08.

By amendatory legislation in 1970, Congress substantially extended the protection of a bankrupt against actions by his creditors well beyond the limits of § 11a. Section 17c(4) now authorizes the bankruptcy court to enjoin any creditor from instituting or continuing an action on any debt, whether or not dischargeable and ~~after as well as before~~ adjudication. This provision is correlated with two other amendments of the Act protective of bankrupts: (1) Paragraphs (1) and (2) of § 17c provide for a determination of the issue of dischargeability of any debt by the bankruptcy court and for the determination of any issues remaining after it determines that any debt is nondischargeable; and (2) section 14f(2) requires

whether before or after

All creditors receive notice of the effect of the petition as a stay along with notice of the first meeting of creditors (see Official Form No. 12). The bankruptcy court may appropriately also give notice of the stay to the judge or other officer of a nonbankruptcy court in which an action subject to the stay is known to be pending, particularly when there appears to be a likelihood that action in disregard of the stay may occur.

that an order of discharge enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Subdivision (a). This rule relieves the bankrupt from the necessity of filing an application for a stay or an injunction against the institution or continuation of any action on a dischargeable debt or of one not dischargeable under § 17a(2), (3), (4), or (8) of the Act. The stay provided by the rule protects the bankrupt and relieves other courts from pointless and needless litigation. The rule provides an expedited procedure in subdivision (d) for determining the propriety of granting relief from the stay where a special justification exists—*e.g.*, to allow an unliquidated claim to be determined by judgment in a pending action, as in *In re Gerstenzang*, 52 F.2d 863, 864 (S.D.N.Y. 1931), or to enable the creditor to satisfy a condition to the enforcement of the claim against a surety, as in *Manufacturers' Finance Corp. v. Vye-Neill Co.*, 46 F.2d 136 (D.Mass. 1930), aff'd, 62 F.2d 625, 628 (1st Cir.), cert.denied, 289 U.S. 738 (1933).

The premise of the provision for staying actions and enforcement of judgments on debts excepted by clauses (2), (4), and (8) of § 17a of the Act from discharge is the same as that underlying § 17c(2) of the Act. As pointed out in Sen. Rep. No. 91-1173, 91st Cong., 2d Sess. 2, 4 (1970), bankrupts have been harassed by creditors who file actions against their debtors notwithstanding the bankruptcy, in the hope and expectation that default judgments will be entered. Section 17c of the Act undertakes to correct this abuse while recognizing the rights of creditors to prompt adjudication of their rights by conferring jurisdiction on the bankruptcy court to determine the dischargeability of any debt under § 17a of the Act. The jurisdiction of the bankruptcy court to make this determination is exclusive with respect to debts alleged to come within clauses (2) and (4) of § 17a and, subject to a limited exception, within clause (8) of § 17a of the Act. The abuse intended to be dealt with by Congress arose in large part as a result of creditors' actions and efforts to enforce judgments on debts alleged

in postbankruptcy complaints to be nondischargeable under § 17a(2). Indeed, dischargeability under this clause typically depends on the resolution of questions of fact that conceivably could be raised in almost any action or in respect to almost any judgment on a contract claim against the bankrupt. *Cf. Hisey v. Lewis-Gale Hospital, Inc.*, 27 F.Supp. 20, 27 (WD.Va. 1939). A stay of the creditors from proceeding outside of the bankruptcy court on debts alleged to come within § 17a(2), (4), and (8) protects the bankrupt from harassment and frustration of the benefits intended to be assured by the enactment of § 17c(2). A creditor who contends that his debt is not discharged under § 17a(8) is not subject to the filing requirement of § 17c(2) if there is a right to jury trial and a jury trial has been or will be demanded. Since the special situation contemplated by this reference to a jury trial can hardly arise except in a pending action for an intentional tort that will support a contractual or quasicontractual claim or in a pending action for negligence, the instances when a court other than the bankruptcy court can determine dischargeability of a debt under § 17a(8) will be infrequent. Although in such an eventuality the creditor may request relief from the stay under subdivision (d), the bankrupt's right to seek an injunction under § 17c(4) is also recognized by subdivision (e).

Subdivision (c). The exception for debts not dischargeable under § 17a(3), *viz.*, those not scheduled in time for proof and allowance, involves considerations different from those discussed in the preceding paragraph. Even though a debt is not listed in the schedules as originally filed, it cannot be said to be nondischargeable unless, without the creditor's notice or actual knowledge, the case has progressed so far in the course of its administration that it is too late for the omitted creditor to prove his claim and avail himself of an equal opportunity with other creditors to participate in the administration of the affairs of the estate. See *In re Beerman*, 112 Fed. 662, 663 (N.D.Ga. 1901); 1 Collier 1149 (1960); *id.* ¶ 17.23 (1967). Subdivision (c) rests on the assumption that if a debt remains unlisted for 30 days after the

first date set for the first meeting of creditors, it is then unlikely that the omitted creditor will have an opportunity to participate effectively in the administration and the stay provided by this rule is accordingly deemed annulled. As recognized by subdivision (e), the bankrupt may nevertheless be able to obtain a stay or an injunction under the Act.

Subdivision (d). A creditor who is subject to the stay of this rule may obtain relief therefrom in appropriate cases by filing a complaint in the court. The adversary proceeding thereby commenced is governed by the rules in Part VII subject to the requirement of subdivision (d) of this rule that the trial ~~date~~ be set for the earliest possible ~~time~~ date and given precedence over all other matters not of the same character. As noted in the previous paragraph, a stay against an omitted creditor is annulled at the end of 30 days following the first date set for the first meeting of creditors. If he should seek relief from the stay before the lapse of that period, he would disclose his knowledge of the bankruptcy and thereby substantially undermine his request for relief.

Subdivision (e). As subdivision (e) recognizes, the right of the bankrupt under § 11a or § 17c(4) of the Act to obtain an injunction against the institution or continuance of an action on a debt against him is not affected by this rule. Such relief may be sought by answer to a complaint of the creditor filed under subdivision (d) of this rule as well as by a complaint. ~~See Rules 701,~~ 713, and 765. The court may terminate, annul, ~~or~~ modify, or condition the stay provided by this rule in any proceeding brought for the purpose of obtaining such relief or of obtaining an injunction or restraining order against an action or the enforcement of a judgment that is subject to the stay. Annulment may be appropriate where a judgment on a nondischargeable debt has been inadvertently entered or enforced notwithstanding the stay. Since the stay provided by this rule does not operate with respect to any action, or the enforcement of any judgment, on a debt excepted from discharge by clause (1), (5), (6), or (7) of the Act, the stay is not likely to be affected by proceedings brought for the purpose of obtaining a determination that a debt is not dischargeable under one of these clauses.

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The premise of this rule is that in the usual case actions on dischargeable debts and on debts alleged to be nondischargeable under § 17a(2), (3), (4), and (8) should be stayed in the interest of protecting the bankrupt's right to his discharge. See *Hisey v. Lewis-Gale Hospital, Inc.*, 27 F.Supp. 20, 26 (W.D.Va. 1939); *In re Nichols*, 22 F.Supp. 691, 695 (W.D.Ky. 1938); *In re DeLauro*, 1 F.Supp 678, 680 (D.Conn. 1932); *In re Nuttall*, 201 Fed. 557, 559 (S.D.N.Y. 1912). The rule not only relieves the bankrupt against the risk of failing to seek timely relief against creditors' actions but eliminates the need for litigation of the right to a stay in the usual case. While the initiative for bringing the issue of the right to a stay is shifted from the bankrupt to the creditor, facts providing a justification for modifying the stay will ordinarily be more easily provable by the creditor than disprovable by the bankrupt. The rule does not supersede § 11a or § 17c of the Act or restrict the discretion of the court as a court of equity to grant relief to any party.

Rule 102. Duties of Bankrupt

1 In addition to performing other duties
2 prescribed by these rules, the bankrupt shall
3 (1) attend and submit to an examination at
4 the first meeting of creditors and at such
5 other times as ordered by the court; (2) at-
6 tend at the hearing ~~up~~on a complaint object-
7 ing to his discharge and, if called as a wit-
8 ness, testify with respect to the issues raised
9 ~~by the pleadings~~; (3) if he has not yet filed a
10 schedule of property pursuant to Rule 108,
11 immediately inform the receiver, or, if no re-
12 ceiver is appointed, the trustee, in writing
13 as to the location of real property ~~he owns~~ in which he has an interest
14 and the name and address of every person
15 holding money or property subject to his

16 withdrawal or order; (4) if the court di-
17 rects, file a statement of the executory con-
18 tracts, including unexpired leases, to which
19 he is a party; (5) cooperate with the re-
20 ceiver, if any, and the trustee in the prepa-
21 ration of an inventory, the examination of
22 proofs of claim, and the administration of
23 the estate; and (6) comply with all orders of
24 the court.

ADVISORY COMMITTEE'S NOTE

Together with Rule 108, which adapts the provisions of § 7a(8) and (9) of the Act, and Rule 205, which incorporates the provisions of § 7a(10) of the Act, this rule imposes substantially all the duties prescribed for the bankrupt by § 7a of the Act. Clause (3) of this rule is an implementation of the provisions of Rule 602, and clause (4) authorizes the court to facilitate compliance with Rule 607 by requiring a bankrupt to make the disclosures respecting his executory contracts ~~already~~ heretofore required of debtors under Chapters XI, XII, and XIII. See §§ 324(1), 424(1), and 624(1) of the Act. But *cf.* Chapter XIII Rule 13-502(3).

Rule 403. Exemptions

1 *(a) Claim of Exemptions.* A bankrupt
2 shall claim his exemptions in the schedule of
3 his property required to be filed by Rule 108.
4 *(b) Trustee's Report.* The trustee shall ex-
5 amine the bankrupt's claim for exemptions,
6 set apart such as are lawfully claimed and
7 allowable, and report to the court the items
8 set apart, the amount or estimated value of
9 each, and the exemptions claimed that are
10 not allowable. The report shall be filed with
11 the court no later than 15 days after the
12 trustee qualifies. If the trustee reports that

13 any exemption claimed is not allowable, he
14 shall forthwith mail or deliver copies of the
15 report to the bankrupt and his attorney.
16 *(c) Objections to Report.* Any creditor or
17 the bankrupt may file objections to the re-
18 port within 15 days after its filing, unless
19 further time is granted by the court within
20 such 15-day period. Copies of the objections
21 so filed shall be delivered or mailed to the
22 trustee and, if the objections are by a credi-
23 tor, to the bankrupt and his attorney. After
24 hearing upon notice the court shall deter-
25 mine the issues presented by the objections.
26 The burden of proof shall be on the objector.
27 *(d) Procedure if No Trustee Qualified.* If
28 no trustee has qualified, [the bankruptcy judge shall file the report prescribed by subdivision (b) of this rule within 15 days after the first date set for the first meeting of creditors.] ~~the duties of the~~
29 ~~trustee prescribed by subdivision (b) shall be~~
30 ~~performed by the bankruptcy judge within~~
31 ~~15 days after the first meeting of creditors~~.
32 If the bankrupt files objections to the report,
33 the court shall appoint a trustee or receiver [, who shall represent the estate in the hearing on the objections.]
34 *(e) Approval of Report if No Objections.*
35 If no objections are filed within the time pro-
36 vided by this rule, the [report shall be deemed approved by the court. On request, the court may, at any time and without reopening the case, enter an order approving the report.] ~~court shall forthwith~~
37 ~~approve the report as filed~~.
38 *(f) Claim of Exemption by Person Other*
39 *Than Bankrupt.* If the bankrupt fails to
40 claim the exemptions to which he is entitled,
41 or if he dies before his exemptions have been
42 set apart to him, his spouse, dependent chil-
43 dren, or any other persons who are entitled
44 to claim the exemptions allowable to the
45 bankrupt may, within such time as the court
46 may order, file a claim for his exemptions or
47 object to the report.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule comes from § 7a(8) of the Act.

Subdivision (b) is derived from § 47a(6) of the Act and General Order 17(2). The time allowed the trustee for filing the report of the exemptions set apart to the bankrupt is extended to 15 days following the trustee's qualification in recognition of the fact that the 5-day period prescribed by the general order generates an excessive number of requests for extension. If the bankrupt needs more prompt determination of his right to exemptions, he may request expedition of the report by the trustee under Rule 906(c). The requirement for delivery of a copy of a report denying a claim of exemption to the bankrupt and his attorney is added by the last sentence of the subdivision to assist them in making a timely decision on whether to appeal.

Subdivision (c) of the rule is an elaboration of the last clause of General Order 17(2). The 10-day period allowed by the general order for the filing of objections to the trustee's report has been enlarged to 15 days, but the time cannot be extended under the rule after the expiration of the 15-day period. The allocation of the burden of proof made by the last sentence of subdivision (c) rests on the assumption that the trustee has performed the duties imposed on him by subdivision (b) with due regard to the rights of the bankrupt as well as the creditors whom he represents. Although the assumption might be questioned by the bankrupt, the case law has generally placed the burden of proof on the bankrupt whenever there is an issue raised as to his right to an exemption claimed. *In re Dederick*, 91 F.2d 646, 650 (10th Cir. 1937); *In re Campbell*, 124 Fed. 417, 421–22 (W.D.Va. 1903); *In re Stinemetz*, 38 Am.B.R. (N.S.) 544, 547 (Ref., D.Kans. 1938); 1 Collier ¶ 6.23 (1960). In view of the centering of the responsibility in the trustee to act generally on behalf of the creditors, ~~however~~, it is not unfair to them and is consonant with principles of sound administration to require any objector to the report to

carry the burden of sustaining his objection. See 3 Remington, *Bankruptcy* 177 (Henderson ed. 1957). But see *In re Campbell*, 124 Fed. 417, 421–22 (W.D.Va. 1903).

Subdivision (d). The procedure prescribed in subdivision (d) for a case in which there is no trustee is an adaptation of that approved in *Smalley v. Laugenour*, 196 U.S. 93 (1905). See 1 Collier, *supra* ¶ 6.21. The last sentence of the subdivision recognizes that if there are objections by the bankrupt or other beneficiary of the exemption law to a report made by the bankruptcy judge under this rule, the adversary character of the matter requires the appointment of a trustee or receiver to represent the interests of the estate. Rule 209(b) governs the appointment of a trustee, and Rule 201(a)(3) has particular reference to the appointment of a receiver in the kind of situation contemplated in this subdivision. If a creditor objects to the report of the bankruptcy judge, no trustee or receiver need be appointed, since the creditor may represent the interests of the estate and the bankrupt may defend the report insofar as it would allow his claim to exemptions.

SEE ATTACHED SHEET

~~*Subdivision (e)* makes explicit an implication of § 2a(11) of the Act and the last clause of General Order 17(2). See 3 Remington, *supra* at 177; *cf. In re Gorman*, 226 Fed. 961, 962 (D.Md. 1915); *In re Herrin & West*, 215 Fed. 250, 252 (N.D.Ga. 1914).~~

Subdivision (f) spells out the procedure to be followed by persons other than the bankrupt entitled to claim exemptions under the case law construing § 6 of the Act and under the proviso of § 8. It adopts the approach of the courts in allowing considerable flexibility in procedure to protect the bankrupt's spouse and other beneficiaries of the exemption laws against prejudice resulting from the failure of the bankrupt to make a timely application in his schedule. See, *e.g.*, *In re Youngstrom*, 153 Fed. 98 (8th Cir. 1907) (bankrupt left state before bankruptcy; wife allowed to claim exemption when trustee was proceeding to sell property); *In re Edelman*, 172 F.Supp. 200, 202 (E.D.N.Y. 1959) (wife of bankrupt allowed to claim wage exemption for benefit of family

<u>Subdivision (e)</u> recognizes that if no timely objection is filed to the report of exemptions, there is no issue before the court, and the bankrupt's right to the exemptions set apart in the report should not await further action of the court. See <u>In re Campbell</u>, 124 Fed. 417, 421-22 (W. D. Va. 1903); <u>Taylor Co. v. Williams</u>, 139 Ga. 581, 77 S. E. 386 (1913). The rule relieves the court of the formality of making an order of approval unless requested by a party and enables the party to obtain a formal order of approval after a case is closed without the necessity of reopening the case.

when trustee sought to compel turnover of deposit in her name which contained funds derived from bankrupt's wages); *In re Maxson*, 170 Fed. 356 (N.D.Iowa 1909) (husband allowed to claim exemption by "petition" 6 months after wife's bankruptcy notwithstanding her failure to claim exemption in schedule); *In re Luby*, 155 Fed. 659 (S.D.Ohio 1907) (wife of absconding bankrupt allowed to file claim for exemption before property sold by trustee). The court retains discretion under the subdivision, however, to refuse to entertain a claim for exemption because of the laches of the party asserting the claim or for other good cause. See, *e.g.*, *In re Barnham*, 202 Fed. 762, 765–66 (W.D.Wash. 1913) (homestead claimed by wife of bankrupt denied when delay of over 3 years in making claim was not due to inadvertence).

Rule 404. Grant or Denial of Discharge

1 *(a) Time for Filing Complaint Objecting*
2 *to Discharge.* The court shall make an order
3 fixing a time for the filing of a complaint ob-
4 jecting to the bankrupt's discharge under §
5 14c of the Act. The time shall be not less
6 than 30 days nor more than 90 days after
7 the first date set for the first meeting of
8 creditors, except that if notice of no dividend
9 is given pursuant to Rule 203(b), the court
10 may fix such time as early as the first date
11 set for the first meeting of creditors.
12 *(b) Notice.* The court shall give at least 30
13 days' notice of the time fixed for filing a
14 complaint objecting to the bankrupt's dis-
15 charge under § 14c of the Act except that
16 only 10 days' notice is required if notice of
17 no dividend is given under Rule 203(b). Such
18 notice shall be given to all creditors ~~and the~~
19 ~~district director of internal revenue~~ in the

20 manner provided in Rule 203, and to the
21 trustee and his attorney, if any, to their re-
22 spective addresses as filed with the court.
23 *(c) Extension of Time.* The court may for
24 cause, ~~up~~on its own initiative or ~~up~~on appli-
25 cation of any party in interest, extend the
26 time for filing a complaint objecting to dis-
27 charge.
28 *(d) Grant of Discharge.* ~~Upon~~ On expiration
29 of the time fixed for filing a complaint ob-
30 jecting to discharge, the court shall forth-
31 with grant the discharge unless (1) a com-
32 plaint objecting to the discharge has been
33 filed, (2) the bankrupt has filed a waiver
34 under Rule 405, (3) it appears that the bank-
35 rupt has failed to attend and submit himself
36 to examination at the first meeting of credi-
37 tors or at any meeting specially called for
38 his examination, or (4) the prescribed filing
39 fees have not been paid in full.
40 *(e) Applicability of Rules in Part VII.* A
41 proceeding commenced by a complaint ob-
42 jecting to discharge is governed by the rules
43 in Part VII.
44 *(f) Order of Discharge.* An order of dis-
45 charge shall conform substantially to Official Form No. 24. ~~declare that~~
46 ~~(1) any judgment theretofore or thereaf-~~
47 ~~ter obtained in any court other than this~~
48 ~~court is null and void as a determination of~~
49 ~~the personal liability of the bankrupt with~~
50 ~~respect to any of the following: (A) debts~~
51 ~~dischargeable under § 17a or b of the Act;~~
52 ~~(B) debts discharged under § 17c(2) of the~~
53 ~~Act; and (C) debts determined to be dis-~~
54 ~~charged under § 17c(3) of the Act; and~~

55 ~~(2) all creditors whose debts are dis-~~
56 ~~charged are enjoined from instituting or~~
57 ~~continuing any action or employing any~~
58 ~~process to collect such debts as personal lia-~~
59 ~~bilities of the bankrupt.~~
60 *(g) Registration in Other Districts.* An
61 order of discharge that has become final may
62 be registered in any other district by filing
63 in the office of the clerk of the district court
64 of that district a certified copy of the order
65 and when so registered shall have the same
66 effect as an order of the court of the district
67 where registered and may be enforced in like
68 manner.
69 *(h) Notice of Discharge.* Within 45 days
70 after an order of discharge becomes final,
71 the court shall mail a copy of ~~the~~ such order ~~of~~
72 ~~discharge~~ to the persons ~~named~~ specified in subdivi-
73 sion (b) of this rule.

ADVISORY COMMITTEE'S NOTE

Subdivisions (a), (b), and (c) of this rule are adaptations of the provisions of §§ 14b(1) and 58b of the Act that pertain to the procedure for determining whether a discharge will be granted. The except clauses of the last sentence of subdivision (a) and the first sentence of subdivision (b) are correlated with provisions of Rule 203(b) and 302(e)(4) designed to facilitate the administration of estates when no dividend is anticipated. The time fixed by the court under subdivision (a) may be enlarged as provided in subdivision (c) and Rule 906(b).

The notice referred to in subdivision (b) is required to be given by mail and addressed to creditors ~~and the district director of internal revenue~~ as provided in Rule 203. The provision of § 58b of the Act for notice to the United States attorney of the time for filing objections

to discharge has not been carried into the rule because of the ineffectualness of such a routine notice to serve its purpose of alerting that officer to the possible need for him to file a complaint objecting to the discharge. When the circumstances indicate the appropriateness of calling on the United States attorney to take an interest in the question of a bankrupt's discharge, the court may act under § 14d of the Act. See also 18 U.S.C. § 3057.

An extension granted on an application pursuant to subdivision (c) of the rule would ordinarily redound to the benefit only of the applicant, but the scope and effect of the extension would in any event depend on the terms of the extension.

Subdivision (d) of this rule is a revision of the first clause of § 14b(2) of the Act. If a complaint objecting to discharge is filed, the court's grant or denial of the discharge will be entered at the conclusion of the proceeding as a judgment in accordance with Rule 921. The inclusion of the clauses in subdivision (d) qualifying the duty of the court to grant a discharge when a waiver has been filed and when the bankrupt has failed to attend or submit to an examination is in accord with the construction of the Act. 1 Collier ¶ 14.16 (1966). If the bankrupt has failed to attend or submit to an examination, the court will ordinarily proceed under Rule 406 to determine whether he shall be deemed to have waived his right to dicharge. As pointed out in the Note accompanying Rule 406, however, the court may proceed to determine whether the discharge should be denied on a ground specified in § 14c of the Act. The prohibition by clause (4) of subdivision (d) on the grant of a discharge to a bankrupt before the filing fees have been paid preserves a limitation embodied in the first clause of § 14b(2) of the Act.

Subdivision (e). An objection to discharge is now required to be made by a complaint, which initiates an adversary proceeding as provided in Rule 703. The requirements of the second sentence of § 58b of the Act respecting notice of the hearing upon objections to the bankrupt's discharge are superseded by Rules 704, 705, 712, and the other rules of Part VII which govern adversary proceedings.

Subdivision (f). Official Form No. 24, to which subdivision (f) refers, includes the provisions which are required by § 14f of the Act to be set out in the order of discharge.

~~*Subdivisions (f), (g), and (h)* are based on § 14f, g, and h of the Act. The order of discharge should conform substantially to Official Form No. 24.~~ Subdivision (g) is based on § 14g of the Act. Registration may facilitate the enforcement of the order of discharge in a

district other than that in which it was entered. See 2 Moore ¶ 1.04[2] (1967). Because of the extraterritorial service of process authorized by Rule 704, however, registration of the order of discharge is not necessary under these rules to enable a discharged bankrupt to obtain relief against a creditor proceeding in any district of the United States in disregard of the injunctive provisions of the order of discharge. ~~Subdivision (h) omits the re-~~ Subdivision (h) is based on § 14h of the Act but omits its re- quirement ~~of § 14h of the Act~~ that notice be given of the debts determined by the court to be nondischargeable and of the debts as to which proceedings to determine dischargeability are pending. The bankrupt and every creditor whose debt is the subject matter of any proceeding to determine dischargeability will otherwise have had notice of its pendency or disposition. Parties other than the bankrupt and the creditor whose debt is involved have no sufficient need of notice of the pendency or determination of such proceedings to warrant inclusion of this information in the notice of discharge required by subdivision (h). The debts to be specified in the notice required by § 14h of the Act could not in any event purport to be a complete list of the debts that may be nondischargeable.

Rule 405. Waiver of Discharge

1 Any bankrupt may waive his right to dis-
2 charge by a writing filed with the court.

Advisory Committee's Note

This rule is an adaptation of the first sentence of the proviso of § 14a of the Act. The rules eliminate the fiction that the adjudication operates as an application for a discharge, and no distinction is made between corporations and other persons in this regard. Accordingly the requirement of the Act that a waiver be filed before the hearing on the application for discharge is omitted.

Rule 406. Implied Waiver of Discharge

1 If the bankrupt fails to attend and submit
2 himself to examination at the first meeting
3 of creditors, at any meeting specially called
4 for his examination, or at the trial on a com-
5 plaint objecting to his discharge, the court
6 on motion shall, or on its own initiative may,
7 set a time for hearing to determine whether
8 the bankrupt shall be deemed to have waived
9 his right to a discharge. Notice of the hear-
10 ing shall be given the bankrupt and such
11 other parties in interest as the court may
12 designate.

Advisory Committee's Note

This rule provides a procedure for determining whether a bankrupt has waived his right to a discharge under § 14e of the Act. It recognizes the right of the bankrupt to notice and an opportunity to be heard on the question whether his failure to attend and submit to an examination was excusable. Notwithstanding the omission in § 14e of any recognition of the possibility of excusing failure to appear or be examined at the hearing on objections to discharge, the courts have afforded the bankrupt an opportunity to justify a failure to appear or submit to examination at such a hearing as well as at a meeting of creditors. See *LaBarbera v. Gruband*, 112 F.2d 738 (2d Cir. 1940); *In re Burdick*, 62 F.Supp. 931 (W.D.N.Y. 1945); 1 Collier 1314.11 (1966). Notwithstanding the failure of the bankrupt to appear or be examined at a meeting or at the trial of the complaint objecting to his discharge, the court may proceed to determine whether the discharge should be denied on a ground specified in § 14c of the Act. If the plaintiff discharges his burden of proof at the trial, he is entitled to judgment denying the discharge, and the issues determinable at a hearing under this rule would thereby become moot.

Rule 407. Burden of Proof in Objecting to Discharge

1 At the trial on a complaint objecting to a
2 discharge, the plaintiff has the burden of
3 proving the facts essential to his objection.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Cal.Evid. Code § 500, which sets out the basic rule governing burden of proof in civil litigation. The rule supersedes the proviso at the end of § 14c of the Act. The proviso has generally been equated with a requirement that the objector make a prima facie case under § 14c. See, *e.g., In re Pioch*, 235 F.2d 903, 905 (3d Cir. 1956) ("the burden of proof is on the objecting creditor to prevent the bankrupt's discharge, otherwise stated, the objecting creditor must make out a prima facie case"). See also *Feldenstein v. Radio Distributing Co.*, 323 F.2d 892, 893 (6th Cir. 1963); *Johnson v. Bockman*, 282 F.2d 544, 545 (10th Cir. 1960); *Industrial Bank of Commerce v. Bissell*, 219 F.2d 624, 625–26 (2d Cir. 1955); *Dixwell v. Scott & Co., Ltd.*, 115 F.2d 873, 875 (1st Cir. 1940); 1 Collier 1314.1 (1966).

This rule does not deal with the burden of going forward with the evidence. Subject to the allocation by the rule of the initial burden of producing evidence and the ultimate burden of persuasion, the rule leaves to the courts the formulation of rules governing the shift of the burden of going forward with the evidence in the light of such considerations as the difficulties of proving the nonexistence of a fact and of establishing a fact as to which the evidence is likely to be more accessible to the bankrupt than to the objector. See, *e.g., In re Haggerty*, 165 F.2d 977, 979–80 (2d Cir. 1948); *Federal Provision Co. v. Ershowsky*, 94 F.2d 574, 575 (2d Cir. 1938); *In re Ricceputo*, 41 F.Supp. 926, 927–28 (E.D.N.Y. 1941).

Rule 408. Notice of Nondischarge

1 If a waiver of discharge is filed, or if an
2 order is entered denying or revoking a dis-
3 charge or deeming the right thereto to have
4 been waived, the court shall, within 30 days
5 after the filing of the waiver or the entry of
6 the order, give notice thereof ~~by mail~~ to all
7 creditors ~~and the district director of internal~~
8 ~~revenue~~ in the manner provided in Rule 203.

ADVISORY COMMITTEE'S NOTE

The suspension by § 11f of the Act of the statute of limitations affecting any provable debt of a bankrupt terminates within 30 days after the bankrupt is denied his discharge or otherwise loses his right to a discharge. If, however, a bankrupt's failure to get a discharge does not come to the attention of his creditors until after the statutes of limitations have run, he obtains substantially the same benefits from his bankruptcy as the bankrupt who is discharged.

This new rule requires the court to notify creditors ~~and the district director of internal revenue~~ if a bankrupt fails to obtain a discharge because he filed a waiver of discharge under Rule 405, or because he lost his right thereto by virtue of an order denying or revoking his discharge under § 14c or § 15 of the Act or determining that he had waived his right to a discharge under Rule 406.

Rule 409. Determination of Dischargeability of a Debt; Judgment on Nondischargeable Debt; Jury Trial

1 *(a) Proceeding to Determine Dischargea-*
2 *bility.*
3 *(1) Persons Entitled to File Complaint;*
4 *Time for Filing in Ordinary Cases.* A bank-

5 rupt or any creditor may file a complaint
6 with the court to obtain a determination of
7 the dischargeability of any debt. Except as
8 provided in paragraph (2) of this subdivi-
9 sion, the complaint may be filed at any time,
10 and a case may be reopened without the pay-
11 ment of an additional filing fee for the pur-
12 pose of filing a complaint under this rule.
13 (2) *Time for Filing Complaint Under §*
14 *17c(2) of the Act*; Notice of Time Fixed. The court shall make an
15 order fixing a time for the filing of a com-
16 plaint to determine the dischargeability of
17 any debt pursuant to § 17c(2) of the Act.
18 The time shall be not less than 30 days nor
19 more than 90 days after the first date set for
20 the first meeting of creditors, except that if
21 notice of no dividend is given pursuant to
22 Rule 203(b), the court may fix such time as
23 early as the first date set for the first meet-
24 ing of creditors. The court shall give credi-
25 tors at least 30 days' notice of the ~~order~~ time so fixed ex-
26 cept that only 10 days' notice is required if
27 notice of no dividend is given under Rule
28 203(b). Such notice shall be given to all cred-
29 itors ~~and the district director of internal~~
30 ~~revenue~~ in the manner provided in Rule 203.
31 The court may for cause, ~~up~~on its own initi-
32 ative or ~~up~~on application of any party in in-
33 terest, extend the time fixed under this para-
34 graph.
35 *(b) Claim and Demand for Judgment on*
36 *Nondischargeable Debt.* If his claim has not
37 yet been reduced to judgment, the creditor
38 shall include in a complaint or answer filed

39 under subdivision (a) of this rule a state-
40 ment of his claim and demand for judgment
41 on the debt as provided in § 17c(3) of the
42 Act.
43 *(c) Jury Trial.* Either party may demand
44 a trial by jury of any issue triable of right
45 by a jury by serving upon the other party
46 and filing a demand therefor in writing at
47 any time after the filing of a complaint
48 under this rule and not later than 10 days
49 after the service of the last pleading directed
50 to such issue. Such demand may be indorsed
51 upon a pleading of the party. In his demand
52 the party shall specify the issues which he
53 wishes to be so tried. If he has demanded
54 trial by jury for only some of the issues so
55 triable of right, any other party within 10
56 days after service of the demand or such
57 lesser time as the court may order, may
58 serve a demand for trial by jury of any
59 other issues so triable of right in the pro-
60 ceeding. The trial of an issue for which a
61 jury trial has been demanded shall be placed
62 on the jury calendar of the district court
63 when it is ready for trial unless (1) the
64 bankruptcy judge determines after hearing
65 on notice that the issue is not triable of right
66 by a jury or (2) a local rule of court provides
67 otherwise. Issues not triable of right by a
68 jury may be tried by the bankruptcy judge,
69 and motions and applications in the proceed-
70 ing other than those necessarily incidental to
71 and made during the course of the jury trial
72 may be determined by the bankruptcy judge.
73 The failure of a party to serve and file a de-

74 mand in accordance with this rule consti-
75 tutes a waiver by him of trial by jury. Rules
76 47–51 of the Federal Rules of Civil Proce-
77 dure apply to a jury trial under this
78 subdivision.
79 (d) *Applicability of Rules in Part VII.* A
80 proceeding commenced by ~~the~~ complaint filed
81 under this rule is governed by the rules in
82 Part VII.

a

ADVISORY COMMITTEE'S NOTE

This rule prescribes the procedure to be followed when a party requests the court of bankruptcy to determine dischargeability of a debt pursuant to § 17c of the Act. The provisions authorizing reduction of the time to be allowed for filing a complaint under the rule and of the required interval between the notice and the date fixed by the court are correlated with the provisions of Rules 203(b), 302(e)(4), and 404(a) and (b) that enable the court to expedite the administration of estates in which no dividend is anticipated. Utilization of the expedited procedures authorized by these provisions for the handling of no-asset and nominal asset cases is discretionary, and the time fixed by the court under paragraph (2) may be extended as provided therein and in Rule 906(b).

Although a complaint that comes within § 17c(2) of the Act must ordinarily be filed before the determination of whether the bankrupt will be discharged, the court need not determine the issues presented by the complaint filed under this rule until the question of discharge has been determined under Rule 404. A complaint filed under this rule initiates an adversary proceeding as provided in Rule 703.

Jury Trial. Subdivision (c) preserves the right to jury trial where it exists under nonbankruptcy law and is an adaptation of the provisions of the Federal Rules of Civil Procedure that govern jury trials. Under the fifth sentence of the subdivision a demand for jury trial requires placement of an issue triable of right by the jury

jury trials to be conducted by a district judge,

on the jury calendar of ~~the district court when the issue is ready for trial,~~ but the bankruptcy judge may deny the demand if he determines after notice and hearing that there is no issue triable of right by a jury. The same sentence recognizes, however, that a local rule of court may make different provisions respecting the placement on the jury calendar, *e.g.*, by providing for immediate placement of the issue on the district court's calendar and restricting authority to grant or deny the demand to a judge of that court, or by providing for retention of the entire proceeding by the referee with authority to conduct the jury trial in the bankruptcy court.

PART V. COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 501. Courts of Bankruptcy and Referees' Offices

1 *(a) Courts of Bankruptcy Always Open.*
2 The courts of bankruptcy shall be deemed al-
3 ways open for the purpose of filing any
4 pleading or other proper paper, of issuing
5 and returning mesne and final process, and
6 of making and directing all interlocutory
7 motions, orders, and rules.
8 *(b) Trials and Hearings; Orders in*
9 *Chambers.* All meetings of creditors and
10 hearings shall be conducted in open court
11 and so far as convenient in a regular court
12 room. All other acts or proceedings may be
13 done or conducted by a bankruptcy judge in
14 chambers and at any place either within or
15 without the district; but no hearing, other
16 than one *ex parte*, shall be conducted outside
17 the district without the consent of all parties
18 affected thereby.
19 *(c) Referee's Office.* The referee's princi-
20 pal office with a clerical assistant in attend-
21 ance shall be open during business hours on
22 all days except Saturdays, Sundays, and the
23 legal holidays as listed in Rule 6(a) of the
24 Federal Rules of Civil Procedure, but a local
25 rule or order may provide that the referee's
26 office shall be open for specified hours on
27 Saturdays or particular legal holidays other

28 than those listed in Rule 77(c) of the Federal
29 Rules of Civil Procedure.

ADVISORY COMMITTEE'S NOTE

This rule is adapted from subdivision (a), (b), and (c) of Rule 77 of the Federal Rules of Civil Procedure.

Insofar as the acts the clerk is authorized to perform by the last sentence of Civil Rule 77(c) are ministerial, the referee may delegate their performance in bankruptcy cases to an assistant in his office pursuant to Rule 506. Rule 77(d) of the Federal Rules of Civil Procedure, dealing with notice of orders or judgments, is adapted in Rule 922.

As pointed out in the Note accompanying Rule 204, the regular places at which courts shall be held within each district and at which creditors' meetings may be held are determined by the Judicial Conference of the United States pursuant to § 37b(1) of the Act. The referee's principal office is his regular place of office designated by the Conference under this statutory provision.

Rule 502. ~~Abolition of~~ Referees' Bonds Not Required

1 A referee shall not be required to file a
2 bond in order to qualify.

ADVISORY COMMITTEE'S NOTE

This rule conforms to Public Law 92-310, enacted June 6, 1972, which repealed the provisions of § 50 of the Act that refer to referees' bonds.

~~The requirement of § 50a of the Act that a referee qualify by entering into a bond is a vestige of the fee system of compensating referees that prevailed before the enactment of the Referees' Salary Act of 1946, 60 Stat. 326, when a referee was frequently the custodian of money of estates. Since a referee ordinarily no longer holds funds in his official capacity, there is no more justification for requiring him to file a bond than there is for any other judicial officer.~~

Rule 503. Restrictions on Referees

1 A referee shall not engage in any transaction, ~~purchase~~, directly or

2 indirectly, ~~any property of an~~ with the estate and
3 shall not act as trustee or receiver in any
4 case under the Act. An active full-time ref-
5 eree shall not engage in the practice of law,
6 and an active part-time referee shall not act
7 as attorney for any party in any case under
8 the Act.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 39b of the Act. The rule does not include the restriction of § 39b on the activities of retired referees, since this is a matter which should be correlated to the benefits provided such referees by Congress. The disqualification required by clause (1) of § 39b is incorporated into Rule 505(b).

Rule 504. Books, Records, and Reports of Referees

1 *(a) Records to be Kept; Reports to be*
2 *Made.* The referee shall keep a docket for
3 each case referred to him and shall keep a
4 list of claims filed against the estate in each
5 case in which it appears there will be a dis-
6 tribution to unsecured creditors after pay-
7 ment of the costs and expenses of adminis-
8 tration. He shall keep such other books and
9 records and make such reports as may be
10 prescribed by the Director of the Adminis-
11 trative Office of the United States Courts
12 with the approval of the Judicial Conference
13 of the United States. All papers filed with
14 the referee, all process issued and returns
15 made thereon, all appearances, orders, ver-
16 dicts, and judgments shall be entered chron-
17 ologically in the referee's docket. These en-

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18 tries shall be brief but shall show the nature
19 of each paper filed or writ issued and the
20 substance of each order or judgment of the
21 court and of the returns showing execution
22 of process.
23 *(b) Disposition of Papers of Closed Cases.*
24 When a case is closed, the referee shall
25 transmit all papers pertaining thereto to the
26 clerk of the district court.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is derived from §§ 39a(9) and 42 of the Act, General Orders 1 (second paragraph), 24, and 26, and Rule 79(a) of the Federal Rules of Civil Procedure. A list of claims is required to be kept only in asset cases, *i.e.*, when a distribution to unsecured creditors other than administrative expense claimants is anticipated. The list serves no purpose except in such cases, and the referee should be relieved of the unnecessary burden in the large number of no-asset and nominal asset cases. The public character of the docket and list kept by the referee is provided for by Rule 508. Authority to prescribe other books and records to be kept and the reports to be made by referees is vested in the Director of the Administrative Office subject to the approval of the Judicial Conference. The authority so conferred falls within the responsibilities conferred upon the Director and the Judicial Conference by 28 U.S.C. §§ 604 and 605. See also §§ 34, 37, 40, 43, 53, and 62 of the Act. The last two sentences of subdivision (a) are adapted from Rule 79(a) of the Federal Rules of Civil Procedure.

The admissibility in evidence of copies of records kept by referees is governed by § 21d, e, and f of the Act and by the Federal Rules of Evidence, made applicable to cases and proceedings in bankruptcy by Rule 917.

Subdivision (b). The custody and disposition of papers transmitted to the clerk pursuant to subdivision (b) are governed by 28 U.S.C. § 457.

Rule 505. Nepotism, Influence, and Interest

1 *(a) Appointment or Employment of Rela-*
2 *tive of or Person Connected with Judge or*
3 *Referee.* No person may be appointed as
4 trustee, receiver, marshal, or appraiser or
5 employed as accountant or auctioneer in a
6 bankruptcy case (1) if he is a relative of any
7 judge or referee of the court making the ap-
8 pointment or authorizing the employment, or
9 (2) if he is so connected with any judge or
10 referee of the court making the appointment
11 or authorizing the employment as to render
12 such appointment or employment improper.
13 *(b) Disqualification of Judge or Referee*
14 *from Acting in Case: Relationship to Party*
15 *or Attorney; Interest in Case; Appearance*
16 *of Influence.* Any judge or referee shall dis-
17 qualify himself in any bankruptcy case (1)
18 in which he is a relative of any party or his
19 attorney, has a substantial, direct or indirect
20 interest, has been of counsel, or is or has
21 been a material witness, or (2) if his acting
22 therein would justify the impression that
23 any person can improperly influence him or
24 unduly enjoy his favor, or that he is affected
25 by the kinship, rank, position, or influence of
26 any party or other person.
27 *(c) Disqualification of Judge or Referee*
28 *from Authorizing Employment of Attorney.*
29 Any judge or referee shall disqualify himself
30 from authorizing the employment [and from determining the compensation] of (1) a
31 relative as an attorney in a bankruptcy case,
32 or (2) an attorney in a bankruptcy case if
33 the judge or referee is so connected with the

34 attorney as to render it improper for him to
35 authorize such employment.

ADVISORY COMMITTEE'S NOTE

Restrictions respecting relatives. The restrictions on the appointment and employment of relatives have antecedents in 28 U.S.C. § 458, 18 U.S.C. § 1910, and 11 U.S.C. § 76a. The first of these statutory provisions prohibits the appointment to or employment in "any office or duty in any court" of a relative of any justice or judge of such court. This statute has been subjected to little interpretation, and it is not clear that it extends to such ad hoc and temporary appointments and employments as those listed in subdivision (a) of the rule. The other two statutes are directed only at the appointment of receivers and trustees who are related to judges of United States courts. Subdivision (a)(1) makes explicit as a rule of judicial administration for all bankruptcy cases that relatives of neither the judges nor the referees of any court of bankruptcy shall be appointed to any of the offices or employed in any of the responsibilities listed. The forbidden degree of relationship varies among the three statutes cited above. The more explicit definition of relative in the Act (§ 1(27)), which includes any person related by affinity or consanguinity within the third degree as determined by the common law and includes the spouse, is the reference intended by this rule.

The rule is not intended to restrict creditors in the exercise of their right to elect a trustee pursuant to Rule 209(a). Nor does the rule interdict the choice by the trustee or any other party of an attorney who is a relative of the judge or referee before whom a proceeding under the Act is pending. The judge or referee is, however, required to disqualify himself from authorizing employment of a relative as an attorney under the Act and must disqualify himself from acting in any proceeding in which a relative is an attorney or a party.

Improper connections. The provisions in subdivisions (a)(2) and (c)(2) are adaptations of the "improper connec-

tion" clause of 28 U.S.C § 455. The first of these provisions goes beyond the statute in prohibiting the appointment or employment of a person to an office or duty listed therein if he has the described connection with any judge or referee of the court authorizing the appointment or employment.

Interest or appearance of influence. Subdivision (b)(1) combines provisions in § 39b(1) of the Act and the first half of 28 U.S.C. § 455 and subjects a judge and referee to essentially the same obligation to disqualify himself on account of interest or personal involvement in a case. *Cf. Dubnoff v. Goldstein,* 385 F.2d 717, 720–21 (2d Cir. 1967). Subdivision (b)(2) is adapted from Canon 13 of the Canons of Judicial Ethics of the American Bar Association.

Rule 506. Delegation of Ministerial Functions

1 The referee may delegate any ministerial
2 function to an assistant employed in his
3 office or, with the approval of the chief
4 judge of the district court, to any person em-
5 ployed in the office of the clerk of the district
6 court.

ADVISORY COMMITTEE'S NOTE

This rule enables the referee to delegate any function he is required or authorized by the Act or by these rules to perform to an assistant in his office or to an employee in the office of the clerk of the district court, unless the function is a judicial one. The referee's authority to delegate applies whether the duty is imposed or the authority is conferred on him when acting as "the court," as "the bankruptcy judge," or as "the referee." The "court" includes the referee, as provided in § 1(9) of the Act, and "bankruptcy judge" includes the referee, as provided in Rule 901(7).

Except in offices where there has been a consolidation of the offices of the clerk of the district court and of the

referee, the delegation authorized by this rule will ordinarily be made to an employee in the referee's office. When a district judge is acting as a bankruptcy judge, he may delegate any duty or authority to perform ministerial acts under these rules to the clerk of the district court and his deputies and assistants as provided in 28 U.S.C. § 956.

Rule 507. Books and Records Kept by Clerks

1 *(a) Bankruptcy Docket.* The clerk of the
2 district court shall keep a book known as the
3 "bankruptcy docket" of such form and style
4 as may be prescribed by the Director of the
5 Administrative Office of the United States
6 Courts with the approval of the Judicial
7 Conference of the United States and shall
8 enter therein each bankruptcy case.
9 *(b) Transmission of Papers.* The clerk
10 shall transmit to the referee all papers
11 which pertain to every case referred to him,
12 unless the judge otherwise directs.
13 *(c) Index of Cases; Certificate of Search.*
14 The clerk shall keep an index of all cases
15 under the Act filed in or transferred to the
16 court and of all discharges granted by the
17 court. On request, the clerk shall make a
18 search of the index and papers in his custody
19 and issue a certificate as to whether a case
20 has been filed in or transferred to the court
21 or a discharge entered in its records.
22 *(d) Public Access.* The docket and index
23 kept by the clerk under this rule shall be
24 open to examination by any person without
25 charge.
26 *(e) Other Books and Records of the Clerk.*

27 The clerk shall also keep such other books
28 and records as may be required from time to
29 time by the Director of the Administrative
30 Office of the United States Courts with the
31 approval of the Judicial Conference of the
32 United States.

ADVISORY COMMITTEE'S NOTE

This rule supersedes §§ 51(4) and 71 of the Act and the first paragraph of General Order 1. Subdivision (a) is an adaptation of the first sentence of Rule 79(a) of the Federal Rules of Civil Procedure. Subdivision (b), together with Rule 504(b), is a restatement of the duty of the clerk imposed by § 51(4) of the Act. Subdivision (c) provides for the index of cases and discharges as heretofore required by § 71 of the Act. The provision in § 71 of the Act for a fee to the clerk for issuing a certificate of search is now superseded by 28 U.S.C. § 1914(b). The provisions for public access to the clerk's docket in General Order 1 and to the index of cases in § 71 of the Act are merged in subdivision (d) of this rule. Subdivision (e) is an adaptation of Rule 79(d) of the Federal Rules of Civil Procedure.

Rule 508. Public Access to Records and Papers in Bankruptcy Cases

1 Subject to the provisions of Rule 918, all
2 papers filed in a bankruptcy case, the refer-
3 ee's docket, and the list of claims, if any,
4 are public records and shall be open to exam-
5 ination by any person at reasonable times
6 without charge.

ADVISORY COMMITTEE'S NOTE

The provisions of this rule regarding the referee's docket and list of claims are derived from General Or-

ders 1 and 24. A list of claims is required by Rule 501(a) to be kept only in asset cases. This rule also covers the subject matter of § 49 of the Act (Accounts and Papers of Receivers and Trustees). The recognition of the right of public access to papers filed in a bankruptcy case accords with the rule of the common law that court records are public documents open to inspection, subject to reasonable regulation. 20 Am. Jur. (2d), Courts § 61 (1965); Anno., 175 A.L.R. 1260 (1918). Rule 918 authorizes the court in particular circumstances to enter protective orders respecting secret, confidential, scandalous, or defamatory matter contained in any paper filed in a bankruptcy case. Referees are relieved by these rules of the duty imposed on them by § 39a(4) of the Act to "furnish or cause to be furnished such information concerning proceedings before them as may be requested by parties in interest." The right of such parties to information in the public records of the court is sufficiently assured by this rule, by Rule 218(3), and by 18 U.S.C. § 151, which imposes criminal sanctions for refusal of a "reasonable opportunity" to a party in interest to inspect "documents and accounts relating to the affairs of estates in his charge."

See also the second paragraph of the Note accompanying Rule 218 supra.

Rule 509. Filing of Papers

commencing a bankruptcy case

1 (a) *Place of Filing.* A petition shall be
2 filed with the clerk of the district court.
3 After reference, all papers, including proofs
4 of claim, shall be filed with the referee un-
5 less otherwise directed by local rule or by
6 order of the judge.

a petition filed in a pending case and

7 (b) *Notation of Time of Filing.* The clerk
8 of the district court shall note on the petition
9 the date and hour of its filing, and the clerk
10 or the referee shall note the date of its filing
11 on each paper thereafter filed with him.
12 (c) *Error in Filing.* A paper erroneously
13 delivered to ~~either~~ the district judge, referee,

intended to be filed but

trustee or receiver, or the attorney for either of them, or to the

14 clerk of the district court, ~~trustee, receiver,~~ [or]
15 ~~or debtor in possession~~ shall, after the date
16 of its receipt has been noted thereon, be
17 transmitted forthwith to the proper person
18 ~~and~~ shall be deemed filed ~~with him~~ as of the
19 date of its original delivery.

[. In the interest of justice, the court may order that the paper]

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is an adaptation of General Order 20. There will be few cases where papers subsequent to the petition should not be filed with the referee. Subdivision (a) recognizes, however, that considerations of administrative convenience may dictate a variation from the normal filing practice prescribed by the rule. In particular the second sentence of this subdivision, by allowing a different provision by local rule, accommodates those offices in which consolidation of personnel and facilities of the clerk of the district court and the re[illegible]e or [illegible] physical locations of the clerk's and referee's [illegible] make it desirable to require all papers, including proofs of claim, to be filed with the clerk of the district court who acts for the referee in receiving any paper [illegible] in the proceeding after a reference.

Subdivision (b) is derived from General Order 2.

Subdivision (c). By subdivision (c) ~~delivery of a paper to the wrong person is excused and made the equivalent of a proper filing when the recipient is one of the persons named therein~~. ~~The recipient in such case is~~ charged with the duty of transmitting the paper to the proper person. This subdivision is new, but it is an extension of the rule of practice prescribed in the last sentence of General Order 21(1) respecting proofs of claim delivered to the trustee.

[[illegible] a paper to be filed is misdelivered to one of a number of persons connected with a bankruptcy case or the bankruptcy court, the recipient is]

[If not contrary to the interest of justice the erroneous delivery may be deemed by the court to be the equivalent of a proper filing.]

[See 3 Collier ¶ 57.10 (1961).]

Rule 510. Issuance and Certification of Copies of Papers

1 On request, the referee or the clerk of the
2 district court shall issue a certified copy of

3 the record of any proceeding in a bank-
4 ruptcy case or of any paper filed with the
5 court.

ADVISORY COMMITTEE'S NOTE

Subdivisions d, e, and f of § 21 of the Act declare the evidentiary effect to be given certified copies of certain orders entered in a bankruptcy case, of proceedings before a referee, and of "papers." Section 21d refers to "certified copies" "issued by the clerk, referee, or an employee of the referee designated by his order, which shall be filed in the office of the clerk." This rule makes explicit the duty of the referee or the clerk to issue a certified copy of the record of any proceeding in a bankruptcy or any paper filed with the court. The issuance of such a certified copy is a ministerial duty of the kind delegable by the referee to an assistant under Rule 506, but the admissibility and evidentiary effect of the copy are to be governed by the Federal Rules of Evidence so far as federal courts are concerned and by subdivisions d, e, and f of § 21 so far as state courts are concerned. Rule 910 makes the Federal Rules of Evidence applicable to cases and proceedings in bankruptcy. Rule 1005 of the Federal Rules of Evidence allows the contents of an official record or of a paper filed with the court to be proved by a duly certified copy, and a copy certified and issued in accordance with this Bankruptcy Rule 510 is accorded authenticity for this purpose by Rule 902(4) of the Federal Rules of Evidence.

Ordinarily only the officer having custody of the original record or paper when the request is made would be in a position to issue a certificate under this rule. See 2 Collier ¶ 21.27 (1964).

Rule 511. Recording and Reporting of Proceedings

1 (a) *Record of Proceedings.* Whenever
2 practicable, the court shall require a record

3 to be made of all proceedings in bankruptcy
4 cases. The record may be taken by ~~electronic~~
5 sound recording or by a reporter employed
6 on authorization of the court to take a verba-
7 tim record by shorthand or other means. The
8 expense of making the record shall be a
9 charge against the estate unless the court as-
10 sesses the cost or a part thereof against a
11 person who asserts a vexatious or frivolous
12 claim or defense. The reporter or operator of
13 a recording device shall attach his certificate
14 to the original shorthand notes or other orig-
15 inal records taken under this rule and
16 promptly file them with the court for reten-
17 tion for at least 6 months and as long there-
18 after as the court directs.
19 *(b) Transcripts of Proceedings.* Upon the
20 request of any person, including the United
21 States, who has agreed to pay the fee there-
22 for, or of the bankruptcy judge, the re-
23 porter or a typist shall promptly transcribe
24 the original records of the requested parts of
25 a proceeding and deliver the transcript, cer-
26 tified by him, to the person making the re-
27 quest. A certified copy of any transcript so
28 made shall be promptly filed with the court
29 by the person making the transcript. The
30 fees for transcripts shall be charged at rates
31 prescribed by the court but in no event shall
32 a separate fee be charged for the copy filed
33 with the court pursuant to the preceding
34 sentence. The cost of transcription shall be a
35 charge against the estate only when ap-
36 proved by the court.
37 *(c) Admissibility of Record in Evidence.*

38 When properly certified, ~~an electronic~~ sound
39 recording or a transcript of a proceeding
40 shall be admissible evidence to establish the
41 record thereof and shall be deemed prima
42 facie a correct statement of the testimony
43 taken and the proceedings had.

a

Advisory Committee's Note

Subdivision (a) of this rule declares and implements as a requisite of sound bankruptcy administration that all proceedings in bankruptcy cases shall be recorded verbatim. Ordinarily it will be possible for the record to be taken by an electronic sound device, but a stenographer may be employed as reporter, as heretofore authorized by § 38(7) of the Act, for the purpose of taking a record in shorthand, by stenotypy, or other means. The court should not allow an examination, hearing, or other proceeding in a bankruptcy case to continue without recording unless neither a stenographer nor an operable recording device is available and neither can be obtained without undue delay. The second sentence of subdivision (a) modifies the rule of General Order 10 in authorizing relief of the estate from liability for the cost of recording proceedings which result from the assertion of vexatious or frivolous claims. The third sentence of the subdivision incorporates a requirement comparable to that imposed by 28 U.S.C. § 753(b) on official court reporters.

or other

Subdivision (b) is an adaptation of provisions in 28 U.S.C. § 753(b) and (f). The person who prepares the transcript as provided in this subdivision need not have taken down the original record by shorthand or other means but may be a typist who prepares the transcript from ~~an electronic~~ sound recording. Variances in prevailing rates of charges for stenographic services and other circumstances having a legitimate bearing on charges made in bankruptcy cases may be reflected in the rates prescribed by the court under this subdivision. The last sentence of this subdivision emphasizes the differentiation that must be made between the expense of the re-

a

There is no requirement that the typist be an employee of the bankruptcy court.

cording by device or shorthand and the cost of the transcription for the purpose of allocating the charges under this rule. When the bankruptcy judge requires a transcript that is not an additional copy requested by someone who has paid the fee for the original, the cost of such transcript would be properly charged to the estate.

Subdivision (c) is an adaptation of provisions found in § 21d of the Act, 28 U.S.C. § 753(b), and Rule 80(c) of the Federal Rules of Civil Procedure. When the record of a proceeding in a bankruptcy case is admissible in evidence in a later proceeding, a properly certified sound recording is not objectionable because of the mode or form of the recording. It is of course necessary to insure "the accuracy and identity of the record," which includes sufficient intelligibility to meet minimal standards of reliability. "If these requirements of reliability are met, the nature of the record as well as the mode of its preparation should be immaterial." *Tatum v. United States*, 249 F.2d 129, 131 (D.C. Cir. 1957), cert. denied, 356 U.S. 943 (1958). Subdivision (c) is consonant with the provisions of the Federal Rules of Evidence and supplements them by according prima facie effect to a properly certified recording or transcript as a correct statement of the testimony and proceedings.

Rule 512. Designated Depositories

1 *(a) Designation.* The referees ~~in each dis-~~
2 ~~trict~~ shall designate ~~the~~ order banking insti- by
3 tutions as depositories for the money of es-
4 tates. Each depository so designated shall
5 give security in accordance with subdivision
6 (b) of this rule for the prompt repayment of
7 deposits made therein. The referees may
8 from time to time change the number of de-
9 positories, the designations, or the amount of
10 security required. Except as provided in the
11 last sentence of subdivision (b), the author-

12 ity of referees under this rule shall be exer-
13 cised by a majority vote.
14 *(b) Security Required.* Except as provided
15 hereinafter, the referees shall require from
16 each designated depository a bond secured
17 by the undertaking of an authorized corpo-
18 rate surety approved by them, or by the de-
19 posit of securities designated in Title 6,
20 U.S.C., § 15. Securities accepted for deposit
21 in lieu of a surety upon a depository bond
22 shall be deposited by the depository bank in
23 the custody of a Federal Reserve bank or
24 branch thereof designated by the referees
25 and shall be subject to the order of the refer-
26 ees. No bond or other security shall be re-
27 quired for any deposits fully insured under
28 Title 12, U.S.C., § 1821, and any referee
29 may designate a banking institution for the
30 purpose of receiving deposits so insured.
31 *(c) Prohibition of Deposits When Ade-*
32 *quacy of Security Doubtful.* No receiver or
33 trustee or other person shall deposit in any
34 depository money received or held by him as
35 a fiduciary under the Act if he has reasona-
36 ble cause to believe that the bond or the secu-
37 rity therefor is or may be inadequate in view
38 of existing and expected deposits.
39 *(d) Condition of Bond; Place of Filing;*
40 *Proceeding on Bond.* The condition of a bond
41 given under this rule shall be that the des-
42 ignated banking institution will well and
43 truly account for all money deposited with it
44 as depository and for all interest payable on
45 savings and time deposits when duly author-
46 ized, will pay out such money and interest

47 only in accordance with the Act, these rules,
48 and rules and orders of the court, and will
49 otherwise faithfully perform all its duties as
50 depository. A bond given under this rule
51 shall be filed with the court and may be pro-
52 ceeded upon in the name of the United
53 States for the use of any person injured by a
54 breach of the condition.
55 *(e) New Bond: When Required.* The ref-
56 erees shall require a depository to give a new
57 bond whenever the prior bond, together with
58 securities deposited pursuant to subdivision
59 (b), does not appear to constitute adequate
60 security in view of existing and expected de-
61 posits.
62 *(f) Revocation of Designation.* If any de-
63 pository fails, within the time fixed, to give a
64 bond under this rule or to deposit securities
65 adequate for existing and expected deposits,
66 the referees shall order the depository imme-
67 diately to pay over all money on deposit with
68 it, with all interest payable thereon, and
69 shall revoke its designation.
70 *(g) Relief from Liability on Bond.* A sur-
71 ety on the bond of a depository may, by an
72 application setting forth the grounds there-
73 for, request to be relieved from liability with
74 respect to any subsequent default of the de-
75 pository. If, after hearing upon notice to the
76 depository, other sureties, trustees, and
77 other representatives of estates having
78 money in the depository, the referees deter-
79 mine that the application can be granted
80 without injury to any party in interest, the
81 applicant shall be relieved and a new bond or

82 other appropriate security shall be required.
83 *(h) Reports Required of Designated De-*
84 *positories.* The Director of the Administra-
85 tive Office of the United States Courts with
86 the approval of the Judicial Conference of
87 the United States shall prescribe by regula-
88 tion the reports to be made by designated
89 depositories.

ADVISORY COMMITTEE'S NOTE

This rule is based on § 61 of the Bankruptcy Act and General Order 53. It vests the authority to designate and terminate designations of depositories in the referees rather than the judges in recognition of the fact that the referees are more likely to be familiar with the considerations that ought to govern the exercise of such authority. A bond given pursuant to the rule should accordingly be filed with the court rather than with the clerk of the court as provided in § 50h of the Act. *Cf.* Rule 509(a). The last sentence of subdivision (b) permits any referee to designate a depository for receiving funds to the extent they are insured by the Federal Deposit Insurance Fund. Any other designation shall be made by the referees of the district acting concurrently. Since the rule recognizes only corporate sureties, references in General Order 53 to qualifications of individual sureties and to deceased sureties are omitted from this rule. For the same reason the 5-year limitation imposed by General Order 53(7) on the term of a depository bond is deleted, this matter being left for prescription by the referees. The rule omits the provisions in General Order 53(9) for termination of a surety's liability on a bond when a new bond is approved, since the term of the obligation should be determined by reference to its language and the order approving the bond. The responsibility for prescribing reporting requirements for designated depositories is assigned to the Director of the Administrative Office subject to the approval of the Judicial Conference to permit flexibility and the prompt utilization of new procedures

The subdivision contemplates that the designation of depositories in any territory shall be made by the referee designated by the Judicial Conference pursuant to § 37 of the Act to serve that territory.

and technological improvements as they are developed. The provision in subdivision (d) regarding a proceeding on a bond given under this rule is derived from § 50h of the Act. *Cf.* Rule 717. Such a proceeding is governed by the rules in Part VII. See the Note accompanying Rule 701. See also Rule 925.

Rule 513. Special Masters

1 If a reference is made in a bankruptcy
2 case by a judge to a special master, the
3 Federal Rules of Civil Procedure applicable
4 to masters apply.

Advisory Committee's Note

The Federal Rules of Civil Procedure applicable to masters include the third sentence of Rule 52(a) and Rule 53. Although references to special masters may be made pursuant to the Federal Rules of Civil Procedure, "A reference to a master shall be the exception and not the rule." Fed.R.Civ.P. 53(b); 5 Moore ¶¶ 53.02, 53.12[6] (1969). This rule does not contemplate that a referee shall ever have occasion to refer any matter to a special master.

Rule 514. Closing Cases

1 Whenever it appears that an estate has
2 been administered and the court has passed
3 upon the final account and discharged the
4 trustee, the case shall be closed.

Advisory Committee's Note

This rule is adapted from § 2a(8) of the Act. Dismissal of a case for want of prosecution or failure to pay filing fees is governed by Rule 120. An estate may be closed even though the period allowed by Rule 302(e) for filing claims has not expired. 1 Collier ¶ 2.48 (1968). The clos-

ing of a case may be expedited when a notice of no dividends is given under Rule 203(b), when no final meeting is necessary under Rule 204(c), and when no trustee has been elected or appointed under Rule 211.

Rule 515. Reopening Cases

1 A case may be reopened on application by
2 the bankrupt or other person to administer
3 assets, to accord relief to the bankrupt, or
4 for other good cause. The application shall
5 be filed with the clerk of the district court
6 having custody of the papers in the case. The
7 case shall be referred forthwith for action on
8 the application and for further proceedings
9 therein.

Advisory Committee's Note

This rule is an elaboration of the provision of § 2a(8) of the Act authorizing estates to be reopened for cause shown. Although this provision was amended in 1938 to clarify the authority of the court to reopen for purposes other than the administration of newly discovered assets, see 1 Collier ¶ 2.49 (1968), the courts have been reluctant to sustain exercises of this authority for the benefit of the bankrupt. See, *e.g.*, *Saper v. Viviani*, 226 F.2d 608, 610–11 (2d Cir. 1955), rev'g sub nom. *In re John Viviane & Son*, 132 F.Supp. 633 (S.D.N.Y. 1955); *In re Perlman*, 116 F.2d 49 (2d Cir. 1940) (Clark, C.J., dissenting), rev'g 34 F.Supp. 685 (S.D.N.Y. 1940); *In re Barlean*, 279 F.Supp. 260 (D.Mont. 1968). The grant of an application to reopen under this rule remains a matter of discretion of the court, but relief to the bankrupt is explicitly recognized as a proper cause for the reopening. A principal ground for refusing to reopen a case to enable a bankrupt to get a discharge has been the rule that the closing of an estate without the grant of a discharge is the legal equivalent of a denial of discharge. *Perlman v. 322 West Seventy-Second Street Co., Inc.*, 127 F.2d 716,

718–19 (2d Cir. 1942); *In re Butts*, 123 F.2d 250, 251 (2d Cir. 1941). This rule has been substantially qualified by § 17b of the Act, added by Pub.Law 91–467 and Rule 120(c). See the Note accompanying the latter rule.

An application under this rule is not subject to the one-year limitation of Rule 60(b) of the Federal Rules of Civil Procedure, which generally applies to motions for relief from an order of the court. See Rule 924. The provision for automatic reference is new. *Cf. In re Loewerree*, 157 F.2d 831, 831 (2d Cir. 1946). It is consonant with the policy of the rules to eliminate unnecessary paperwork and involvement of the judge in bankruptcy cases otherwise than as provided in Rule 102. *Cf.* Rule 217(b). The fees, if any, to be charged for reopening cases are prescribed by the Judicial Conference pursuant to § 40c of the Act.

district

SEE ATTACHMENT

INSERT IN NOTE AT END OF RULE 515

A number of rules authorize the court to take action respecting matters connected with a closed case without the necessity of a reopening. See, e.g., Rule 403(e), authorizing entry of order approving exemptions after a case is closed when no objections were filed to the trustee's report; Rule 608, authorizing abandonment of property of inconsequential value recovered after a case is closed and entry of a post-closing order approving abandonment of scheduled but unadministered property; Rule 924, incorporating in these rules Rule 60(a) of the Federal Rules of Civil Procedure, which enables the court on its own initiative to correct clerical mistakes in judgments, orders, and other parts of the records and errors therein due to oversight or omission. A judgment determined to be nondischargeable pursuant to Rule 409 may be enforced after a case is closed by a writ of execution obtained pursuant to Rule 769 or Rule 69 of the Federal Rules of Civil Procedure.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 601. Filing of Petition as Automatic Stay Against Lien Enforcement

1 *(a) Stay Against Lien Enforcement.* The
2 filing of a petition shall operate as a stay of [any act or]
3 the commencement or continuation of any
4 [court] proceeding ~~or act~~ to enforce (1) a lien
5 against property in the custody of the bank-
6 ruptcy court, or (2) a lien against the prop-
7 erty of the bankrupt obtained within 4
8 months before bankruptcy by attachment,
9 judgment, levy, or other legal or equitable
10 process or proceedings.
11 *(b) Duration of Stay.* Except as it may be
12 terminated, annulled, or modified by the
13 bankruptcy court under subdivision (c)[, (d), or (e)] of
14 this rule, the stay shall continue until the
15 bankruptcy case is dismissed or closed, or
16 until the property subject to the lien is, with
17 the approval of the ~~bankruptcy~~ court, set
18 apart as exempt, abandoned, or transferred.
19 *(c) Relief from Stay.* Upon the filing of a
20 complaint seeking relief from a stay pro-
21 vided by this rule, the bankruptcy ~~judge~~ [court]
22 shall, subject to the provisions of subdivision
23 (d) of this rule, set the trial ~~date~~ for the
24 earliest possible ~~time,~~ [date] and it shall take pre-
25 cedence ~~of~~ [over] all matters except older matters
26 of the same character. ~~Unless the party seek-~~
27 ~~ing continuation of the stay shows that he is~~
28 ~~entitled thereto, the~~ [The] court ~~shall~~ [may, for cause shown,] terminate

rty seeking
inuation of a
against lien
rcement shall
that he is
tled thereto.

29 annul, ~~or~~ modify ~~the stay on such terms as~~
30 ~~may be appropriate under the circum-~~
31 ~~stances.~~

, or condition
such stay.

32 *(d) Ex Parte Relief from Stay.* Upon the
33 filing of a complaint seeking relief from a
34 stay provided by this rule, relief may be
35 granted without written or oral notice to the
36 adverse party if (1) it clearly appears from
37 specific facts shown by affidavit or by a veri-
38 fied complaint that immediate and irrepara-
39 ble injury, loss, or damage will result to the
40 plaintiff before the adverse party or his at-
41 torney can be heard in opposition, and (2)
42 the plaintiff's attorney certifies to the court
43 in writing the efforts, if any, which have
44 been made to give the notice and the reasons
45 supporting his claim that notice should not
46 be required. The party obtaining relief
47 under this subdivision shall give written or
48 oral notice thereof as soon as possible to the
49 trustee or receiver or, if none has qualified,
50 to the petitioner or petitioners and, in any
51 event, shall forthwith mail to such person or
52 persons a copy of the order granting relief.
53 On 2 days' notice to the party who obtained
54 relief from a stay provided by this rule with-
55 out notice or on such shorter notice to that
56 party as the court may prescribe, the ad-
57 verse party may appear and move its rein-
58 statement, and in that event the court shall
59 proceed to hear and determine such motion
60 as expeditiously as the ends of justice re-
61 quire.
62 *(e) Availabil[illegible] [illegible] Other [illegible].* Nothing
63 in this rule pre[illegible] the is[illegible], or re-

64 lief from, any stay, restraining order, or in-
65 junction when otherwise authorized.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule adopts features of the stay provided by § 148 of the Act against an act or proceeding to enforce a lien on the property of a bankrupt estate (1) if the property is in the custody of the court or (2) if the lien was obtained by means and at a time rendering it vulnerable to avoidance under § 67a of the Act, whether or not the court has custody of the property. The premise of the rule is that such a stay is no less needful in straight bankruptcy than in a reorganization case to protect creditors against prejudicial dismemberment and disposition of the estate before a trustee or receiver can qualify. The stay provided by this rule is to be distinguished from that provided by Rule 401, which reinforces §§ 11a, 14f(2), and 17c(1) of the Act by protecting the bankrupt against harassment and possible frustration of his right to a discharge.

The first branch of subdivision (a) protects the custody of the bankruptcy court against interference by an attempt to enforce a lien, whether the attempt is by a judicial proceeding or by a nonjudicial mode of enforcement. Property is in the custody of the bankruptcy court if it is in the actual or constructive possession of the bankrupt at the date of bankruptcy. See *Ex parte Baldwin*, 291 U.S. 610, 615 (1934); *Chicago Board of Trade v. Johnson*, 264 U.S. 1, 12 (1924); *Lazarus, Michel & Lazarus v. Prentice*, 234 U.S. 263, 266-67 (1914); *Acme Harvester Co. v. Beekman Lbr. Co.*, 22 U.S. 300, 307 (1911); 1 Collier ¶ 2.62[1] (1968); MacLachlan, *Bankruptcy* 265 (1956); Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, 92, 98 (1948). Insofar as such property is concerned, the rule is a substantially restricted restatement of the much quoted and applied dictum of *Mueller v. Nugent*, 184 U.S. 1, 14 (1901), that "the petition is a *caveat* to all the world, and in effect an attachment and injunction." Once the jurisdiction of the court has attached, [illegible]

All creditors receive notice of the effect of the petition as a stay along with notice of the first meeting of creditors (see Official Form No. 12). The bankruptcy court may appropriately also give notice of the stay to the judge or other officer of a nonbankruptcy court in which an action subject to the stay is known to be pending, particularly when there appears to be a likelihood that action in disregard of the stay may occur.

brought in another court to enforce a lien against such property cannot disturb the custody of the bankrupt court without its consent. See *Isaac v. Hobbs Tie & Timber Co*, 282 U.S. 734, 737 (1931). The automatic stay is thus a logical corollary of the bankruptcy court's exclusive jurisdiction to deal with the property of the bankrupt within its custody from the date of bankruptcy. The term "lien" is used in the rule to include a consensual security interest in personal or real property, a lien obtained by judicial proceedings, a statutory lien, or any other variety of charge against property securing an obligation.

The second branch of subdivision (a) recognizes that a lien obtained within 4 months before bankruptcy by judicial process or proceedings is likely to be voidable in summary proceedings under § 67a of the Act. See MacLachlan, *Bankruptcy* § 295 (1956). While avoidance depends on a showing that the debtor was insolvent when the lien was obtained, the lien is voidable without regard to the creditor's mental state, and the stay is needed to prevent the frustration of the purpose of § 67a by a transfer of the property subject to the voidable lien to a bona fide purchaser. *Cf. Clarke v. Larremore*, 188 U.S. 486 (1903).

Subject to the possible limitation imposed by the second clause of subdivision (a), the

~~The~~ stay provided by this rule does not operate to prevent the continuation of any proceeding or act to enforce a lien when the creditor has possession at the time of bankruptcy. Thus a pledgee may enforce his lien after bankruptcy, see 1 Collier ¶ 2.62[3] (1958); and a mortgagee who has commenced foreclosure proceedings in a state or federal district court before bankruptcy may continue them notwithstanding the stay, see *id.* ¶ 2.63[1]. Since [illegible] of nonjudicial foreclosure of a mortgage under a power of sale does not ordinarily deprive the mortgagor of possession, however, the stay bars further steps in enforcement of the mortgage although the foreclosure [illegible] was commenced before bankruptcy. See 1 Collier ¶ 2.62[2] (19[illegible]). Judicial proceedings to enforce the lien of [illegible] months before bankruptcy [illegible] of this rule. Even if the creditor has obtained a lien by judicial pro-

unless the property remained in the custody of the bankrupt at the time of the filing of the petition.

obtained

ceedings within the 4 months before bankruptcy but the lien is no more than a step in the enforcement of a lien obtained by such proceedings over 4 months before bankruptcy, the stay does not operate against continuation of the proceedings to enforce such prior lien. *Cf. Straton v. New*, 283 U.S. 318 (1931); *Metcalf v. Barker*, 187 U.S. 165 (1902). Likewise proceedings on a judgment within the 4-month period foreclosing a prior consensual or statutory lien are not subject to the stay of the rule. See generally 1 Collier ¶ 2.63[1] (1968); 4 *id.* ¶¶ 67.01[1], 67.08[1], 67.11 (1967).

entered

unless the bankrupt retained custody at bankruptcy.

Subdivisions (b), (c), and (d). Whether the enforcement of a lien against property in the bankruptcy court's custody by an act or proceeding after bankruptcy without permission of the bankruptcy court is void has been the subject of conflicting views by the courts and commentators. See 1 Collier ¶ 2.62[1] & [2] (1968). This rule consists with the view that such an act or proceeding is void, but subdivision (c) recognizes that in appropriate cases the court may annul the stay so as to validate action taken during the pendency of the stay.

No substantive right is abridged, enlarged, or modified by a limited stay of the enforcement of a lien against property in the court's custody or a lien potentially voidable under § 67a. *Continental Ill. Nat. Bank & Trust Co. v. Chicago, R.I. & P. R.Ry.*, 294 U.S. 648, 676, 681 (1935). The stay does not extend beyond the dismissal or closing of the case in any event and may be terminated, annulled, or modifed earlier on the complaint of the lienor seeking relief pursuant to subdivision (c) or (d). Such relief may also result from a determination in the lienor's favor on a complaint by the trustee, receiver, or other party in interest seeking avoidance of the lien or other relief in an adversary proceeding governed by Rule 701(2) or (3). If the court avoids the lien, preserves it for the benefit of the estate, or orders the property sold free of the lien, the lienor's rights against the property are terminated.

The stay provided by this rule remains effective during the pendency of the case unless sooner modified by

12 preceding sentence, the trustee shall as soon
13 as possible after his qualification record in
14 every such office a certified copy of the peti-
15 tion without schedules or of the order of ad-
16 judication, if any, or of the order approving
17 his bond. The recording of a copy pursuant
18 to this subdivision is not necessary, however,
19 in the county in which is kept the record of
20 the original proceedings in the case or in any
21 office where such a copy has previously been
22 recorded.
23 *(b) Personal Property.* As soon as possible
24 after his qualification a receiver or, if a re-
25 ceiver has not done so, the trustee shall give
26 notice of the bankruptcy to every bank,
27 building and loan association, public utility
28 company, and landlord with whom the bank-
29 rupt has a deposit, to every insurance com-
30 pany which has issued a policy having a cash
31 surrender value payable to the bankrupt,
32 ~~and to~~ every ~~other~~ person known to be hold-
33 ing money or property subject to withdrawal → including
34 or order of the bankrupt. No notice need be
35 given, however, to any of the forenamed per-
36 sons who has knowledge or has previously
37 been notified of the bankruptcy, and no no-
38 tice need be given with respect to property
39 exempt from execution.

ADVISORY COMMITTEE'S NOTE

Subd[illegible] Section 21g of the Act [illegible] the recordation of certain papers in [illegible] counties where the [illegible] makes such recordation, [illegible] law, a condition of [illegible] the bankruptcy [illegible]

of the bankrupt's realty. Section 47c of the Act has imposed a duty on the trustee to record one of these papers, *viz.*, the order approving his bond, within 10 days after his qualification, in every county where the bankrupt owns nonexempt realty. Subdivision (a) of this rule is an adaptation of § 47c but imposes a duty of prompt recordation on a receiver if one is appointed, and on the trustee if there has been no previous recordation. The duty may be performed by recordation of a certified copy of any of the 3 papers authorized to be recorded with the effect of constructive notice under § 21g of the Act, but a receiver may be able to record only a copy of the petition and in any event cannot record a copy of the order approving the trustee's bond. The definition of "to record" in § 1(25) of the Act includes "to register or to file for record or registration." The rule excuses recordation in the county in which is kept the record of the proceedings in the case, since, as § 21g recognizes, such record is itself constructive notice of the pendency of the bankruptcy and of the resultant divestment of the bankrupt's title to realty in that county. *In re Kabbage*, 93 F.Supp. 516, 517 (Ref., N.D. Ohio 1950). Recordation is not required in a county where the bankrupt's only interest in real estate may be claimed by him as exempt inasmuch as postbankruptcy transfers of such an interest are not detrimental to the estate.

Although there are no counties in Louisiana or Puerto Rico, the provisions of §§ 21g and 47c of the Act referring to "county" have given rise to no difficulties in practice or application of the law. Courts and counsel in Louisiana read "parish" for "county"; and in Puerto Rico "county" is deemed to refer to the subdivision in which the bankrupt's property is located. In like manner, the city of St. Louis, Mo., is regarded as a "county" for the purpose of § 21g of the Act. Since there is a statewide system of recordation in Hawaii, the word "state" has in effect been substituted for "county" in the construction of the same sections. The same reading should be given subdivision (a) of this rule.

Subdivision (b). Section 70d of the Act severely restricts the transferability of personal property of the estate after bankruptcy but protects certain good faith transferees. Subdivision (b) of this rule, which is new, recognizes the desirability of protecting the estate as well as innocent depositaries, bailees, and other persons holding money and property of the estate subject to withdrawal or order of the bankrupt, against the risk of postbankruptcy transfers. Failure to give the notice required by this subdivision carries no implication that a postbankruptcy transaction is therefore not subject to challenge under § 70d of the Act or is necessarily within the scope of the doctrine of *Bank of Marin v. England*, 385 U.S. 99 (1966). Although debtors on accounts receivable owned by the bankrupt may be protected by § 70d(2) of the Act in respect to postbankruptcy payments under certain circumstances, it would be an onerous burden and often impracticable to require the receiver or trustee immediately after his qualification to notify all such debtors of the bankrupt. The duty of the officer in respect to such property is to exercise reasonable diligence in the discharge of the duties imposed on him by Rule 501 (if a receiver) or Rule 605 (if the trustee) and by orders of the court.

Responsibilities of receiver and trustee. The duties imposed by subdivisions (a) and (b) fall in the first instance on the receiver, if one is appointed, and the trustee is excused to the extent that recordation or notification has already occurred. If a schedule of the bankrupt's property has been filed, it will presumably afford the receiver and the trustee the best source of information as to the places where recordation should be made and the persons to be notified. In any event the receiver and the trustee are required by this rule to exert all reasonable efforts necessary to determine the places where recordation is necessary and the persons entitled to notice in order to discharge their responsibilities under this rule as soon as possible. See generally 1 Collier ¶ 2.28[1] ([illegible]); 2 *id.* ¶ 47.08[1] ([illegible]); MacLachlan, *Bankruptcy* [illegible] 185-86 (1956).

Rule 603. Burden of Proof as to Validity of Post-Bankruptcy Transfer

1 Any person asserting the validity of a
2 transfer under § 70d of the Act shall have
3 the burden of proof.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 70d(5) of the Act.

Rule 604. Accounting by Prior Custodian of Property of the Estate

1 *(a) Accounting Required.* Any receiver or
2 trustee appointed in proceedings not under
3 the Act, assignee for the benefit of creditors,
4 or agent, required by the Act to deliver prop-
5 erty in his possession or control to the trus-
6 tee or receiver in bankruptcy, shall promptly
7 file a written report and account with the
8 bankruptcy court with respect to the prop-
9 erty of the estate and his administration
10 thereof.
11 *(b) Examination of Administration* ~~*by*~~ .
12 ~~*Bankruptcy Court; Proceeding to Sur-*~~
13 ~~*charge.*~~ ~~Upon~~ the filing of the report and ac-
On
14 count required by subdivision (a) of this rule
15 and after an examination has been made
16 into the superseded administration, the court
17 shall determine the propriety of such admin-
18 istration, including the reasonableness of all
19 disbursements. ~~Any proceeding to surcharge~~
20 ~~is governed by the rules in Part VII~~.

ADVISORY COMMITTEE'S NOTE

This rule [illegible]

In re Ira Haupt & Co., 287 F.Supp. 3[illegible] [illegible]20-21, 323-24 (S.D.N.Y. 1968), appeal dismissed, [illegible] 493 (2d Cir. 1968);

any person required to deliver property to the trustee or receiver in bankruptcy and to account for his disposition of the property of the bankrupt under [illegible] and [illegible] of the Act. See [illegible] v. Hanks, 318 U.S. [illegible] (19[illegible]); and cf. § 70a(8) of the Act. The examination [illegible] subdivision (b) may be initiated (1) on the [illegible] of the custodian required to account under subdivision (a) for an approval of his account and discharge thereon, (2) on the filing of an objection to the custodian's account by, the trustee, ~~or~~ receiver in bankruptcy, or (3) on the court's own initiative. ~~As pointed out in the Note to Rule 701, if the examination discloses an excessive payment or other transfer that entails a surcharge proceeding, the trustee or receiver should file a complaint under Rule 701.~~ If no receiver or trustee has qualified, ~~one~~ may be appointed pursuant to Rule 201(a)(3).

motion of, or

any other party in interest, or

a contest develops and

a receiver.

Rule 605. Money of The Estate: Collection, Deposit, and Disbursement

1 (a) *Collection of Estate; Conversion to*
2 *Money.* A trustee shall collect the property
3 of the estate and, with the approval of the
4 court, convert it into [illegible].
5 (b) *Deposits; Interest.* The trustee shall
6 deposit all money received by him in a desig-
7 nated depository, either in a checking ac-
8 count or, if authorized by the court, in an in-
9 terest-bearing account or deposit.
10 (c) *Withdrawals and Disbursements.* The
11 trustee shall withdraw and disburse money
12 of the estate only by check or other method
13 approved by the court.

Rule 914 applies to any contested matter arising under this rule.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule [illegible] 47 of the Act [illegible]

estate. Subdivision (a) is an adaptation of § 47a(1) but omits reference to the duty to close up the estate expeditiously. The objective of expeditious administration underlies all provisions of these rules, and every officer is obliged to pursue this objective in the performance of duties imposed on him by the rules. See Rule 903.

Subdivision (b) is derived from § 47a(2) of the Act. Designation of a depository is governed by Rule 512. The trustee will ordinarily place the money of an estate in a deposit payable on demand by check in order to permit prompt payment of dividends as required by Rule 308 and to facilitate expeditious administration of the estate. The rule preserves the authority granted in 1963 by the amendment of § 47a(2), 77 Stat. 14, which enables the court to approve the investment of the funds of the estate in interest-bearing accounts and deposits, including renewable time certificates of deposit, whenever it appears that the funds will necessarily be held by the trustee for a substantial period. See Sen. Rep. No. 117 on H.R. 2849, 88th Cong., 1st Sess. 2 (1963). The "interest-bearing savings deposits, time certificates of deposit, or time deposits-open account" referred to in § 47a(2) are all either interest-bearing accounts or deposits within the rule. The trustee's duty under § 47a(3) of the Act to account for all interest received upon funds of the estate is included in the duties prescribed by Rule 218.

Subdivision (c) authorizes the trustee to disburse money of the estate not only by check as permitted by § 47a(1) and General Order 29 but by any other method approved by the court. The provisions of General Order 29 requiring checks to be countersigned by the judge, referee, clerk, or an assistant and particularizing the method of keeping a record of all disbursements are omitted as too rigid and detailed. Mechanisms for payments through bank accounts are subject to technological and other changes and should not be frozen by rules that cannot anticipate these developments. See Dunne, *Variation on a Theme by Parkinson or Some Proposals for the Uniform Commercial Code and the Checkless Society*, 75 Yale L.J. 788 (1966). The rule does not preclude the

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29 proceeding to sell property free of a lien, or
30 of any other interest for which the holder
31 can be compelled to take a money satisfac-
32 tion, is governed by the rules in Part VII.
33 *(4) Execution of Instruments.* After a
34 sale in accordance with this subdivision the
35 trustee or receiver, as the case may be, shall
36 execute such instruments as may be neces-
37 sary or ordered by the court to effectuate the
38 transfer to the purchaser.
39 *(c) Compensation and Eligibility of Auc-*
40 *tioneers and Appraisers.* No auctioneer shall
41 be employed or appraiser appointed except
42 upon an order of the court fixing the amount
43 or rate of compensation. No officer or em-
44 ployee of the Judicial Branch of the United
45 States or the United States Department of
46 Justice shall be eligible to act as an auc-
47 tioneer or appraiser. No residence or licens-
48 ing requirement shall apply to an auctioneer
49 employed or appraiser appointed under this
50 rule.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 70f and g of the Act and General Orders 18 and 45.

Subdivision (a). The first sentence of subdivision (a) of the rule recognizes that the appointment of an appraiser may not always be warranted by a consideration of what is best for the creditors. Although such an appointment is apparently mandatory in every case under § 70f, the rule conforms to the practical construction of the language. See *Robertson v. Howard*, 229 U.S. 54, 61 (1913); *Berger v. Gerstel*, 148 F.2d 757, 760 (5th Cir. 1945); 4A Collier 1122 n.5 (1967).

Subdivision (b). Paragraph (1) of subdivision (b) recognizes the power of the court to protect the estate against

improvident sales by setting a minimum or "upset price" in advance of the sale or by refusing confirmation of a sale at an inadequate price. See 4A Collier, *supra* ¶ 70.98[16]. Paragraph (2) of the subdivision is an adaptation of General Order 18.

Paragraph (3) of subdivision (b) recognizes the adversary character of the proceeding by a trustee in seeking authority to sell property free of liens or of a spouse's interest or of any other interest that can be liquidated by forced sale of the property. If, however, the holder of a lien or other interest amenable to liquidation is fully protected by a deposit in escrow or similar arrangement, the sale may be ordered without the necessity of an adversary proceeding. The authority of the court to sell free of liens rests in case law. See 4A Collier, *supra* ¶ 70.99. The authority to compel the bankrupt's spouse to accept liquidation of her interest was recognized by an amendment of § 2a(7) of the Act in 1938. 1 Collier ¶ 2.45 (1968). If, however, applicable nonbankruptcy law does not compel a spouse to accept a money satisfaction in lieu of her dower interest, the court of bankruptcy does not have the power under § 2a(7) to determine and liquidate the interest. *In re Jones*, 86 F.Supp. 695 (E.D. Mich. 1949). The principle that underlies authority to sell free of liens, including [illegible] (*Van Huffel v. Harkelrode*, 284 U.S. 225 (1931)), supports an order to sell free of an interest that is subject to conversion to money without the holder's consent. See *In re Bowling Green Milling Co., Inc.*, 132 F.2d 279, 284 (6th Cir. 1942), approving sale of wheat by a trustee in bankruptcy of a warehouseman free of claims of holders of warehouse receipts who were owners in common of the wheat; *In re Blodgett*, 115 F.Supp. 33 (E.D.Wis. 1953), approving order for sale of real estate owned by a bankrupt and wife as joint tenants where bankruptcy severed the tenancy. Compare *In re A. Roth Co., Inc.*, 118 F.2d 156 (7th Cir. 1941), denying power of the court of bankruptcy to sell free of liens where the bankrupt's interest [illegible] only that of a [illegible]; [illegible], 6 F.2d 157, 159 (7th Cir. [illegible]), refusing to approve [illegible] by the trustee of property "clear from any [illegible] right" of one

an admittedly valid

9 a contract. Any such contract not assumed
10 within 60 days after qualification of the
11 trustee, or within such further or reduced
12 time as the court may allow within such 60-
13 day period, shall be deemed to be rejected. If
14 a trustee does not qualify, any such contract
15 shall be deemed to be rejected within 60 days
16 after the date of an order directing that a
17 trustee be not appointed, or within such fur-
18 ther or reduced time as the court may fix
19 within such 60-day period. ~~After hearing~~
20 ~~upon notice to the other party to the contract~~
21 ~~the court may, upon such terms and condi-~~
22 ~~tions as it may fix, approve the assignment~~
23 ~~by the trustee of any contract which he has~~
24 ~~assumed.~~

On application by the trustee for authority to assign any contract he has assumed pursuant to this rule, the court shall determine the matter after hearing on notice to the other party to the contract.

ADVISORY COMMITTEE'S NOTE

This rule is based [illegible] Act. The rule eliminates [illegible] the time [illegible] the rule requiring court approval [illegible] of an assumption of an executory contract, wherever practicable, is new, but is in accord [illegible] 169 Fed. 69, 75 (9th Cir. [illegible] 65 F.Supp. 167, [illegible] 251 Fed. 966, 969 (N.D. [illegible] 529-31 (1967); [illegible] Under another new [illegible] direct the bankrupt [illegible] the rule. The trustee [illegible]

to assume as a rejection until 60 days after the trustee's qualification in order to afford creditors an additional opportunity to evaluate the situation in respect to contracts not assumed and to apply to the court for an order approving assumption of any additional contracts that appear to be advantageous to the estate. The rule recognizes, however, that delay of the decision on whether an executory contract should be assumed may be unduly prejudicial to the other party. See, *e.g.*, *Samuels v. E.F. Drew & Co.*, 292 Fed. 734, 739 (2d Cir. 1923); Silverstein, *Rejection of Executory Contracts in Bankruptcy and Reorganization*, 31 U. of Chi.L.Rev. 467, 473 (1964). In an appropriate case he may obtain an order reducing the 60-day period ordinarily allowed for exercising the option to assume. See 4A Collier, *supra* at 528. Conversely it may be impracticable for the decision on whether to assume to be made in the 60-day period ordinarily available, and the trustee or a creditor may obtain an extension in an appropriate case. See, *e.g.*, *In re Rochester Shipbuilding Corp.*, 32 F.Supp. 98, 100 (W.D.N.Y. 1940). Under the rule, however, the extension must be sought and granted within the 60-day period. Enlargement pursuant to the dispensation allowable generally under Rule 906(b)(2) cannot be had for the purpose of rendering a contract amenable to assumption after it has once been deemed rejected. The fourth sentence of the rule, dealing with the effect of nonassumption when no trustee has qualified, is correlated with the provisions that apply when a trustee fails to elect within the time allowed.

The last clause of § 70b of the Act, which relieves the trustee of liability for breaches of any contract or lease occurring after an assignment to a third person, states a rule of substantive law inappropriate for incorporation into the rules.

Rule 608. Abandonment of Property

1 ~~The trustee or receiver may, upon ap-~~
2 ~~proval by the court, abandon any property to~~

1 The court may, on application or on its own initiative and after hearing
2 on such notice as it may direct, approve the abandonment of any property
3 and, without reopening the case, may direct the abandonment of any property
4 of inconsequential value discovered after a case is closed. If a case is
5 closed without administration of property of the estate that has been
6 scheduled, the property shall be deemed to have been abandoned with the
7 approval of the court, and on request the court may, without reopening the
8 case, enter an order approving the abandonment.

3 the bankrupt if it is burdensome or has no
4 net realizable value.

ADVISORY COMMITTEE'S NOTE

This rule is new but codifies the preferred practice developed under case law. See 4A Collier ¶ 70.42[3] (1967); MacLachlan, *Bankruptcy* 119 (1956). Many local rules are to the same effect. S.D. & E.D.N.Y. Bankr. R. 14(d); N.D.Ill. Bankr. R. 18G. It is particularly important that abandonment of real estate owned by the bankrupt be approved by court order to avoid later and needless vexation in regard to the marketability of the title to the realty. See, *e.g.*, *Saper v. Viviani*, 226 F.2d 608 (2d Cir. 1955); MacLachlan, *Bankruptcy* 119, 366 (1956). Notice of the hearing, if any, on the application to abandon property is governed by Rule 203(a)(4).

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SEE ATTACHED

Rule 609. Redemption of Property from Lien or Sale

1 On application by the trustee and after
2 hearing upon such notice as the court may
3 direct, the court may authorize the redemp-
4 tion of property from a lien or from a sale
5 on execution or foreclosure in accordance
6 with applicable law.

to enforce a lien

ADVISORY COMMITTEE'S NOTE

This rule is a revision of General Order 28 Ordinarily the secured creditor should be given notice of the trustee's application so that he can raise any objection he may have to the proposed redemption. If he is in possession, however, and raises an objection to the redemption that makes his claim to continued possession more than colorable, the trustee may be required to commence a plenary action. See 4A Collier ¶ 70.991 (1967).

insofar as it deals with redemption of property.

While it is clearly desirable for any abandonment by the trustee to be authorized by an express order of the court, the second sentence of the rule adopts the case law that treats the closing of an estate without administration of scheduled assets as tantamount to an approval of abandonment. Sparhawk v. Yerkes, 142 U.S. 1 (1891); In re Malcolm, 48 F. Supp. 675 (E.D. Ill. 1943); Beck v. Unruh, 37 Cal. 2d 148, 231 P. 2d 13 (1951). A formal order of approval, which may be necessary to enable the bankrupt to transfer marketable title to realty owned at the time of bankruptcy, is obtainable under the rule without the necessity of reopening the estate. Compare Saper v. Viviani, 226 F. 2d 608 (2d Cir. 1955); and see MacLachlan, Bankruptcy 119, 366 (1956). The rule also provides an effective, expeditious, and inexpensive solution for the vexing problem that not infrequently arises when property belonging to the estate is recovered after the case is closed but it is of insufficient value to warrant the reopening of the case. The rule constitutes no limitation on the right of any party in interest to apply for and obtain an order reopening the case pursuant to Rule 515 on a showing that there are valuable assets that the creditors are entitled to have administered for their benefit.

Rule 610. Prosecution and Defense of Proceedings by Trustee or Receiver

1 The trustee or receiver may, with or with-
2 out court approval, prosecute or enter his
3 appearance and defend any pending action
4 or proceeding by or against the bankrupt, or
5 commence and prosecute any action or pro-
6 ceeding in behalf of the estate, before any
7 tribunal.

ADVISORY COMMITTEE'S NOTE

This rule is derived from subdivisions b, c, and e of § 11 of the Act.

Rule 611. Preservation of Voidable Transfer

1 Whenever any transfer is voidable by the
2 trustee, the court may determine, in an ad-
3 versary proceeding in which are joined per-
4 sons claiming interests or rights in the prop-
5 erty subject to the transfer, whether the
6 transfer shall be avoided only or shall be
7 preserved for the benefit of the estate.

ADVISORY COMMITTEE'S NOTE

This rule is derived from provisions in §§ 60b, 67a(3), 67c(2), 67d(6), and 70e(2) of the Act. The power to preserve a voidable lien for the benefit of the estate probably inheres in the court of bankruptcy as a court of equity. *Cf. Jorden v. Hamlett*, 312 F.2d 121, 124 (5th Cir. 1963); *In re Edward Bibinger, Inc.*, 12 App.Div. 2d 237, 239, 210 N.Y.S.2d 319, 321 (1961); Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 Mich.L.Rev. 1419, 1438 n 68 (1967). This rule is applicable whenever the question arises whether a transfer should be avoided only or preserved for the benefit of the estate.

All persons claiming interests or rights in the property that may be held subject to the rights of the transferee and thus of the trustee by the order of preservation should be joined as parties in the proceeding governed by this rule. Any person holding an interest superior to that of the transferee and not challenged by the trustee need not be joined in the proceeding since his rights would not be affected by the order of preservation. The holder of such a superior interest should nevertheless be joined as a party to any proceeding in which a sale free of his interest is contemplated, ~~even though~~ unless the validity and priority of the interest are not in question and the ~~interest is to be transferred to the proceeds of the sale.~~ See Rules 701(3) and 606(b)(3) and the accompanying Notes.

Although §§ 67d(6) and 70e(2) of the Act authorize the preservation of voidable obligations for the benefit of the estate, no instance of the application of either of these preservation provisions has been found in the reported cases. In any event, the determination of the validity and priority of unsecured obligations of the estate is governed by Rule 306.

Rule 612. Proceeding to Avoid Indemnifying Lien or Transfer to Surety

1 If a lien voidable under § 67a of the Act
2 has been dissolved by the furnishing of a
3 bond or other obligation and the surety there-
4 on has been indemnified by the transfer of,
5 or the creation of a lien upon, nonexempt
6 property of the bankrupt, the surety shall be
7 joined as a defendant in any proceeding to
8 avoid the indemnifying transfer or lien ~~or transfer~~. Such proceeding is
9 governed by the rules in Part VII. If an
10 order is entered for the recovery of indemni-
11 fying property in kind or for the avoidance
12 of an indemnifying lien, the court, upon mo-

13 tion by any party in interest, shall ascertain
14 the value of such property or lien; if such
15 value is less than the amount for which ~~the~~ such
16 property or lien is indemnity ~~or than the amount of~~
17 ~~the lien, the transferee or lienholder~~ the surety may
18 elect to retain the property ~~of~~ or lien ~~upon~~ upon payment
19 ment of the value so ascertained to the trus-
20 tee or debtor, as the case may be, within
21 such time as the court shall fix.

ADVISORY COMMITTEE'S NOTE

This rule is derived from § 67a(2) and (4) of the Act.

PART VII. ADVERSARY PROCEEDINGS

[N.b. The numbering of the rules in this Part VII is correlated with the numbering of the Federal Rules of Civil Procedure.]

Rule 701. Scope of Rules of Part VII

1 The rules of this Part VII govern any pro-
2 ceeding instituted by a party before a bank-
3 ruptcy judge to (1) recover money or prop-
4 erty, [other than a proceeding under Rule 220 or Rule 604,] (2) determine the validity, priority, or
5 extent of a lien or other interest in property,
6 (3) sell property free of a lien or other inter-
7 est for which the holder can be compelled to
8 take a money satisfaction, (4) object to or
9 revoke a discharge, (5) obtain an injunction,
10 (6) obtain relief from a stay as provided in
11 Rule 401 or 601, ~~(7) avoid an obligation~~
12 ~~under Rule 220, or (8)~~ [or (7)] determine the dis-
13 chargeability of a debt. Such a proceeding
14 shall be known as an adversary proceeding.

Advisory Committee's Note

The rules in Part VII (701 to 782 inclusive) govern the procedural aspects of most of the litigation within the jurisdiction of the court of bankruptcy. The procedure in plenary actions or proceedings, on the other hand, is governed by the Federal Rules of Civil Procedure when brought in United States district courts and by applicable state rules of civil procedure when brought in state courts. Proceedings on a contested petition and to vacate an adjudication are governed by the rules in Part VII to the extent provided by Rule 121. Proceedings to which the rules in Part VII apply directly include those

brought to avoid transfers of the bankrupt under §§ 60, 67, and 70 of the Act when plenary actions are unnecessary; reclamation proceedings filed by secured creditors, beneficiaries of trusts, and bailors of property in the custody of the court; proceedings initiated by counterclaims by trustees and receivers for money or property from creditors who have filed claims (Rule 306(c)); proceedings to sell property free of liens and spouses' interests (Rule 606(b)(3)); proceedings on bonds under §§ 50n and 69b of the Act (Rules 212(f), 512(d), and 923); proceedings to recover excessive dividends under § 57 of the Act; ~~proceedings to surcharge prebankruptcy custodians (Rule 604(b));~~ actions by trustees and receivers for recovery of money or property against defendants who consent to trial before referee; proceedings to determine whether discharge should be denied because of an objection grounded on § 14c of the Act (Rule 404) or revoked as provided in § 15 of the Act; proceedings for injunctions under §§ 2a(15), 11a, and 17c(4) of the Act and for relief from stays provided by Rules 401 and 601; ~~proceedings to avoid obligations subject to examination under Rule 220(b);~~ and proceedings initiated pursuant to § 17c of the Act to determine the dischargeability of particular debts of the bankrupt and to obtain judgments on those not discharged (Rule 409).

If a lienor seeks relief from a stay as provided by Rule 401 or 601, the proceedings shall be expedited in accordance with the provisions of the applicable rule. *Ex parte* relief against the stay of acts and proceedings to enforce liens prescribed by Rule 601 is governed by subdivision (d) of that rule. Failure of any party to move for reinstatement of a stay pursuant to that subdivision after *ex parte* relief has been granted to the lienor does not bar him from seeking injunctive relief under this rule and Rule 765.

Except as provided in Rules 121 and 914 Part VII does not govern contested proceedings in the court of bankruptcy other than those described in this rule. Thus, proceedings initiated by the filing of an objection to [illegible] [illegible] [illegible] money judgment or recovery of property, and proceed

ings ~~initiated by the court~~ under Rule 604 to require a prebankruptcy liquidator to account to the court for the disposition of the property of the bankrupt (see, *e.g.*, *In re Ira Haupt & Co.*, 287 F.Supp. 318~~, 320~~ (S.D.N.Y. 1968), appeal dismissed, 405 F.2d 493 (2d Cir. 1968)) and under Rule 220 to examine and determine the reasonableness of compensation paid or promised by a bankrupt to an attorney at law (see, *e.g.*, *Davis v. Negin*, 357 F.2d 154, 155 (6th Cir. 1966)), are ~~generally~~ not subject to the rules in Part VII. ~~If, after an examination it appears necessary to commence a proceeding to surcharge under § 2a(21) of the Act or a proceeding to recover an excessive payment or transfer or to avoid an obligation to an attorney under Rule 220, the rules in Part VII govern, as indicated in the first paragraph of this Note. It may be necessary for a receiver to be appointed for the purpose of commencing such a proceeding as provided in Rule 201(a)(2).~~ The procedure for handling most objections to claims and for their reconsideration is prescribed by Rules 306 and 307. The procedure for handling exemptions is prescribed by Rule 403.

[*N.b. The next rule is 703.*]

Rule 703 Commencement of Adversary Proceedings

1 An adversary proceeding is commenced by
2 filing a complaint with the court.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 3 of the Federal Rules of Civil Procedure. A bankruptcy case is commenced as provided in Rule 101. A claim against the estate is made by filing a proof of claim in accordance with Rule 302. An application for relief against a party, or opposed by a party in interest, which is not otherwise designated [illegible] of a "motion" [illegible] [illegible] [illegible]

Rule 704. Process; Service of Summons, Complaint, and Notice of Trial

1 *(a) Summons and Notice of Trial: Issu-*
2 *ance and Form; Service with Complaint.*
3 Upon the commencement of an adversary
4 proceeding the bankruptcy judge shall set a
5 date for trial and shall forthwith issue a
6 summons and notice of trial. The summons
7 and notice shall conform substantially to Of-
8 ficial Form No. 26 and shall be served to-
9 gether with the complaint on the defendant
10 in one of the modes authorized by this rule.
11 *(b) Personal Service.* Service of the sum-
12 mons, complaint, and notice of trial may be
13 made as provided in Rule 4(d) of the Federal
14 Rules of Civil Procedure for the service of
15 process. Personal service may be made by
16 any person not less than 18 years of age who
17 is not a party.
18 *(c) Service by Mail.* Service of summons,
19 complaint, and notice of trial may also be
20 made by any form of mail requiring a signed
21 receipt as follows:
22 (1) Upon an individual other than an in-
23 fant or incompetent, by mailing a copy of
24 the summons, complaint, and notice to his
25 dwelling house or usual place of abode or to
26 the place where he regularly conducts his
27 business or profession.
28 (2) Upon an infant or an incompetent
29 person, by mailing a copy of the summons,
30 complaint, and notice to the person upon
31 whom process is prescribed to be served by

32 the law of the state in which service is made
33 when an action is brought against such de-
34 fendant in the courts of general jurisdiction
35 of that state. The summons, complaint, and
36 notice in such case shall be addressed to the
37 person required to be served at his dwelling
38 house or usual place of abode or at the place
39 where he regularly conducts his business or
40 profession.

41 (3) Upon a domestic or foreign corpora-
42 tion or upon a partnership or other unincor-
43 porated association, by mailing a copy of the
44 summons, complaint, and notice ~~to a place~~
45 ~~where such organization regularly carries on~~
46 ~~its business~~.

[Marginal insertion after "notice":] directed to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

47 (4) Upon the United States, by mailing a
48 copy of the summons, complaint, and notice
49 to the United States attorney for the district
50 in which the action is brought and also to the
51 Attorney General of the United States at
52 Washington, District of Columbia, and in
53 any action attacking the validity of an order
54 of an officer or an agency of the United
55 States not made a party, by also mailing a
56 copy of the summons, complaint, and notice
57 to such officer or agency.

58 (5) Upon any officer or agency of the
59 United States, by mailing a copy of the sum-
60 mons, complaint, and notice to the United
61 States as prescribed in paragraph (4) of this
62 subdivision and also to the officer or agency.
63 If the agency is a corporation, the mailing
64 shall be as prescribed in paragraph (3) of
65 this subdivision of this rule.

66 (6) Upon a state or municipal corporation

67 or other governmental organization thereof
68 subject to suit, by mailing a copy of the sum-
69 mons, complaint, and notice to the person or
70 office upon whom process is prescribed to be
71 served by the law of the state in which serv-
72 ice is made when an action is brought
73 against such a defendant in the courts of
74 general jurisdiction of that state, or in the
75 absence of the designation of any such per-
76 son or office by state law, then to the chief
77 executive officer thereof.
78 (7) Upon a defendant of any class re-
79 ferred to in paragraph (1) or (3) of this
80 subdivision of this rule, it is also sufficient if
81 a copy of the summons, complaint, and notice
82 is mailed to the person upon whom service is
83 prescribed to be served by any statute of the
84 United States or by the law of the state in
85 which service is made when an action is
86 brought against such defendant in the courts
87 of general jurisdiction of that state.
88 (8) Upon any defendant, it is also suffi-
89 cient if a copy of the summons, complaint,
90 and notice is mailed to an agent of such de-
91 fendant authorized by appointment or by
92 law to receive service of process, at his
93 dwelling house or usual place of abode or at
94 the place where he regularly carries on his
95 business or profession and, if the authoriza-
96 tion so requires, by mailing also a copy of
97 the summons, complaint, and notice to the
98 defendant as provided in this subdivision.
99 *(d) Service Pursuant to Court Order.*
100 *(1) Service in Accordance with Federal*
101 *Rule of Civil Procedure 4(e).* If a party can-

102 not be served as provided in subdivision (b),
103 (c), or (i) of this rule, the court may order
104 the summons, complaint, and notice of trial
105 to be served as provided in Rule 4(e) of the
106 Federal Rules of Civil Procedure for service
107 of summons, notice, or order in lieu of sum-
108 mons.
109 *(2) Service by Publication.* If a party to
110 an adversary proceeding to determine or pro-
111 tect rights in property in the custody of the
112 court cannot be served as provided in subdi-
113 vision (b), (c), or (i) of this rule, the court
114 may order the summons, complaint, and no-
115 tice of trial to be served by mailing copies
116 thereof to the party's last known address, if
117 any, and by at least one publication in such
118 manner and form as the court may direct.
119 *(e) Time of Service.* Service under subdi-
120 vision (b) shall be made within [illegible] days after
121 the issuance of the summons. If service is
122 made under subdivision (c), the summons,
123 complaint, and notice of trial shall be depos-
124 ited in the mail within [illegible] days after the issu-
125 ance of the summons. Service under subdivi-
126 sion (d) or (i) shall be made within the time
127 fixed by the court. If a summons is not timely
128 served in accordance with the foregoing pro-
129 visions, another summons shall be issued and
130 served and a new date set for trial.
131 *(f) Territorial Limits of Effective Service.*
132 (1) The summons, together with the com-
133 plaint and notice of trial, and all other proc-
134 ess except a subpoena may be served any-
135 where within the United States. "United
136 States," as used in this subdivision, includes

137 the Commonwealth of Puerto Rico and the
138 territories and possessions to which the Act
139 is or may hereafter be applicable.
140 (2) The summons, together with the com-
141 plaint and notice of trial, and all other proc-
142 ess except a subpoena may be served in a
143 foreign country (A) on the bankrupt, any
144 person required to perform the duties of a
145 bankrupt, any general partner of an adjudi-
146 cated partnership, or any attorney who is a
147 party to a transaction subject to examina-
148 tion under Rule 220, or (B) on any party to
149 an adversary proceeding to determine or
150 protect rights in property in the custody of
151 the court, or (C) on any person whenever
152 such service is authorized by a federal or
153 state law referred to in Rule 4(d)(7) or Rule
154 4(e) of the Federal Rules of Civil Procedure.
155 (3) A subpoena may be served within the
156 territorial limits provided in Rule 45 of the
157 Federal Rules of Civil Procedure.
158 *(g) Proof of Service.* Service of process
159 under the foregoing provisions of this rule
160 shall be proved as provided in Rule 4(g) of
161 the Federal Rules of Civil Procedure. When
162 service is made by mail, the proof shall in-
163 clude the signed receipt or other evidence
164 satisfactory to the court that delivery was
165 made to the addressee or that acceptance was
166 refused by the addressee. Failure to make
167 proof of service does not affect the validity
168 of the service.
169 *(h) Effect of Errors; Amendment.* Service
170 of process under this rule shall be effective

171 notwithstanding an error in the papers
172 served or the manner or proof of service if
173 no material prejudice resulted therefrom to
174 the substantial rights of the party against
175 whom the process issued. Amendment of
176 process or proof of service thereof may be al-
177 lowed as provided in Rule 4(h) of the Fed-
178 eral Rules of Civil Procedure.
179 *(i) Alternative Provisions for Service in a*
180 *Foreign Country.* If service of the summons,
181 complaint, and notice of trial or of any proc-
182 ess is authorized to be effected upon a party
183 in a foreign country, it may also be made
184 and proved as provided in subdivision (i) of
185 Rule 4 of the Federal Rules of Civil Proce-
186 dure.

ADVISORY COMMITTEE'S NOTE

Rule 701 is an adaptation of Rule 4 of the Federal Rules of Civil Procedure. The latter rule has been applied in contested proceedings in bankruptcy. *Slocum v. Edwards*, 168 F.2d 627, 631 (2d Cir. 1948).

Subdivision (a) of this Bankruptcy Rule, like the corresponding subdivision of the Civil Rule, provides for the issuance of a summons upon the filing of the complaint that commences an adversary proceeding. This rule, however, requires the bankruptcy judge to set a date for trial before issuance of the summons so that notice of the trial date may accompany the summons. The form of the summons and notice of trial is set out in Official Form No. 26, subject to such alteration as may be necessary when, for example, service is made pursuant to a statute or rule of court under subdivision (d) of this rule and the statute or rule requires a different form. A mistake in the form used should ordinarily be harmless error amenable to correction by amendment under subdivision (h). See 2 Moore 1001 (1961).

Designation of the date of trial in advance serves an important objective of bankruptcy procedure. As the Supreme Court observed in *Katchen v. Landy*, 382 U.S. 323, 328 (1966), "this Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" Provision for disposition without the delay that is the usual incident of conventional litigation is one of the means chosen to effectuate that purpose. *Id.* at 329. In the typical case the date for the trial should be set not later than ~~25~~ 30 days after the filing of the complaint. Such a period accommodates the provision in Rule 712(a) which fixes the time to answer in the usual case as ~~20~~ 25 days after issuance of the ~~complaint~~ summons. Unless the defendant interposes a defense or objection which requires several days for trial, or a postponement to enable the parties to prepare for trial, the adversary proceeding can thus be determined within the time normally allowed for the service of the answer to a complaint filed in an ordinary civil action. If the plaintiff amends his complaint or if the defendant serves a motion, counterclaim, or cross-claim, the time for filing responsive pleadings is likely to extend beyond ~~20~~ 25 days after the issuance of the summons, and the setting of a new date for trial will often be necessary or advisable in such event. Likewise if either party seeks discovery before the date set for trial, it is likely that a new trial date will have to be set. A court setting an early date of trial under this rule should be liberal in granting requests for continuance having a plausible basis. *Boyd v. Glucklich*, 116 Fed. 131, 134 (8th Cir. 1902); Drake, *Contested Matters and Ex Parte Procedure in Bankruptcy*, 19 Mercer L.Rev. 318, 320 (1968). As indicated in the Note accompanying Rule 409, however, the trial of issues presented by a complaint seeking determination of the dischargeability of a debt under that rule will ordinarily be set for a date after the disposition of the question whether the bankrupt is to be granted a discharge. The practice of setting a date for trial in advance of service is nonetheless justifiable as a measure that will expedite the disposition of the major portion of litigation governed by the rules in Part VII. Although the setting of the trial date and issuance of the summons and notice of trial are made duties of the bankruptcy judge, both are ministerial functions delegable under Rule 506 to an assistant.

Subdivision (a) recognizes that service of the summons, complaint, and notice of trial may be made by personal service, by mail, by one of the modes prescribed by Rule 4(i) of the Federal Rules of Civil Procedure when service is to be effected on a party in a foreign country, or, when ordered by the court pursuant to subdivision (d), by publication or one of the modes authorized by Rule 4(e) of the Federal Rules of Civil Procedure.

Subdivision (b). When personal service is the mode employed, subdivision (b) follows Rules 4(i)(1) and 45(c) of the Federal Rules of Civil Procedure in recognizing the eligibility for making such service of any nonparty who is not less than 18 years of age.

Subdivision (c). Service in contested proceedings in bankruptcy cases has usually been effected by mail. See Drake, *Contested Matters and Ex Parte Procedure in Bankruptcy,* 19 Mercer L.Rev. 318, 320 (1968). It is contemplated that most service under this rule will continue to be by mail as explicitly authorized by subdivision (c) because of the resultant savings in time and money. *Cf.* 4 Wright & Miller, *Federal Practice and Procedure—Civil* 564, 591 (1969). Only a mode of mail requiring a signed receipt is authorized to be used in view of the necessity for proof of the service. Subdivision (c) is itself an adaptation of Rule 4(d) of the Federal Rules of Civil Procedure for the purposes of mail service.

In serving a corporation, partnership, or other unincorporated association by mail pursuant to paragraph (3) of subdivision (c), it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title.

Subdivision (d). Service in the manner permitted by Rule 4(e) of the Federal Rules of Civil Procedure or by publication is authorized by subdivision (d) of this rule but only when personal service, service by mail, or, when the defendant is in a foreign country, service in accordance with Rule 4(i) of the Federal Rules of Civil Procedure cannot be made. Service by publication pursuant to paragraph (2) of this subdivision is further restricted to adversary proceedings to determine or protect rights to property in the custody of the court. The court is authorized by Rule 908 to determine the form and manner of publication in the respects not prescribed by this paragraph.

Subdivision (e). Since the date for trial is set under subdivision (a) before the issuance of the summons and

the time allowed for filing responsive pleadings under Rule 712 starts to run with the issuance of the summons, it is imperative that service under the rule be made with dispatch. A 5-day limit is thus generally prescribed for service of the summons after its issuance. When the service is made by mail, the papers to be served must be deposited in the mail within the 5-day period. Insofar as compliance with subdivision (e) is concerned, the effect given the deposit of the mail is consistent with the last sentence of Rule 5(b) of the Federal Rules of Civil Procedure ("Service by mail is complete upon mailing"), but proof of service is governed by subdivision (h) of this rule. When service is made pursuant to subdivision (d) (*i.e.*, in accordance with Federal Rule of Civil Procedure 4(e) or by publication), the court should take into account the mode of service and all the circumstances in fixing the time for making the service.

Subdivision (f)(1). The most important change from prior practice authorized by this rule is the extension of the territorial scope of effective service by paragraph (1) of subdivision (f) to include all of the United States. The power to extend the reach of process in bankruptcy cases has been generally acknowledged. 1 Collier ¶ 2.11[2] (1968); 2 Moore 1293.15 (1967); Note, 89 U. of Pa.L.Rev. 960, 962–63 (1941); *cf. Slocum v. Edwards*, 168 F.2d 627, 631 (2d Cir. 1948). The necessity for service of process beyond district and state boundaries in reorganization proceedings under the Act has been recognized by the Supreme Court in *Ex parte Baldwin*, 291 U.S. 610, 615 (1934), and *Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648, 682–84 (1935). The power to authorize such service was predicated on the court's jurisdiction of the debtor's property "wherever located." This power was said to entail "[a]s a necessary consequence . . . the power to preserve and safeguard the property for the benefit of the trust estate," including "jurisdiction to enjoin, in a proper case, interferences with the property, and . . . the power to send process to that end for service upon the person to be enjoined wherever they may be found within the United States. *Continental Ill.Nat.Bank & Trust Co. v.*

Chicago, R.I. & Pac.Ry., 294 U.S. at 683. The property in the possession of the bankrupt at the date of the filing of a bankruptcy petition passes into the custody of the court of bankruptcy to no less extent than does the property in the possession of a debtor at the filing of a reorganization petition. MacLachlan, *Bankruptcy* § 194 (1956); 1 Collier, *supra* ¶¶ 2.06, 2.11[1]; 2 *id.* ¶¶ 23.01, 23.05 (1961). The rationale supporting extraterritorial service of process in reorganization proceedings thus applies with equal validity to those in straight bankruptcy. See Mussman & Reisenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, 99 (1948). It is to be noted, however, that plenary actions which may be brought in the court of bankruptcy in a reorganization case by virtue of the exclusion of § 23 from Chapter X of the Act, *Williams v. Austrian*, 331 U.S. 642 (1947), do not lie within the jurisdiction of the court in a bankruptcy case, *i.e.*, unless there is consent. Accordingly, such cases as *In re Standard Gas & Electric Co.*, 119 F.2d 658, 663–65 (3d Cir. 1941), sustaining objections to extraterritorial service of process attempted by the trustee in suing on causes of action belonging to the debtor's estate would not be affected by this rule.

Paragraph (1) of subdivision (f) authorizes nationwide service of process other than a subpoena on any party to an adversary proceeding. The rule thus overrules such cases as *Gathany v. Bishop*, 177 F.2d 567, 569 (4th Cir. 1949), insofar as it held or implied that the court of bankruptcy sitting in North Carolina could not enjoin an action in Illinois. Insofar as that case rested on the implications of *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), it has been overruled by §§ 14f and 17c(4) of the Act. An adversary proceeding may be transferred under Rule 782 to any other district in the interest of justice and for the convenience of the parties and, as pointed out in the Note accompanying that rule, a court should be particularly hospitable to a motion for transfer when the defendant resides or has his principal place of business at a substantial distance from the district where the case is pending. A judgment for the recovery of money

or property rendered in the court of bankruptcy may be registered in any other district upon compliance with the procedure authorized by Rule 921(b) and 28 U.S.C. § 1963.

Paragraph (2) of subdivision (f) authorizes service on certain parties in foreign countries. The premise of including the bankrupt and the other persons listed in clause (A) of the paragraph is that the court must have the power to proceed against the bankrupt and the persons associated with him in the manner indicated for the purposes of administering the estate notwithstanding their absence from the country. *Cf.* §§ 7a(10) and 10 of the Act; *In re Wood & Henderson,* 210 U.S. 246, 253-54, 257-58 (1908) (holding that re-examination of bankrupt's attorney's fees under § 60d of the Act can be had only by the court administering the estate and that notice by mail to attorneys outside the district sufficed); *Stegeman v. United States,* 425 F.2d 984 (9th Cir. 1970) (sustaining conviction of bankrupts for concealment of assets notwithstanding lack of personal service of process upon them and their presence in Canada during the time the offenses were committed); *Benitez v. Ancioni,* 127 F.2d 121, 125-26 (1st Cir. 1942), cert.denied, 317 U.S 699 (1943) (involving service on nonresident heir of debtor who died after filing of petition); *[illegible] v. Whisler,* 275 Fed. 743, 746 (8th Cir. 1921) (involving partnership adjudicated in the District of Montana and an alleged partner residing in Iowa); 1 Collier ¶ 7.16 (1960). Clause (A) would overrule such cases as *Babbitt v. Dutcher,* 216 U.S. 102 (1910), insofar as it requires ancillary proceedings against a nonresident president of a corporate bankrupt to turn over corporate records in an adversary proceeding, and *Noll v. Hogdson,* 70 F.2d 19 (4th Cir. 1934), reversing a turnover order against the president of a corporate bankrupt served by mail on the president's attorney in another state. The validity of service on a party outside the country in order to determine or protect rights in property located in this country has frequently been recognized. *Restatement, Judgments* §§ 32, 34 (1942); Ehrenzweig, *Conflict of Laws* § 26

(1962); 2 Moore 1258, 1267.1 (1961), 4 Wright & Miller, *Federal Practice & Procedure—Civil* 555 (1969); see *In re Granite City Bank*, 137 Fed. 818, 820–22 (8th Cir. 1905). Clause (C) of paragraph (2) adopts the provisions of Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure insofar as they authorize foreign service of process. See generally 2 Moore ¶ 4.45 (2d ed. 1961); 4 Wright & Miller, *Federal Practice and Procedure—Civil* § 1133 (1969). No provision of this rule, of course, extends service of process for the purpose of plenary litigation brought by or against the trustee or the bankrupt.

Paragraph (3) of subdivision (f) is identical to the last sentence of Rule 4(f) of the Federal Rules of Civil Procedure. Bankruptcy Rule 916 provides that Rule 15 of the Federal Rules of Civil Procedure applies in bankruptcy cases with qualifications not relevant here.

Subdivision (g) follows Rule 4(g) of the Federal Rules of Civil Procedure in respect to requiring proof of service, but particularizes the need, when service is made by mail, for a signed receipt or other evidence of delivery or refusal of the mail by the addressee.

Subdivision (h) gives the court the same discretion to allow amendment of process or proof of service as that granted by Rule 4(h) of the Federal Rules of Civil Procedure but also recognizes that insubstantial and nonprejudicial errors occurring in papers served under this rule and in the proof of service may be disregarded. See also Rule 905.

Rule 705. Service and Filing of Pleadings and Other Papers

1 *(a) Service.* Subdivisions (a), (b), and (c)
2 of Rule 5 of the Federal Rules of Civil Pro-
3 cedure apply in adversary proceedings, but
4 when service of pleadings on parties in de-
5 fault is required by subdivision (a) of that
6 rule, service shall be made in the manner
7 provided for service of summons in Rule
8 704.

9 (b) *Filing.* All papers after the complaint
10 required to be served upon a party shall be
11 filed with the court not later than the second
12 business day following service.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Subdivisions (a), (b), and (c) of Rule 5 of the Federal Rules of Civil Procedure prescribe the mode of service of parties after the complaint. For the purposes of applying these subdivisions in adversary proceedings it is necessary to distinguish between parties to a bankruptcy case, which is initiated by a petition (see Rule 101), and the parties to an adversary proceeding, which is initiated by a complaint (see Rule 703). Parties to a bankruptcy case include not only the petitioners, the bankrupt, and the trustee or receiver but any person who has filed an appearance in the case and creditors who have filed proofs of claim. 2 Moore 1334 (1961). Subdivision (a) of Rule 705 is to be taken to require service only on parties to the adversary proceeding. Economical bankruptcy administration and the need for full exchange of information among the parties in interest are appropriately accommodated thereby. *Ibid.*

Notices to creditors of proceedings not subject to rules in this part are governed by Rule 203. See also Rule 914, prescribing the procedure for contested matters other than adversary proceedings.

Subdivision (b). Rule 509 governs the place and other aspects of filing of papers with the bankruptcy court. Subdivision (b) of Rule 705 supplements Rule 509 by prescribing the time allowed for the filing of papers required to be served in adversary proceedings. The allowable time is subjected to fixed limits rather than left to the "reasonable time" standard of Rule 5(d) of the Federal Rules of Civil Procedure in the interest of expediting the proceedings.

[*N.b. Th*[illegible] 707.]

Rule 707. Pleadings Allowed

1 Rule 7(a) of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

Advisory Committee's Note

Under this rule the pleadings allowable in adversary proceedings governed by Part VII are those listed in Rule 7(a) of the Federal Rules of Civil Procedure. *Cf.* [illegible], 127 F.2d 841, 842–43 (2d Cir. 1942); [illegible] *New York* [illegible], 113 F.2d [illegible], 888 (2d Cir. 1940). The pleadings allowable in connection with the commencement of a bankruptcy case and the formulation of issues in a contested proceeding governed by Part I are a petition and an answer thereto, as provided in Rules 101 and 112. When the Bankruptcy Rules, other than those in Parts I and VII, refer generally to "pleadings," as in Rules 904 and 911, the inclusive definition of Rule 901(10) governs.

Rule 708. General Rules of Pleading

1 Rule 8 of the Federal Rules of Civil Proce-
2 dure, except clause (1) of subdivision (a)
3 thereof, applies in adversary proceedings.
4 All statements in pleadings shall be made
5 subject to the obligations set forth in Rule
6 911(a).

Advisory Committee's Note

The court's jurisdiction of an adversary proceeding may be predicated on consent, which may be implied. 2 Collier ¶ 23.08 (1961); MacLachlan, *Bankruptcy* 206–07 (1956). The caption appropriate for use in an adversary proceeding (see Official Form No. 25) apprises the defendant of the fact that the complaint is filed as a proceeding in a pending bankruptcy case. Accordingly, there is no necessity for the recital of the grounds of jurisdic-

tion as provided in Rule 8(a)(1) of the Federal Rules of Civil Procedure. Objection to the court's jurisdiction is governed by Rule 915.

Except for its requirement of jurisdictional allegations in clause (1) of subdivision (a), Rule 8 of the Federal Rules of Civil Procedure states rules of pleading that are entirely suitable for an adversary proceeding in a bankruptcy case. *Commercial Credit Corp. v. Skutt*, 341 F.2d 177, 179 (8th Cir. 1965); *Royal Petroleum Corp. v. Smith*, 127 F.2d 811, 812–13 (2d Cir. 1942); *Zydney v. New York Credit Men's Ass'n*, 113 F.2d 986, 987–88 (2d Cir. 1940); Yankwich, *The Impact of the Federal Rules of Civil Procedure on Bankruptcy*, 42 Cal.L.Rev. 738, 748 (1954).

Subdivisions (b) and (e)(2) of Rule 8 of the Federal Rules of Civil Procedure subject a pleader who files a general denial or who states his claims alternatively or hypothetically to the obligations set forth in Rule 11 of the Federal Rules of Civil Procedure. Rule 911 prescribes the same obligations for a pleader and his attorney as are imposed by Civil Rule 11 and in addition provides that an attorney's signature on a pleading certifies that it is not interposed for an improper purpose. The obligations imposed by Rule 911 apply to all statements in pleadings served and filed in adversary proceedings.

Rule 709. Pleading Special Matters

1 Rule 9 of the Federal Rules of Civil Proce-
2 dure applies in adversary proceedings.

Advisory Committee's Note

The provisions of Rule 9 of the Federal Rules of Civil Procedure are appropriate for application in adversary proceedings. *Cf.* [illegible] *Freeport* [illegible], 340 F.2d 50, 54 (2d Cir. 1965); [illegible] *R. & M.* [illegible] *Co.*, [illegible] 426 F.2d [illegible] (2d Cir. 1970).

Rule 710. Form of Pleadings

1 Rule 10 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings, ex-
3 cept that the caption of each pleading in
4 such a proceeding shall conform substan-
5 tially to Official Form No. 25.

ADVISORY COMMITTEE'S NOTE

Rule 904(b) requires the caption of every paper filed in a bankruptcy case to contain certain elements. Official Form No. 25, which sets out the form for a caption in an adversary proceeding, adds the names and identification of the parties to that proceeding. The second sentence of Rule 10(a) of the Federal Rules of Civil Procedure, made applicable by this rule, prescribes the practice as to the use of names when there are 2 or more parties on one side in an adversary proceeding.

[*N.B. The next rule is 712.*]

Rule 712. Defenses and Objections

1 *(a) When Presented.* If a complaint is
2 duly served upon him, a defendant shall
3 serve his answer within 20 days after the is-
4 suance of the summons, except when a dif-
5 ferent time is prescribed by the court. The
6 court shall prescribe the time for service of
7 the answer when service of a complaint is
8 made by publication or upon a party in a
9 foreign country. A party served with a
10 pleading stating a cross-claim against him
11 shall serve an answer thereto within 10 days
12 after the service upon him. The plaintiff
13 shall serve his reply to a counterclaim in the
14 answer within 10 days after service of the

15 answer or, if a reply is ordered by the court,
16 within 10 days after service of the order, un-
17 less the order otherwise directs. The United
18 States or an officer or agency thereof shall
19 serve an answer to a complaint within 30
20 days after the issuance of the summons, and
21 shall serve an answer to a cross-claim, or a
22 reply to a counterclaim, within 30 days after
23 service upon the United States attorney of
24 the pleading in which the claim is asserted.
25 The service of a motion permitted under this
26 rule alters these periods of time as follows,
27 unless a different time is fixed by order of
28 the court: (1) if the court denies the motion
29 or postpones its disposition until the trial on
30 the merits, the responsive pleading shall be
31 served within 5 days after notice of the
32 court's action; (2) if the court grants a mo-
33 tion for a more definite statement, the re-
34 sponsive pleading shall be served within 5
35 days after the service of a more definite
36 statement.

37 *(b) Applicability of Federal Rule of Civil*
38 *Procedure 12(b)-(h).* Subdivisions (b)-(h) of
39 Rule 12 of the Federal Rules of Civil Proce-
40 dure apply in adversary proceedings, except
41 that:

42 (1) if an order granting a motion for a
43 more definite statement is not obeyed
44 within 5 days after notice of the order or
45 within such other time as the court may
46 fix, the court may strike the pleading to
47 which the motion was directed or make
48 such order as it deems just;

49 (2) a motion made by a party under

50 subdivision (f) to strike a pleading to
51 which no responsive pleading is permitted
52 by these rules must be made within 10
53 days after service of the pleading upon the
54 party;
55 (3) the references to Rules 15(a) and
56 19 in subdivision (h) shall be read as refer-
57 ences to Bankruptcy Rules 715 and 719
58 respectively; and
59 (4) an objection to the jurisdiction of
60 the court of bankruptcy is governed by
61 Rule 915.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is an adaptation of Rule 12 of the Federal Rules of Civil Procedure. The departures from subdivision (a) of the Civil Rule subserve the objective of expediting the resolution of controversies that arise in the administration of bankrupt estates. The rule thus retains and reinforces the policy expressed in the provision in General Order 37 that authorizes the court to "shorten the limitations of time prescribed [by the Federal Rules of Civil Procedure] so as to expedite hearings." See also *Katchen v. Landy,* 382 U.S. 323, 328 (1966); *Bailey v. Glover,* 88 U.S. (21 Wall.) 312, 316–17 (1874). As pointed out in the Note to Rule 701, the 20-day period allowed the defendant for serving his answer in the typical case enables the court to set a date for trial no more than 25 days after the filing of the complaint and the issuance of the summons. The 20-day period is subject to enlargement or reduction by the court for cause shown as provided in Rule 906, and the date for trial may be advanced or postponed accordingly. *Cf. Melo v. Bailey,* 4 Fed.Rules Serv.2d 6b.31, Case 1 (E.D.Pa. 1960); *Blanton v. Pacific Mutual Life Ins. Co.,* 8 Fed.Rules Serv. 6b.51, Case 1, 4 F.R.D. 200 (W.D.N.C. 1944).

Subdivision (a) of the rule moreover explicitly recog-

nizes, as does Civil Rule 12(a), that the time to be allowed a defendant for service of his answer should be subject to modification by the court when he has been served by publication or in a foreign country. Rule 704 goes beyond Civil Rule 4 in authorizing nationwide service by mail, but it is not contemplated that the 20-day period usually allowed the defendant for service of his answer will warrant the court's intervention to prescribe a longer time. ~~Mail properly addressed can ordinarily be delivered anywhere in the United States within one day after deposit or arrival in the post office of the place of origin.~~ For the purposes of the second sentence of subdivision (a) service by mail is made upon a party in a foreign country when the ~~mail is~~ addressed to him there.

25

papers

are mailed. See Rule 906(e).

The periods allowed for service of an answer to a cross-claim, of a reply to a counterclaim, and of a responsive pleading by the United States run, as in Rule 12(a) of the Federal Rules of Civil Procedure, from the time of service of the pleading to which the response is being made. The times allowed have been reduced from those prescribed by Civil Rule 12(a), however, in the interest of expediting the trial of adversary proceedings. For the same reason the times allowed for serving responsive pleadings after motions have been served, and for serving a motion to strike when no responsive pleading is permitted, are shorter in this rule than are allowed by Civil Rule 12.

Subdivision (b). Rule 12(h)(1) of the Federal Rules of Civil Procedure permits certain defenses to be made by amendment of a responsive pleading if the amendment is one permitted as a matter of course by Rule 15(a) and if the defense has not otherwise been waived. Subdivision (b) of this rule makes Civil Rule 12(h)(1) applicable in adversary proceedings but requires (in clause (3)) a reference to Bankruptcy Rule 715(1) to determine when an amendment of a responsive pleading is permitted as a matter of course in an adversary proceeding.

Rule 12(h)(2) of the Federal Rules of Civil Procedure allows certain defenses, including that of failure to join a party indispensable under Rule 19, to be made in a variety of ways. Subdivision (b) of this rule makes Civil

Rule 12(h)(2) applicable in adversary proceedings but requires a reference to Bankruptcy Rule 719 for a determination of what parties must be joined in adversary proceedings.

Rule 12(h)(3) of the Federal Rules of Civil Procedure requires dismissal of an action whenever it appears to the court that it lacks jurisdiction of the subject matter. Under § 2a(7) of the Act, however, failure to interpose objection to the jurisdiction of the court of bankruptcy by a timely motion or answer constitutes consent to jurisdiction of the court over any controversy arising in a proceeding under the Act. The distinctive problems that arise when an objection is made to the jurisdiction of the court of bankruptcy are governed by Bankruptcy Rule 915 rather than Civil Rule 12(h)(3).

Rule 713. Counterclaim and Cross-Claim

1 Rule 13 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings, ex-
3 cept that a party sued by a trustee or re-
4 ceiver need not state as a counterclaim any
5 claim which he has against the bankrupt, his
6 property, or the estate, and ~~that~~ persons
7 other than the original parties to the adver-
8 sary proceeding may be made parties to a
9 counterclaim or cross-claim in accordance
10 with Rules 719 and 720.

(1) subdivision (f) does not apply, (2)

(3) when a trustee or receiver fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, he may by leave of court set up the omitted counterclaim by amendment or by commencing a new adversary proceeding or separate action,

(4)

Advisory Committee's Note

Rule 13 of the Federal Rules of Civil Procedure has generally been held applicable in bankruptcy cases. *Harris v. Capehart-Farnsworth Corp.*, 225 F.2d 268, 270 (8th Cir. 1955); *In re House of Gus Holder, Inc.*, 91 F.Supp. 841, 844 (D.N.J. 1950); 2 Collier 554 (1961). No case has held, however, that a secured creditor or other party to an adversary proceeding commenced by a trustee or receiver in the court of bankruptcy can be compelled to submit all his claims arising out of the transaction or oc-

currence that is the subject matter of the trustee's or receiver's claim for determination by that court. Considerations of procedural economy and expedition and the advantages of organic administration of all the affairs of a bankrupt estate by the court of bankruptcy do not warrant compulsion of an adversary party who is not otherwise subject to the court's jurisdiction to file any counterclaim in that court. *Cf. Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 162 (1931).

Excusing an adversary party from being required to state a counterclaim against the bankrupt or his property when he is sued in the court of bankruptcy is consonant with the 1963 amendment of Rule 13(a) of the Federal Rules of Civil Procedure. This amendment relieves a defendant from the compulsion to file a counterclaim in a quasi-in-rem proceeding instituted in a federal court that does not have jurisdiction to render a personal judgment against him. The amendment withdraws the dispensation if the defendant states any counterclaim under Rule 13, but no comparable provision seems warranted in this rule. The adversary party must file his claim in the bankruptcy proceeding if he wishes to receive any distribution. If the proceeding concerns property in the custody of the bankruptcy court on which the adversary party has a lien, the trustee may compel the secured party to accept foreclosure in the bankruptcy court by obtaining an order for sale free of liens. See 4A Collier ¶ 70.99 (1967). The adversary party is bound in any event by the court's determination of all the issues presented by the pleadings and is subject to the operation of the doctrine of res judicata. *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *Schwartz v. Levine & Malin, Inc.*, 111 F.2d 81 (2d Cir. 1940).

The foregoing considerations afford no comparable justification for excepting the trustee or receiver from the operation of Rule 13 insofar as it requires him to state any compulsory counterclaim he has against a party to an adversary proceeding. See *In re Belmetals Mfg. Co.*, 299 F.Supp. 1290, 1296–97 (N.D. Cal. 1969); *In re House of Gus Holder, Inc.*, 91 F.Supp. 841, 844 (D.N.J. 1950); 2 Collier, *supra* 555. When the trustee or a receiver wishes

to assert a claim for money or property under these rules against a creditor-claimant in the court of bankruptcy, he must commence an adversary proceeding by filing a complaint. See the Notes to Rules 306 and 701.

ordinarily

SEE ATTACHED

When a counterclaim or cross-claim filed under this rule requires joinder of other persons as parties in order for the court to reach a complete and just conclusion of the proceeding, Bankruptcy Rule 719 rather than Rule 19 of the Federal Rules of Civil Procedure governs the determination of whether such persons shall be joined. As the Note to Rule 719 points out, the jurisdictional limitations that restrict the joinder of persons in adversary proceedings differ from those that apply in plenary actions governed by the Federal Rules of Civil Procedure. With respect to permissive joinder of parties to a counterclaim or cross-claim, Rule 720 makes all the provisions of Rule 20 of the Federal Rules of Civil Procedure applicable in adversary proceedings. The provision for "bulge service" in Rule 4(f) of the Federal Rules of Civil Procedure is not included in the Bankruptcy Rules. That provision, which permits additional parties to a counterclaim or cross-claim to be served anywhere within the United States but not beyond 100 miles from the place where the action is commenced, is unnecessary in Bankruptcy Rule 704(f), since it authorizes nationwide service of all process other than a subpoena in adversary proceedings.

Rule 714. Third-Party Practice

1 Rule 14 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings ex-
3 cept as the court otherwise directs. A third-
4 party defendant served under this rule shall
5 make his defenses as provided in Rule 712
6 and his counterclaims as provided in Rule
7 713.

ADVISORY COMMITTEE'S NOTE

While Rule 14 of the Federal Rules of Civil Procedure does not appear to have been involved in any reported case involving an adversary proceeding in bankruptcy, it is consonant with § 2a(6) of the Act. Notwithstanding

An inflexible application of the compulsory counterclaim provisions of Rule 13(a) of the Federal Rules of Civil Procedure against the trustee or receiver, however, may be detrimental to the bankrupt estate, the complainant who may be subject to a possible counterclaim, and the objective of facilitating a just, speedy, and inexpensive determination of adversary proceedings. Thus, if a secured creditor seeks reclamation before or shortly after a trustee has qualified, or if a creditor seeks relief from the stay provided by Rule 401 or 601, the trustee may not have an opportunity to determine whether he has any claim arising out of the transaction or occurrence that is the basis for the complaint. In that circumstance, if the compulsory counterclaim provisions were to be rigidly applied, the only practical course open to him would be to seek an extension of the time for filing his responsive pleading to permit an investigation of possible bases for counterclaims. Clause (3) of the rule protects the trustee or receiver against the risk of losing a claim against an adverse party by failing to plead it as a counterclaim and thereby reduces the likelihood that adversary proceedings against a trustee or receiver will be delayed for the purpose of enabling him to investigate potential counterclaims.

The relief authorized by clause (3) to be afforded the trustee or receiver who belatedly discovers a counterclaim includes permission to institute a new proceeding or action, as may be necessary when the adversary proceeding against the estate may have been terminated. Since a party sued by the trustee or receiver is not subject to any compulsion to file a counterclaim under clause (2) of the rule and since clause (3) authorizes relief that goes beyond that authorized by Rule 13(f) of the Federal Rules of Civil Procedure, that subdivision of the Civil Rules is not applicable in adversary proceedings.

this statutory provision, a person sought to be impleaded in a bankruptcy proceeding may be entitled to object to the jurisdiction of the court of bankruptcy. *In re Boudouine*, 101 Fed. 574, 575–76 (2d Cir. 1900); *cf. Evarts v. Eloy Gin Corp.*, 204 F.2d 712, 717 (7th Cir.), cert. denied, 346 U.S. 876 (1953); *In re Chakos*, 24 F.2d 482, 485 (7th Cir. 1928). And this rule does not, of course, extend the jurisdiction of the court over a third-party proceeding. See Rule 928; *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959). The court of bankruptcy nevertheless has jurisdiction to determine controversies between third persons as to property in its custody and, with the consent of the disputants, controversies between third persons that are necessary to be resolved to permit complete administration of the estate. *Harris v. Avery Brundage Co.*, 305 U.S. 160, 163–64 (1938); *Reconstruction Finance Corp. v. Riverview State Bank*, 217 F.2d 455, 459–60 (10th Cir. 1954); *Central States Corp. v. Luther*, 215 F.2d 38, 44–45 (10th Cir. 1954).

Bankruptcy Rule 712, which is an adaptation of Rule 12 of the Federal Rules of Civil Procedure, governs the making of any defense by the third-party defendant so that the same time limits shall apply to the service of responsive pleadings and motions in the third-party proceeding as in the original adversary proceeding between the plaintiff and defendant. Bankruptcy Rule 713 follows Civil Rule 13 in all respects except that no one sued by a trustee or receiver is compelled to assert a counterclaim in an adversary proceeding. The reference to Rule 713 in the second sentence of this rule protects a third-party defendant against the possibility that he will be deemed bound to assert a counterclaim against the trustee or receiver.

The provision for "bulge service" in Rule 4(f) of the Federal Rules of Civil Procedure is not included in the Bankruptcy Rules. That provision, which permits persons brought in as parties pursuant to Civil Rule 14 to be served anywhere within the United States but not beyond 100 miles from the place where the action is commenced, is unnecessary in Bankruptcy Rule 4(f) since it

authorizes nationwide service of all process other than a subpoena in adversary proceedings.

Rule 715. Amended and Supplemental Pleadings

1 Rule 15 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings ex-
3 cept that (1) a pleading to which no respon-
4 sive pleading is permitted may be amended
5 as a matter of course at any time within 15
6 days after it is served but before the date set
7 for trial and that (2) a party shall plead in
8 response to an amended pleading within the
9 time remaining for response to the original
10 pleading or within 5 days after service of
11 the amended pleading, whichever period may
12 be longer, unless the court otherwise orders.

ADVISORY COMMITTEE'S NOTE

The reduction provided by this rule of the time limits prescribed by Rule 15(a) of the Federal Rules of Civil Procedure conforms generally to bankruptcy practice and furthers established policy to expedite bankruptcy proceedings. See *Katchen v. Landy*, 382 U.S. 323, 328–29 (1966); General Order 37, explicitly authorizing the bankruptcy court to shorten the time limits prescribed by the Federal Rules of Civil Procedure so as to expedite hearings. Since Rule 704(a) requires a date to be set for trial before service of the summons and complaint, the condition prescribed by Federal Civil Rule 15(a) on amendment of a pleading to which no response is permitted—*viz.*, that the action not have been placed upon the trial calendar—is inappropriate in this rule. Obviously, however, an amendment as of course must be served before the trial is held.

Rule 716. Pre-Trial Procedure; Formulating Issues

1 Rule 16 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

The economies of time and money and greater efficiency in the judicial process attainable by the use of pre-trial procedures should be available to the court in adversary proceedings in bankruptcy cases. See Yankwich, *The Impact of the Federal Rules of Civil Procedure in Bankruptcy*, 42 Cal.L.Rev. 738, 756 (1954). The references to a jury and to a master in Rule 16 of the Federal Rules of Civil Procedure are not likely to be relevant when a referee acts under this rule.

Rule 717. Parties Plaintiff and Defendant; Capacity

1 Except as provided in Rules 212(f) and
2 512(d), Rule 17 of the Federal Rules of Civil
3 Procedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

The exceptions recognize the propriety of bringing a proceeding on a bond of a trustee, receiver, or designated depository in the name of the United States as heretofore authorized by § 50h of the Act. Rule 17 of the Federal Rules of Civil Procedure has been deemed applicable in bankruptcy proceedings. *Prudence-Bonds Corp. v. State Street Trust Co.*, 202 F.2d 555, 560 (2d Cir.), cert.denied, 346 U.S. 835 (1953).

It has been assumed that 28 U.S.C. § 754, to which Civil Rule 17(b) (2) refers, does not apply to receivers appointed in bankruptcy cases. Oglebay, *Some Developments in Bankruptcy Law*, 23 Ref.J. 70, 71–72 (1949). Whereas this section of the Judicial Code confers capacity on a receiver "to sue in any district without ancillary appointment," § 69c of the Act and General Order 51 have contemplated the appointment of an ancillary receiver when it is necessary for a receiver to commence an action or proceeding in a district other than that wherein the bankruptcy case is pending. In view of the abolition of ancillary appointment of receivers by Rule

217, however, there is no reason why the capacity of a receiver in bankruptcy to sue should not be governed by 28 U.S.C. § 754 in accordance with Rule 17(b)(2) of the Federal Rules of Civil Procedure. The applicability to receivers in bankruptcy of 28 U.S.C. § 959(a), to which Civil Rule 17(b)(2) refers and which governs capacity of a receiver to be sued, seems never to have been doubted. *Cf. Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 138–41 (1946); *Vass v. Conron Bros.*, 59 F.2d 969 (2d Cir. 1932); *Kennison v. Philadelphia & Reading C. & I. Co.*, 38 F.Supp. 980, 983 (D.Minn. 1940).

Rule 718. Joinder of Claims and Remedies

1 Rule 18 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Advisory Committee's Note

Subject to jurisdictional limitations, the policy of Rule 18 of the Federal Rules of Civil Procedure to adjust at one time all conflicts between the parties is congenial to adversary proceedings in bankruptcy. 2 Collier ¶ 23.01[2] (1961); Yankwich, *The Impact of the Federal Rules of Procedures on Bankruptcy*, 42 Cal.L.Rev. 738, 750–52, 29 Ref.J. 75, 79 (1955).

As pointed out in the note accompanying Rule 701, the rules in Part VII, including this Rule 718, do not govern the making of a claim by an unsecured creditor against the estate of the bankrupt. The making of such a claim is governed by the rules in Part III.

Rule 719. Joinder of Persons Needed for Just Determination

1 *(a) Persons to be Joined if Feasible.* A
2 person who is subject to service of process
3 shall be joined as a party in the proceeding
4 if (1) in his absence complete relief cannot be
5 accorded among those already parties, or (2)

6 he claims an interest relating to the subject
7 of the proceeding and is so situated that the
8 disposition of the proceeding in his absence
9 may (i) as a practical matter impair or
10 impede his ability to protect that interest or
11 (ii) leave any of the persons already parties
12 subject to a substantial risk of incurring
13 double, multiple, or otherwise inconsistent
14 obligations by reason of his claimed interest.
15 If he has not been so joined, the court shall
16 order that he be made a party. If he should
17 join as a plaintiff but refuses to do so, he
18 may be made a defendant, or, in a proper
19 case, an involuntary plaintiff.
20 *(b) Objection to Jurisdiction by Joined*
21 *Person.* If a person joined under subdivision
22 (a) hereof makes a timely objection as pro-
23 vided in Rule 915 to the jurisdiction of the
24 court to determine issues affecting his inter-
25 est and the objection is sustained, the court
26 shall dismiss such person from the proceed-
27 ing or, pursuant to Rule 915(b), transfer the
28 part of the proceeding involving his interest
29 to the civil docket of the district court.
30 *(c) Determination by Court Whenever*
31 *Joinder or Proceeding with Joined Person*
32 *Not Feasible.* If a person as described in
33 subdivision (a) hereof cannot be made a
34 party, or if such a person is dismissed or the
35 part of the proceeding involving his interest
36 is transferred pursuant to subdivision (b)
37 hereof, the court shall determine whether in
38 equity and good conscience the proceeding
39 should continue among the parties before it,
40 or should be dismissed, the absent person

41 being thus regarded as indispensable. The
42 factors to be considered by the court include:
43 first, to what extent a judgment rendered in
44 the person's absence might be prejudicial to
45 him or those already parties; second, the ex-
46 tent to which, by protective provisions in the
47 judgment, by the shaping of relief, or other
48 measures, the prejudice can be lessened or
49 avoided; third, whether a judgment ren-
50 dered in the person's absence will be ade-
51 quate; fourth, whether the plaintiff will
52 have an adequate remedy if the proceeding
53 is dismissed for nonjoinder.
54 *(d) Pleading Reasons for Nonjoinder.* A
55 pleading asserting a claim for relief shall
56 state the names, if known to the pleader, of
57 any persons as described in subdivision (a)
58 who are not joined, and the reasons why
59 they are not joined.
60 *(e) Exception of Class Proceedings.* This
61 rule is subject to the provisions of Rule 723.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 19 of the Federal Rules of Civil Procedure for the purposes of adversary proceedings. The word "determination" appears in the title in lieu of "adjudication" as used in the title of Civil Rule 19 because of the special meaning given the latter word by § 1(2) of the Act.

Subdivision (a). Since joinder of a party can neither deprive the court of the jurisdiction otherwise existing over the subject matter of an adversary proceeding nor render the venue of an adversary proceeding improper, subdivision (a) of the rule omits the language of Civil Rule 19(a) that refers to these [illegible] in [illegible] civil litigation [illegible]

Subdivision (b). A person may, however, be entitled to raise an objection to the jurisdiction of the court of bankruptcy to determine his rights and obligations even though other parties to the proceeding may have no such objection because, for example, they have waived it. See *In re Prima Co.*, 98 F.2d 952, 956–59 (7th Cir. 1938), cert. denied, 305 U.S. 658 (1939). In such a case subdivision (b) governs the disposition of such an objection when it is timely raised. No comparable provision is found in Civil Rule 19 because the situation does not arise in ordinary civil litigation in the district court.

Subdivision (c) is an adaptation of subdivision (b) of Civil Rule 19, making the procedure and considerations appropriate when joinder is not feasible likewise applicable when a jurisdictional objection by a joined party is sustained.

Subdivisions (d) and (e) follow subdivisions (c) and (d) of Civil Rule 19.

Rule 720. Permissive Joinder of Parties

1 Rule 20 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Advisory Committee's Note

Rule 20 of the Federal Rules of Civil Procedure has been deemed applicable in bankruptcy proceedings. *Elias v. Clarke*, 143 F.2d 640, 644 (2d Cir.), cert. denied, 323 U.S. 778 (1944).

Rule 721. Misjoinder and Non-Joinder of Parties

1 Rule 21 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Advisory Committee's Note

Rule 21 of the Federal Rules of Civil Procedure has been held applicable in proceedings under the Bank-

ruptcy Act. *In re Hudik-Ross Co., Inc.*, 198 F.Supp. 695, 697 (S.D.N.Y. 1961). Its second sentence is an elaboration of § 2a(6) of the Act. See 1 Collier ¶ 2.39 (1968). The third sentence of Civil Rule 21, like Civil Rules 13 (i) and 42(b), is "certainly . . . applicable in bankruptcy . . . and, indeed, . . . perhaps more readily available there, since the practice of interlocutory appeals in bankruptcy provides for the complete splitting of the issues upon review, whereas a civil appeal requires generally a final judgment disposing of an entire matter." *Elias v. Clarke*, 143 F.2d 640, 644 (2d Cir.), cert.denied, 323 U.S. 778 (1944).

Rule 722. Interpleader

1 Rule 22(1) of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

The determination of conflicting claims against particular property is a familiar exercise of the jurisdiction of a court of bankruptcy. *Cf.* Bankruptcy Act § 2a(6); *South Side Atlanta Bank v. Thomasson*, 406 F.2d 407 (5th Cir. 1969); *Nisbet v. Federal Title & Trust Co.*, 229 Fed. 644, 647 (8th Cir. 1915), cert. denied, 241 U.S. 669 (1916). Paragraph (2) of Rule 22 of the Federal Rules of Civil Procedure does not apply in adversary proceedings since it has reference only to a special statutory remedy provided by the Judicial Code when 2 or more claimants are of diverse citizenship. Since process may be served anywhere within the United States under Rule 704(f)(1), the court may afford protection of its jurisdiction and determination under this rule comparable to that provided for statutory interpleader under 28 U.S.C. § 2361.

Rule 723. Class Proceedings

1 Rule 23 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Rule 723.1 Derivative Proceedings by Shareholders

1 Rule 23.1 of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

Rule 723.2 Adversary Proceedings Relating to Unincorporated Associations

1 Rule 23.2 of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

Rule 724. Intervention

1 Rule 24 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings ex-
3 cept that a person desiring to intervene shall
4 serve a motion to intervene upon the parties
5 as provided in Rule 705.

ADVISORY COMMITTEE'S NOTE

The applicability of Rule 24 of the Federal Rules of Civil Procedure to proceedings in bankruptcy is well established. *Securities & Exchange Comm'n v. United States Realty & Improvement Co.*, 310 U.S. 434, 458-60 (1940); *Klein v. Nu-Way Shoe Co.*, 136 F.2d 986, 989 (9th Cir. 1943); *Mutual Life Ins. Co. v. Menin*, 115 F.2d 975, 980 (2d Cir. 1940), cert.denied, 313 U.S. 578 (1941); *Seaboard Terminals Corp. v. Western Maryland Ry. Co.*, 108 F.2d 911, 914 (4th Cir. 1940); *In re Finger Lakes Land Co., Inc.*, 29 F.Supp. 50, 51 (W.D.N.Y. 1939); *cf. In re Bender Body Co.*, 139 F.2d 128, 130 (6th Cir. 1943).

Rule 705 governs the service of all motions upon parties under these rules.

Rule 725. Substitution of Parties

1 Subject to the provisions of Rule 221(b),
2 Rule 25 of the Federal Rules of Civil Proce-

3 dure applies in adversary proceedings, but a
4 motion for substitution under this rule shall
5 be served and filed as provided in Rules 704
6 and 705.

ADVISORY COMMITTEE'S NOTE

Rule 221(b), which provides for automatic substitution of the successor of a trustee or receiver as a party in any pending proceeding without abatement, accords the same treatment to the successor of a trustee or receiver as that given the successor to a public officer by Rule 25(b)(1) of the Federal Rules of Civil Procedure. Federal Civil Rule 25 has been regarded as generally applicable in bankruptcy cases. *Benitez v. Anciani*, 127 F.2d 121, 125 (1st Cir. 1942), cert. denied, 317 U.S. 699 (1943); 2 Collier 93 (1966). Rules 704 and 705 govern the service and filing of all motions under these rules.

Rule 726. General Provisions Governing Discovery

1 Rule 26 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

Section 21k of the Act provides that in all bankruptcy proceedings parties in interest are entitled to all the rights and remedies granted by the Federal Rules of Civil Procedure pertaining to discovery. The courts have thus allowed resort to the provisions of Rule 26 to obtain discovery in the course of bankruptcy proceedings. See *Georgia Jewelers, Inc., v. Bulova Watch Co.*, 302 F.2d 362, 367–68 (5th Cir. 1962). But *cf. Berg v. Hoppe*, 352 F.2d 776 (9th Cir. 1965) (C.J. Barnes dissenting), criticized in 34 G.W.L.Rev. 945 (1966). In rejecting an effort by the bankrupt to restrict discovery under Civil Rule 26(b) by reference to decisions construing § 21a of the

Act, the court said in *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d at 367:

> "Bankruptcy is indeed a specialized branch of law and jurisdiction, but save in those areas still reserved to specialized treatment under General Order 37 . . ., it is otherwise subject to the same approach as other civil litigation. The essence of that system, reflected by the Civil Rules, is that pleadings seldom are now the means by which the claim is to be determined, or notice given to the adversary as to what facts might be asserted. That is the function of discovery."

See generally 2 Collier ¶¶ 21.25[2], 21.34 (1964); *Developments in the Law-Discovery*, 74 Harv.L.Rev. 940, 1069–72 (1961).

Rule 727. Depositions Before Adversary Proceeding or Pending Appeal

1 *(a) Before Adversary Proceeding.*
2 *(1) Application.* A person who desires to
3 perpetuate his own testimony or that of an-
4 other person regarding any matter that may
5 be cognizable and relevant in an adversary
6 proceeding may file an application with the
7 court in a pending bankruptcy case. The ap-
8 plication shall show: (A) that the applicant
9 expects to be a party to an adversary pro-
10 ceeding but is presently unable to bring it or
11 cause it to be brought; (B) the subject mat-
12 ter of the expected proceeding and the appli-
13 cant's interest therein; (C) the facts which
14 the applicant desires to establish by the pro-
15 posed testimony and his reasons for desiring
16 to perpetuate it; (D) the names or a descrip-
17 tion of the persons he expects will be adverse
18 parties and their addresses so far as known;
19 and (E) the names and addresses of the per-
20 sons to be examined and the substance of the
21 testimony which he expects to elicit from

22 each. The application shall ask for an order
23 authorizing the applicant to take depositions
24 of the persons to be examined named in the
25 application, for the purpose of perpetuating
26 their testimony.
27 *(2) Notice and Service.* The applicant
28 shall thereafter serve a notice upon each per-
29 son named in the application as an expected
30 adverse party, together with a copy of the
31 application, stating that the applicant will
32 apply to the court, at a time and place
33 named therein, for the order described in the
34 application. At least 20 days before the date
35 of hearing the notice shall be served in the
36 manner provided in Rule 704(b) or (c) for
37 service of summons; but if such service can-
38 not with due diligence be made upon any ex-
39 pected adverse party named in the applica-
40 tion, the court may make such order as is
41 just for service by publication or otherwise,
42 and shall appoint, for persons not served in
43 the manner provided in Rule 704(b) or (c),
44 an attorney who shall represent them. If any
45 expected adverse party is a minor or incom-
46 petent the provisions of Rule 717 apply.
47 *(3) Order and Examination.* If the court
48 is satisfied that the perpetuation of the testi-
49 mony may prevent a failure or delay of jus-
50 tice, it shall make an order designating or
51 describing the persons whose depositions
52 may be taken and specifying the subject
53 matter of the examination and whether the
54 depositions shall be taken upon oral exami-
55 nation or written interrogatories. The depo-
56 sitions may then be taken in accordance with

57 these rules; and the court may make orders
58 of the character provided for by Rules 734
59 and 735.
60 *(b) Pending Appeal.* If an appeal has been
61 taken from a judgment of a referee or be-
62 fore the taking of an appeal if the time there-
63 for has not expired, the referee who ren-
64 dered the judgment may allow the taking of
65 the depositions of witnesses to perpetuate
66 their testimony for use in the event of fur-
67 ther proceedings before the referee. In such
68 case the party who desires to perpetuate the
69 testimony may make a motion before the ref-
70 eree for leave to take the depositions, upon
71 the same notice and service thereof as if the
72 proceeding were pending before the referee.
73 The motion shall show (1) the names and ad-
74 dresses of the persons to be examined and
75 the substance of the testimony which he ex-
76 pects to elicit from each; (2) the reasons for
77 perpetuating their testimony. If the referee
78 finds that the perpetuation of the testimony
79 is proper to avoid a failure or delay of jus-
80 tice, he may make an order allowing the dep-
81 ositions to be taken and may make orders of
82 the character provided for by Rules 734 and
83 735, and thereupon the depositions may be
84 taken and used in the same manner and
85 under the same conditions as are prescribed
86 in these rules for depositions taken in pro-
87 ceedings pending before the referee.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 27 of the Federal Rules of Civil Procedure. The relief it affords is avail-

able only in respect of a matter that may be cognizable and relevant in an adversary proceeding in a pending bankruptcy case. See also Rule 911, which provides for the situation in which a person expects to be a party to a contested matter in a bankruptcy case.

This rule does not militate in any way against the availability of Civil Rule 27 to any person who desires to perpetuate testimony regarding any matter that may be cognizable in a court of the United States when no bankruptcy case is pending. Nor does this rule any more than Civil Rule 27 limit the power of a court to entertain an action to perpetuate testimony. See 4 Moore ¶ 27.21 (1968).

An application under this rule should be filed with the referee as provided by Rule 509(a). See Rule 102. The referee's jurisdiction to enter orders under this rule is ancillary to his jurisdiction of the adversary proceeding for which the testimony is sought to be perpetuated. See 4 Moore ¶ 27.03 (1968). The time prescribed in subdivision (a)(2) for the service of notice may be shortened in exigent circumstances, as provided in Rule 906(c).

Rule 728. Persons Before Whom Depositions May Be Taken

1 Rule 28 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Rule 729. Stipulations Regarding Discovery Procedure

1 Rule 29 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Rule 730. Depositions Upon Oral Examination

1 Rule 30 of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

1 except that the 30-day period during which
2 leave of court must be obtained under sub-
3 division (a) for the taking of a deposition
4 runs from the issuance of the summons under
5 Rule 704 and that the attendance of witness
6 may be compelled by the use of subpoena as
7 provided in Rule 916.

ADVISORY COMMITTEE'S NOTE

For illustrative cases authorizing the taking of [illegible] tions in proceedings under the Act see *[illegible]*, 315 F.2d 221 (5th Cir. 1963); *In re [illegible] Anthracite & Bituminous Coal Corp.*, 22 F.R.D. 501 (S.D.N.Y. 1958); *In re Coronet Metal Products Corp.*, 81 F.Supp. 500 (E.D.N.Y. 1948).

Consistently with the provision governing the time for serving an answer under Rule 712(a), the provision of this rule prescribing the time during which leave must be sought for the taking of a deposition starts the period from the issuance of the summons. Rules 12(a) and 26(a) of the Federal Rules of Civil Procedure start the comparable periods therein prescribed from the time of service upon the defendant. Service of a summons, complaint, and notice of trial under [illegible] is [illegible] Rule 704 and conventionally will be made by mail. When service is so made, the summons, complaint, and [illegible] of trial must be deposited in the mail within 5 days after the issuance of the summons in order to be timely under Rule 704(e). The time during which a defendant is protected under this rule against the taking of a deposition without leave of court thus bears the same relation to the time allowed by Rule 712(a) for filing an answer as the period of protection of the defendant [illegible] by Rule 30(a) of the Federal Rules of Civil Procedure bears to the time allowed the defendant for serving his answer under Civil Rule 12(a). As pointed out in the Note [illegible] accompanying Rule 704, discovery sought [illegible] the date [illegible] set for trial is likely to [illegible] date to be fixed.

Rule 916 [illegible]

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of the rule, makes Rule 45 of the Federal Rules of Civil Procedure applicable in adversary proceedings but authorizes subpoenas to be served in such proceedings to be issued in the name of and under the authority of the bankruptcy judge and eliminates the requirement of a seal.

Rule 731. Deposition upon Written Questions

1 Rule 31 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings, ex-
3 cept that the attendance of witnesses may be
4 compelled by the use of subpoena as provided
5 in Rule 916.

Advisory Committee's Note

Under Rule 31(a) of the Federal Rules of Civil Procedure the service of questions on a party starts the time period allowed him for serving cross, redirect, or recross questions. When, as permitted under these rules, service is made by mail, such time period begins upon the mailing. See the last sentence of Rule 5(b) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 70[illegible](a). The reference in the last clause of the rule to Rule 916 is explained in the Note to Rule 730.

Rule 732. Use of Depositions in Adversary Proceedings

1 Rule 32 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Advisory Committee's Note

On the propriety of the use of depositions in contested bankruptcy matters, see Drake, *Contested Matters and Ex Parte Procedure in Bankruptcy*, 19 Mercer L.Rev. 318, 328 ([illegible]).

Rule 733. Interrogatories to Parties

1 Rule 33 of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

Rule 33 of the Federal Rules of Civil Procedure allows a party on whom interrogatories have been served 30 days after the service within which to serve [illegible] of his answers and objections. As indicated in the Note accompanying Rule 731, service of interrogatories by mail is complete upon mailing.

Rule 734. Production of Documents and Things and Entry upon Land for Inspection and Other Purposes

1 Rule 34 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

Discovery pursuant to Rule 34 of the Federal Rules of Civil Procedure has been allowed in bankruptcy proceedings. *In re Shuland*, 219 F.Supp. 195 (D.Mont. 19[illegible]); *cf. Mattox v. Hertwig*, 315 F.2d 221 (5th Cir. 1963). Civil Rule 34 allows a party upon whom is served a request of the kind provided for in the rule a period of time after the service within which to serve a written response. As indicated in the Note accompanying Rule 731, when the request is served by mail, the time period allowed for service of the response starts upon the mailing of the request.

Rule 735. Physical and Mental Examination of Persons

1 Rule 35 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Rule 736. Requests for Admission

1 Rule 36 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

The applicability of Rule 36 of the Federal Rules of Civil Procedure in bankruptcy proceedings has been sustained. *In re Stein*, 43 F.Supp. 815 (N.D.Ill. 1942); *In re Independent Distillers of Ky.*, 34 F.Supp. 724, 729 (W.D.Ky. 1940). Under Rule 36(a) of the Federal Rules of Civil Procedure a matter is deemed admitted if a party on whom a request for admission is served fails to serve an answer or objection within a prescribed period of time after the service of the request. As indicated in the Note accompanying Rule 731, if the request is served by mail, the time allowed for serving the response starts to run from the mailing of the request.

Rule 737. Failure To Make Discovery: Sanctions

1 Rule 37 of the Federal Rules of Civil
2 Procedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

As pointed out in the Note accompanying Rule 114 the cases holding that Rule 37 of the Federal Rules of Civil Procedure is inconsistent with the Bankruptcy Act are overruled. These cases include *In re Richard's Discount Jewelers, Inc.*, 305 F.Supp. 517, 518 (S.D.N.Y. 1969); *In re Shulund*, 210 F.Supp. 195, 199–200 (D.Mont. 1962); and *In re Cardinal Service Corp.*, 175 F.Supp. 47 (S.D.N.Y. 1959). Any order entered under this rule treating a failure to obey an order to provide or permit discovery as a contempt of the court in which the adversary proceeding is pending is subject to Rule 920.

[*N.b. The next rule is 741.*]

Rule 741. Dismissal of Adversary Proceedings

1 Rule 41 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings, ex-
3 cept that a complaint objecting to the bank-
4 rupt's discharge shall not be dismissed at the
5 plaintiff's instance save upon notice to the
6 trustee and upon order of the court contain-
7 ing such terms and conditions as the court
8 deems proper, and the reference in subdivi-
9 sion (b) of that rule shall be read as a refer-
10 ence to Rule 719.

to Rule 19

Advisory Committee's Note

Rule 41 of the Federal Rules of Civil Procedure qualifies its first sentence by a reference to Rule 66 of the Federal Rules. Since the latter rule, which governs the practice in federal equity receiverships, including their dismissal, has no application to adversary proceedings in bankruptcy, 7 Moore 1905 (1955), the reference to Rule 66 in Rule 41 of the Federal Civil Rules has no relevance insofar as Rule 41 applies to adversary proceedings.

Special considerations apply to the dismissal of a complaint objecting to a discharge in view of the hazard that the plaintiff may be induced to dismiss by an advantage given or promised by the bankrupt or someone acting in his interest. The same kind of risk underlies the safeguards embodied in Rule 120 against voluntary dismissal of a bankruptcy case. The courts have generally allowed a creditor to withdraw or abandon his objections to discharge of a bankrupt but have allowed other creditors to be substituted, to introduce evidence, and generally to oppose the discharge as if they had originally filed the objections. 1 Collier ¶ 14.14 (1966). The rule accommodates a continuation of this practice. Notice to other creditors of the plaintiff's motion to dismiss his complaint objecting to discharge will often be appropriate to

afford them an opportunity to intervene in the proceeding in order to press objections made in the complaint. See, *e.g.*, N.D.Ill. Bankr. R. 23(F); E.D. Mich. Bankr. R. 13; 19 Ref. J. 57 (1945).

A number of local rules provide that if any party seeks to withdraw or fails to prosecute an objection to the bankrupt's discharge, the bankrupt and his attorney must file an affidavit that they have not promised or given any consideration to effect the withdrawal or failure to prosecute. *E.g.*, N.D.Ill. Bankr. R. [illegible]; S.D. & E.D.N.Y. Bankr. Rule 17(a) [illegible] 8. Other rules require an objector seeking to withdraw to file an affidavit that he has not been promised or given any consideration for his withdrawal. *E.g.*, D.Minn. Bankr. R. 22; E.D. Mich. Bankr. R. 13. Rule 711 contemplates that such a requirement may be imposed as a condition on the dismissal of [illegible] complaint objecting to the bankrupt's discharge, either as an exercise of discretion in an individual case or as a matter governed by local rule.

Since the conditions requiring dismissal of an adversary proceeding for failure to join a party differ from those governing the dismissal for such a reason of a civil action in the district court, Rule 719 [illegible] in proceedings under the [illegible] reference in the last sentence of Rule [illegible] Federal Rules of Civil Procedure [illegible] applied in adversary proceedings.

The withdrawal of a proof of claim is governed by Rule 305.

Rule 712 Consolidation of Adversary Proceedings; Separate Trials

1 Rule 42 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Advisory Committee's Note

Rule 42 of the Federal Rules of Civil Procedure has been held applicable in bankruptcy proceedings. [illegible] *Clarke*, 1[illegible] F.2d 6[illegible], 644 (2d Cir.), cert. denied, [illegible]

77[illegible] (1941). The right to jury trial referred to [illegible] sion (b) of that rule is not likely to require r[illegible] an adversary proceeding in a bankruptcy c[illegible]. See *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966); *B[illegible]* *v. Barbour*, 104 U.S. 126, 133-34 (1881); 2 Collier ¶¶ 19.02, 19.07 (1940).

[N.b. The next rule is 741.1.]

Rule 741.1 Determination of Foreign Law

1 Fed[illegible] 44.1 of the Federal Rules [illegible]
2 Procedure applies in adversary pro[illegible].

[N.b. The next rule is 752.]

Rule 752. Findings by the Court

1 *(a) Effect.* In all matters tried up[illegible] the
2 facts without a jury or with an adv[illegible]ry
3 jury, the court shall find the [illegible] sp[illegible]
4 and state separately its concl[illegible]ions of law
5 thereon and the judgment [illegible]
6 pursuant to Rule 921(a). Requests for find-
7 ings are not necessary for purp[illegible] of re-
8 view. Findings of fact shall not be [illegible]
9 unless clearly erroneous, and due regard
10 shall be given to the opportunity of the trial
11 court to judge of the credibility of the wit-
12 nesses. If an opinion or memorandum of de-
13 cision is filed, it will be sufficient if the find-
14 ings of fact and conclusions of law appear
15 therein. Findings of fact and concl[illegible]ns of
16 law are unnecessary on decisions of motions
17 under these rules except when, on a motion
18 to dismiss under Rule 741, the cou[illegible]
19 a judgment on the merits aft[illegible]
20 facts.

21 *(b) Amendment.* Upon motion of a party
22 made not later than 10 days after entry of a
23 judgment the court may amend its findings
24 or make additional findings and may amend
25 the judgment accordingly. The motion may
26 be made with a motion for a new trial or to
27 alter or amend a judgment pursuant to Rule
28 923. When findings of fact are made in mat-
29 ters tried by the court without a jury, the
30 question of the sufficiency of the evidence to
31 support the findings may thereafter be
32 raised whether or not the party raising the
33 question has made before the court an objec-
34 tion to such findings or has made a motion to
35 amend them or a motion for judgment.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 52 of the Federal Rules of Civil Procedure. Rule 52 has been frequently applied in adversary proceedings in bankruptcy cases. See, *e.g.*, *In re Woodmar Realty Co.*, 307 F.2d 591, 593 (7th Cir. 1962) (findings of fact regarding secured claim held sufficient to comply with Fed.R.Civ.P. 52(a)); *In re Ulrico Development*, 311 F.Supp. 1393 (D.P.R. 1970) (referee's turnover order reversed for lack of findings of fact).

The reference to the advisory jury in subdivision (a) will rarely be applicable in an adversary proceeding. The judgment of the referee is required by Rule 921(a) to be entered in the referee's docket as provided in Rule 504(a), and if the judgment is that of the district judge, it is required to be entered in the civil docket as provided in Rule 79(a) of the Federal Rules of Civil Procedure. The necessity of findings and conclusions in connection with interlocutory injunctions is not specially mentioned in this rule as it is in Civil Rule 52(a), since the statement of the court's duty in the first sentence

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seems sufficiently comprehensive to apply to the court's disposition of applications for such relief. The "clearly erroneous" standard for overturning the court's findings appears in substantially identical form in Rule 810, which governs the review of findings of a referee by the district court in any proceeding or matter under these rules. The provision of Civil Rule 52(a) assimilating the findings of a master, if adopted by the court, to findings by the court applies in bankruptcy cases by virtue of Rule 5[illegible].

[*N.B. The next rule is 751.*]

Rule 751. Judgments; Costs

1 *(a) Judgments.* Subdivisions (a), (b) and
2 (c) of Rule 54 of the Federal Rules of Civil
3 Procedure apply in adversary proceedings.
4 *(b) Costs.* On one day's notice costs may
5 be taxed and judgment therefor rendered by
6 the court.

Advisory Committee's Note

Subdivision (a). Rule 54 of the Federal Rules of Civil Procedure has been deemed generally applicable in bankruptcy cases. *South Falls Corp. v. Rochelle*, 329 F.2d 611, 619 (5th Cir. 1964); *In re Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952); *In re Industrial Sugar Engineering, Inc.*, 230 F.Supp. 154 (E.D.Wis. 1964); 1 Collier 381-82 (1968).

Subdivision (b). Under § 2a(18) of the Act the bankruptcy courts have followed the equity practice of allowing costs to either party as a matter of discretion. 1 Collier, *supra* 381-82. Because of the adverse effect on creditors of imposing costs on a bankrupt estate and the reciprocal equities of those involved in litigation with such an estate, costs have often been denied either party in contested proceedings in bankruptcy cases. Subdivision (b) preserves the traditional [illegible] by leaving the taxation of costs in such proceedings to the court's discretion.

Rule 755. Default

1 *(a) Entry.* When a judgment is sought
2 against a party in adversary proceedings
3 and such party has, without sufficient ex-
4 cuse, (1) failed to plead or otherwise defend
5 or, (2) having filed a pleading or motion, is
6 not ready to proceed with trial on the day set
7 therefor in accordance with these rules, the
8 court upon request therefor shall enter a
9 judgment by default, except as provided
10 hereinafter. If, in order to enable the court to
11 enter judgment or to carry it into effect, it is
12 necessary to take an account or to determine
13 the amount of damages or to establish the
14 truth of any averment by evidence or to
15 make an investigation of any other matter,
16 the court may conduct such hearings as it
17 deems necessary and proper. No judgment
18 by default shall be entered against an infant
19 or incompetent person unless represented in
20 the proceeding by a general guardian, com-
21 mittee, conservator, or other such represent-
22 ative who has appeared therein.
23 *(b) Setting Aside Judgment by Default.*
24 For good cause shown the court may set
25 aside a judgment by default in accordance
26 with Rule 924.
27 *(c) Plaintiffs, Counterclaimants, Cross-*
28 *Claimants.* The provisions of this rule apply
29 whether the party entitled to the judgment
30 by default is a plaintiff, a third-party plain-
31 tiff, or a party who has pleaded a cross-claim
32 or counterclaim. In all cases a judgment by
33 default is subject to the limitations of Rule

34 54(c) of the Federal Rules of Civil Proce-
35 dure.
36 *(d) Judgment Against the United States.*
37 No judgment by default shall be entered
38 against the United States or an officer or
39 agency thereof unless the claimant estab-
40 lishes his claim or right to relief by evidence
41 satisfactory to the court.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 55 of the Federal Rules of Civil Procedure. The distinction between the entry of a default under subdivision (a) of the Civil Rule and the entry of a judgment by default under subdivision (b) of the Civil Rule and the provisions in the latter subdivision for a 3-day notice of an application for judgment and for a right of trial by jury have all been eliminated from the Bankruptcy Rule as inappropriate and unnecessary in adversary proceedings. No affidavit as to the fact of default or as to the amount due is a prerequisite to the entry of the judgment by default by the court under this rule. There is no right to entry of a judgment by default, however, against a party whose failure to appear or to be ready for trial is sufficiently excused, *e.g.*, because he is in military service. The operation of subdivision (a) of this rule is subject to the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 501 *et seq.*, in the same way as is Rule 55(b) of the Federal Rules of Civil Procedure. See 6 Moore ¶¶ 55.01[6], 55.04, 55.10[3], 55.13 (1953). The court may withhold entry of a default judgment whenever it deems further investigation or hearings to be necessary. The rule does not contemplate that before entering a judgment by default the court is obliged to make an inquiry into whether the party who has failed to plead or defend or is not ready to proceed with trial has a sufficient excuse or whether the party against whom the judgment by default is requested to be entered is an infant or incompetent person.

Subdivisions (b), (c), and (d) of the rule follow with

slight change subdivisions (c), (d), and (e) of Rule 55 of the Federal Rules of Civil Procedure.

Rule 756. Summary Judgment

1 Rule 56 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

Rule 56 of the Federal Rules of Civil Procedure has frequently been deemed applicable in contested proceedings in bankruptcy cases. See, *e.g., In re Yellow Transit Freight Lines, Inc.*, 207 F.2d 602, 604 (7th Cir. 1953); *Cohen v. Eleven West 42nd Street, Inc.*, 115 F.2d 531, 532 (2d Cir. 1940); *In re Georgia Jewelers, Inc.*, 219 F.Supp. 386, 390 (Ref., N.D.Ga. 1962), aff'd, 219 F.Supp. 393 (N.D.Ga. 1962); *In re Norwalk Tire & Rubber Co.*, 93 F.Supp. 870, 871 (D.Conn. 1950); Yankwich, *The Impact of the Federal Rules on Bankruptcy*, 42 Cal.L.Rev. 738, 756-58 (1954), 29 Ref.J. 75, 81 (1955). As recognized in the Note accompanying Rule 701, a motion filed under this rule will typically require the setting of a new date for trial.

[*N.b. The next rule is 762.*]

Rule 762. Stay of Proceedings to Enforce a Judgment

1 Subject to the provisions of Rule 805, Rule
2 62 of the Federal Rules of Civil Procedure
3 applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

Section 39c of the Act vests discretion in the referee in respect to the suspension of the execution or enforcement of any referee's order that is being reviewed and Rule 805 explicitly retains this discretion. Rule 62(a) of the Federal Rules of Civil Procedure, however, appear

ently gives an appellant a stay as of right on the filing of a supersedeas bond, but the bond must be approved by the court. 7 Moore ¶ 62.06 (1951). Although the courts have found no conflict between the provisions of Rule 62 of the Federal Rules of Civil Procedure and the Act, 2 Collier ¶ 25.12 (1966), the qualifying reference to Rule 805 at the beginning of this rule removes any doubt as to the continuing authority of the referee in respect to the stay of proceedings pending an appeal to the district court.

[*N.b. The next rule is 764.*]

Rule 764. Seizure of Person or Property

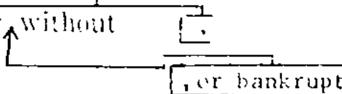
1 Rule 64 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings ex-
3 cept that an adversary proceeding in which
4 any of the remedies referred to in that rule
5 is used shall be commenced and prosecuted
6 pursuant to these rules.

Advisory Committee's Note

It has been held that Rule 64 of the Federal Rules of Civil Procedure does not "purport to enlarge the powers of a referee beyond those conferred upon him by the Bankruptcy Act" so as to enable him to issue an order of execution to reach the beneficial right of the bankrupt to trust income when the trustee was not subject to the court's jurisdiction. *Th[illegible] v. Von Hoffman*, 109 F.2d 293, 296 (3d Cir. 1940). This rule is subject to the same limitation.

Rule 765. Injunctions

1 Rule 65 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings ex-
3 cept that a temporary restraining order or
4 preliminary injunction may be issued on ap-
5 plication of a trustee ~~or~~ receiver without



6 compliance with subdivision (c) of that rule.
7 When security is required under subdivision
8 (c) of that rule and is given in the form of a
9 bond or other undertaking, Rule 925 governs
10 its enforcement against the surety thereon.

ADVISORY COMMITTEE'S NOTE

This rule authorizes the court to relieve the trustee or receiver of the security requirement of Rule 65(c) of the Federal Rules of Civil Procedure. It thus does not go so far as *In re [illegible] Corp.*, 184 F.2d 7[illegible], 795 (6th Cir. 1950), cert.denied, 340 U.S. 946 (1951), and *In re [illegible]*, 85 F.Supp. 311, 312 (W.D.Pa. 1949), both of which apparently deny applicability of subdivisions (b) and (c) of Rule 65 in adversary proceedings in a bankruptcy case on the ground of incompatibility with the exigencies of bankruptcy administration. *Cf. Magidson v. Duggan*, 180 F.2d 473, 479 (8th Cir.), cert.denied, 339 U.S. 965 (1950), denying applicability of Fed.R.Civ.P. 65(c) to issuance of temporary and permanent injunctions in a plenary action within reorganization court's jurisdiction under §§ 2a(7), 102, and 115 of the Act; *In re J.S. Gissel & Co.*, 238 F.Supp. 130 (S.D.Tex. 1965), denying applicability of Fed.R.Civ.P. 65(c) to an injunction by the court in a Chapter X case against a proceeding in admiralty to foreclose a preferred mortgage.

The stays provided by Rules 401 and 601 are not subject to this Rule 765, nor is relief available under this rule limited by Rule 401 or Rule 601.

[N.b. The next rule is 767.]

Rule 767. Deposit in Court

1 Rule 67 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

This rule does not deal with the deposit of money of bankrupt estates but with the deposit of money or p[illegible]

erty in an adversary proceeding wherein a party seeks recovery of money or property. See, *e.g.*, *O'Dell v. United States*, 326 F.2d 451 (10th Cir. 1964); *cf. In re Casco Chemical Co.*, 335 F.2d 645, 648–49 (5th Cir. 1964). The rule contemplates that the money shall be deposited by the clerk in a designated depository in the name and to the credit of the court, subject to withdrawal only on order of the court. See 7 Moore ¶ 67.02 (19[illegible]). The deposit of money of bankrupt estates is governed by Rules 310 and 512.

Rule 768. Offer of Judgment

1 Rule 68 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

Rule 769. Execution

1 Rule 69 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

ADVISORY COMMITTEE'S NOTE

The applicability of Rule 69 of the Federal Rules of Civil Procedure to the collection of a judgment rendered in summary proceedings under the Bankruptcy Act was recognized in *Governor Clinton Co. v. Knott*, 120 F.2d 149 (2d Cir.), cert. dismissed per stipulation, 314 U.S. 701 (1941). *Cf.* MacLachlan, *Bankruptcy* 215 (1956).

Rule 770. Judgment for Specific Acts; Vesting Title

1 If a judgment directs a party to execute a
2 transfer or to deliver a document or to per-
3 form any other specific act and the party
4 fails to comply within the time specified, the
5 court may direct the act to be done at the
6 cost of the disobedient party by some other

7 person appointed by the court and the act
8 when so done has like effect as if done by the
9 party. On application of the party entitled
10 to performance, the court shall issue a writ
11 of attachment or sequestration against the
12 property of the disobedient party to compel
13 obedience to the judgment. In proper cases
14 the disobedient party may also be held in
15 contempt in proceedings under Rule 920.
16 The court in lieu of directing a transfer of
17 real or personal property may enter a judg-
18 ment divesting the title of any party thereto
19 and vesting it in others and such judgment
20 has the effect of a transfer executed in due
21 form of law. When any judgment is for the
22 delivery of possession, the party in whose
23 favor it is entered is entitled to a writ of ex-
24 ecution or assistance upon application to the
25 court.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 70 of the Federal Rules of Civil Procedure.

Rule 771. Process in Behalf of and Against Persons not Parties

1 Rule 71 of the Federal Rules of Civil Pro-
2 cedure applies in adversary proceedings.

[*N.b. The next rule is 782.*]

Rule 782. Transfer of Adversary Proceeding

1 Upon notice and hearing afforded the par-
2 ties, any adversary proceeding may, in the
3 interest of justice and for the convenience of

4 the parties, be transferred by the court to
5 any other district and shall thereafter con-
6 tinue as if originally filed in such district.
7 An adversary proceeding transferred under
8 this rule shall be referred to a referee by the
9 clerk of the court to which it has been trans-
10 ferred.

Advisory Committee's Note

The court to which an adversary proceeding is transferred pursuant to this rule may determine the controversy in the exercise of ancillary jurisdiction conferred by § 2a(20) of the Act. Rule 116(c), which is derived from § 32b and c of the Bankruptcy Act, authorizes transfer of an entire bankruptcy case to another district. This rule recognizes that sound judicial administration may involve the exercise of the same power in a lesser magnitude by authorizing transfer of only a severable part of a case, *viz.*, an adversary proceeding, to another district. In view of the extension of the territorial limits of effective service by Rule 704(f), it behooves courts of bankruptcy to accord a liberal construction to this Rule 782 in order to minimize hardship to parties served in a part of the country remote from the district where the court of bankruptcy is sitting. An order transferring or retaining a case under § 32 of the Act is reviewable on appeal. *L.F. Popell Co., Inc. v. Delta Airlines, Inc.*, 323 F.2d 50, 51 (2d Cir. 1963) (appeal from order of transfer); *In re SOS Sheet Metal Co.*, 297 F.2d 32 (2d Cir. 1961) (appeal from order retaining case). An order transferring or retaining an adversary proceeding under this rule should likewise be reviewable by appeal.

PART VIII. APPEAL TO DISTRICT COURT

Rule 801. Manner of Taking Appeal

1 An appeal from a judgment or order of a
2 referee to a district court shall be taken by
3 filing a notice of appeal with the referee
4 within the time allowed by Rule 802. Failure
5 of an appellant to take any step other than
6 that specified in the first sentence does not
7 affect the validity of the appeal, but is
8 ground only for such action as the district
9 court deems appropriate, which may include
10 dismissal of appeal. The notice of appeal
11 shall conform substantially to Official Form
12 No. 28 and shall be accompanied by the fee
13 fixed by the Judicial Conference of the
14 United States pursuant to § 40c of the Act.

, shall contain the names of all parties to the judgment or order appealed from and the names and addresses of their respective attorneys,

Each appellant shall file a sufficient number of copies of the notice of appeal to enable the referee to comply promptly with Rule 804.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule [illegible] and [illegible] of the Federal Rules of Appellate Procedure for the purpose of prescribing the procedure governing appeals from the referee to the district court.

The procedure governing appeals from judgments of the district judge entered when he is acting as a bankruptcy judge as well as when he is acting on an appeal from a referee is governed by the Federal Rules of Appellate Procedure.

Rule 802. Time for Filing Notice of Appeal

1 *(a) Ten-Day Period.* The notice of appeal
2 shall be filed with the referee within 10 days
3 of the date of the entry of the judgment or
4 order appealed from. If a timely notice of
5 appeal is filed by a party, any other party
6 may file a notice of appeal within 10 days of
7 the date on which the first notice of appeal

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8 was filed, or within the time otherwise pre-
9 scribed by this rule, whichever period last
10 expires.

11 *(b) Effect of Motion on Time for Appeal.*
12 The running of the time for filing a notice of
13 appeal is terminated as to all parties by a
14 timely motion filed with the referee by any
15 party pursuant to the rules hereafter enu-
16 merated in this subdivision. The full time
17 for appeal fixed by this rule commences to
18 run and is to be computed from the entry of
19 any of the following orders made upon a
20 timely motion under such rules: (1) granting
21 or denying a motion for judgment notwith-
22 standing the verdict under Rule [illegible];
23 (2) granting or denying a motion under Rule
24 752(b) to amend or make additional findings
25 of fact, whether or not an alteration of the
26 judgment would be required if the motion is
27 granted; (3) granting or denying a motion
28 under Rule 923 to alter or amend the judg-
29 ment; or (4) denying a motion for a new
30 trial under Rule 923.

31 *(c) Extension of Time for Appeal.* The
32 referee may extend the time for filing the
33 notice of appeal by any party for a period
34 not to exceed 20 days from the expiration of
35 the time otherwise prescribed by this rule. A
36 request to extend the time for filing a notice
37 of appeal must be made before such time has
38 expired, except that a request made after the
39 expiration of such time may be granted upon
40 a showing of excusable neglect if the judg-
41 ment or order does not authorize the sale of
42 ~~real property~~

any property.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 4(a) of the Federal Rules of Appellate Procedure. The rule retains the initial 10-day limit now prescribed by § 39c of the Act for seeking review of a referee's judgment or order. Whereas § 39c, however, allows the court to extend the time for the filing of a petition for review without limit so long as the request for extension is itself timely, this rule, in subdivision (c), places an outer limit of 20 days on any extension. If no motion of the kind contemplated in subdivision (b) and no request for an extension in accordance with subdivision (c) is filed, the time for appeal from a referee's judgment or order expires 10 days after its entry, and it becomes final as provided in Rule 803. Rule 906(b), like Rule 26(b) of the Federal Rules of Appellate Procedure, prohibits the enlargement of the time for filing a notice of appeal.

Motions that will terminate the running of the time for filing a notice of appeal under subdivision (b) are analogous to those which will terminate the running of the appeal time under Rule 4[illegible] the [illegible] Rules of Appellate Procedure. In order [illegible] with a single exception, must b[illegible] days after entry of the judgment or order [illegible]. The exception involves a motion [illegible] under Rule 50(b) of the Federal Rules [illegible] discharge of the jury, in which case the [illegible] period runs from the date of such discharge. Such [illegible] would be made in a bankruptcy case only in a proceeding on a contested petition, to which this provision of the Civil Rules is made applicable by Bankruptcy Rule 115(b)(1).

When the judgment or order appealed from authorizes the sale of ~~real estate,~~ property, it becomes final 10 days after its entry unless within the 10-day period a motion terminating the running of the appeal time or a request for extension is filed. This result, required by the second sentence of subdivision (c), preserves the objective of the amendment of § 39c of the Act in 1960 to eliminate the uncertainty as to the title to ~~real estate~~ property authorized to be sold by a referee's order, once 10 days have passed with-

out an appeal or any request or motion extending the period of vulnerability. If such a motion or request is filed within the 10-day period, the other provisions of this rule apply to a judgment or order authorizing the sale of ~~real estate~~ property as they do to any other judgment or order of the referee.

A request for an extension of the time for filing a notice of appeal from a referee's judgment or order not authorizing the sale of ~~real estate~~ property may be filed after the expiration of the 10-day period following its entry or the entry of an order disposing of a motion as provided in subdivision (b), but the extension may be granted on such a request only on a showing that the delay was due to excusable neglect. Moreover, any allowable extension cannot exceed the 20-day limitation prescribed by the first sentence of subdivision (c). Thus the maximum time allowable under this rule for filing an appeal is 30 days after the entry of the judgment or order appealed from or 30 days from the entry of an order disposing of a motion that terminates the running of the time for filing an appeal as provided in subdivision (b).

Rule 803. Finality of Referee's Judgment or Order

1 Unless a notice of appeal is filed as pre-
2 scribed by Rules 801 and 802, the judgment
3 or order of the referee shall become final.

ADVISORY COMMITTEE'S NOTE

This rule preserves the finality of a referee's order on the expiration of the period allowed for seeking review, as now provided in § 39c of the Act.

Rule 804. Service of the Notice of Appeal

1 The referee shall serve notice of the filing
2 of a notice of appeal by mailing a copy
3 thereof to counsel of record of each party

4 other than the appellant or, if a party is not
5 represented by counsel, to the party at his
6 last known address. Failure to serve notice
7 shall not affect the validity of the appeal.
8 The referee shall note on each copy served
9 the date of the filing of the notice of appeal
10 and shall note in the docket the names of the
11 parties to whom he mails copies and the date
12 of the mailing.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of the provisions of Rule 3(d) of the Federal Rules of Appellate Procedure. The duties imposed by this rule on the referee are delegable to an assistant as provided in Rule 506.

Rule 805. Stay Pending Appeal

1 A motion for a stay of the judgment or
2 order of a referee, for approval of a superse-
3 deas bond, or for other relief pending appeal
4 must ordinarily be made in the first instance
5 to the referee. Notwithstanding Rule 762
6 but subject to the power of the district court
7 reserved hereinafter, the referee may sus-
8 pend or order the continuation of proceed-
9 ings or make any other appropriate order
10 during the pendency of an appeal upon such
11 terms as will protect the rights of all parties
12 in interest. A motion for such relief, or for
13 modification or termination of relief granted
14 by the referee, may be made to the district
15 court, but the motion shall show why the re-
16 lief, modificaton, or termination was not ob-
17 tained from the referee. The district court
18 may condition the relief it grants under this

12 ment of the appellant, file and serve on the
13 appellant a designation of additional papers
14 to be included. If the record designated by
15 any party includes a transcript of any pro-
16 ceeding or a part thereof, he shall imme-
17 diately after the designation order the tran-
18 script and make satisfactory arrangements
19 for payment of its cost. All parties shall take
20 any other action necessary to enable the ref-
21 eree to assemble and transmit the record.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 10(b) of the Federal Rules of Appellate Procedure. The last sentence of the rule is a revision of a sentence taken from Rule 11(a) of the Federal Rules of Appellate Procedure.

Rule 807. Transmission of the Record; Docketing of the Appeal

1 The record on appeal shall be transmitted
2 by the referee to the clerk of the district
3 court within 30 days after the filing of the
4 statement of the issues unless a different
5 time is prescribed by order of the district
6 court, and the clerk shall thereupon enter the
7 appeal upon the docket.

ADVISORY COMMITTEE'S NOTE

This rule is derived from Rules 11(a) and 12(a) of the Federal Rules of Appellate Procedure. The time allowed the referee for transmission of the record is shorter than the corresponding period prescribed by Appellate Rule 11(a) in recognition of the need for expedition in bankruptcy cases, but the time runs from the filing of the statement of the issues rather than the filing of the no-

tice of appeal so that delay in receipt of the statement will not prejudice the referee in complying with his duty under this rule.

Rule 808. Filing and Service of Briefs

1 Unless a local rule or court order excuses
2 the filing of briefs or provides for different
3 time limits:
4 (1) The appellant shall serve and file
5 his brief within 15 days after ~~the service~~
6 ~~of the statement of the issues.~~
7 (2) The appellee shall serve and file his
8 brief within 15 days after service of the
9 brief of the appellant.
10 (3) The appellant may serve and file a
11 reply brief within 5 days after service of
12 the brief of the appellee.

entry of the appeal on the docket pursuant to Rule 807.

ADVISORY COMMITTEE'S NOTE

This rule is adapted from Rule 31(a) of the Federal Rules of Appellate Procedure. The introductory clause of the rule recognizes the desirability of allowing local and individual variations in respect to the filing of briefs, and the numbered clauses prescribe shorter periods than the corresponding intervals allowed by Appellate Rule 31(a).

Rule 809. Oral Argument

1 Unless otherwise provided by local rule or
2 court order the parties shall be given an op-
3 portunity to be heard on oral argument.

ADVISORY COMMITTEE'S NOTE

In lieu of detailed provisions governing oral argument comparable to Rule 34 of the Federal Rules of Appellate

Procedure, this rule provides the parties in general terms an opportunity to be heard on oral argument but subject to control by the court.

Rule 810. Disposition of Appeal; Weight Accorded Referee's Findings

1 Upon an appeal the district court may af-
2 firm, modify, or reverse a referee's judg-
3 ment or order, or remand with instructions
4 for further proceedings. The court shall ac-
5 cept the referee's findings of fact unless they
6 are clearly erroneous, and shall give due re-
7 gard to the opportunity of the referee to
8 judge of the credibility of the witnesses.

Advisory Committee's Note

This rule is a revision of General Order 47, which courts have applied when reviewing referees' orders under § 39c of the Act. *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 530 (10th Cir. 1962), cert. denied, 372 U.S. 930 (1963); *Allen v. Lokey*, 307 F.2d 353, 354 (5th Cir. 1962); *Mazer v. United States*, 298 F.2d 579, 581-82 (7th Cir. 1962). The rule defines the judge's authority in disposing of judgments, orders, and findings on review in conformity with § 2a(10) of the Act and requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court. *Gross v. Fidelity & Deposit Co. of Md.*, 302 F.2d 338, 339 (8th Cir. 1962); *Simon v. Agar*, 299 F.2d 853 (2d Cir. 1962). The same standard is prescribed by Rules 752(a) and 914, which govern the review of findings of fact in adversary proceedings and contested matters in bankruptcy cases, whether such findings are made by a referee or district judge. This rule is not subject to suspension or modification by local rule or order. See Rule 814. The rule does not retain the provision of General Order 47 authorizing receipt of further evidence by the district judge in

connection with a review of a referee's order or findings. See 2 Collier ¶ 39.28 (1968).

Rule 811. Costs

1 Except as otherwise provided by law,
2 agreed to by the parties, or ordered by the
3 court, costs shall be taxed against the losing
4 party on an appeal; if a judgment is af-
5 firmed or reversed in part, or is vacated,
6 costs shall be allowed only as ordered by the
7 court. Costs incurred in the preparation and
8 transmission of the record, the cost of the
9 reporter's transcript, if necessary for the
10 determination of the appeal, the premiums
11 paid for cost of supersedeas bonds or other
12 bonds to preserve rights pending appeal, and
13 the fee for filing the notice of appeal shall be
14 taxed by the referee as costs of the appeal in
15 favor of the party entitled to costs under
16 this rule.

Advisory Committee's Note

This rule is an adaptation of Rule 39(a) and (e) of the Federal Rules of Appellate Procedure.

Rule 812. Motion for Rehearing

1 Unless otherwise provided by local rule or
2 court order, a motion for rehearing may be
3 filed within 10 days after entry of the judg-
4 ment of the district court.

Advisory Committee's Note

This rule is an adaptation of the first sentence of Rule 40(a) of the Federal Rules of Appellate Procedure. The

filing of a motion for rehearing pursuant to this rule does not terminate the running of the time for filing a notice of appeal from the district court to the court of appeals. See Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 813. Duties of Clerk on Disposition of Appeal

1 Immediately upon the entry of an order or
2 judgment the clerk of the district court shall
3 serve a notice of the entry by mail upon each
4 party to the appeal, together with a copy of
5 any opinion respecting the order or judg-
6 ment, and shall make a note of the mailing
7 in the docket. Original papers transmitted as
8 the record on appeal shall be returned to
9 the referee upon disposition of the appeal.

Advisory Committee's Note

The first sentence of this rule is substantially identical to the first sentence of Rule 45(c) of the Federal Rules of Appellate Procedure. The second sentence is an adaptation of the next to the last sentence of Rule 45(d) of the Federal Rules of Appellate Procedure.

The duties of the clerk of the district court in respect to the keeping of records of cases appealed from the referee to the district court are as prescribed by the Director of the Administrative Office of the United States Courts pursuant to Rule 507.

Rule 814. Suspension of Rules in Part VIII

1 In the interest of expediting decision or
2 for other good cause, the district court may,
3 by local rule or order, suspend the require-
4 ments or provisions of the rules in Part
5 VIII, except Rules 801, 802, 803, and 810,

also

6 and may order proceedings in accordance
7 with its direction.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 2 of the Federal Rules of Appellate Procedure, but it recognizes that the district court may prescribe a procedure for appeals from referees by local rules or may order the suspension of one or more provisions or requirements of Rules 804, 805, 806, 807, 808, 809, 811, 812, and 813 for a particular appeal. An existing local rule may continue to govern the filing and service of briefs, oral argument, and motion for rehearing, as provided in Rules 808, 809, and 812, but the other rules listed in the preceding sentence can be suspended only by a rule adopted or order made after these rules become effective. The court may make an order of suspension on application or motion of a party or on its own initiative. Neither a local rule nor an order in an individual instance can contravene the requirements of Rules 801, 802, 803, and 810. Subject to this limitation the district court may by local rule or order direct that the provisions of one or more of the Federal Rules of Appellate Procedure shall be followed.

Rule 901. General Definitions

The definitions of words and phrases in § 1 of the Act govern their use in these rules to the extent they are not inconsistent with the rules. In addition, the

1 ~~The~~ following words and phrases used in
2 these rules have the meanings herein indi-
3 cated unless they are inconsistent with the
4 context:
5 (1) "Accountant" includes an accounting
6 partnership or corporation.
7 (2) "Act" means the Bankruptcy Act.
8 (3) "Affiliate" of a bankrupt means (A) a
9 corporation 25 per cent or more of whose
10 outstanding voting securities are directly or
11 indirectly owned, controlled, or held with
12 power to vote, by the bankrupt, or (B) a per-
13 son who directly or indirectly owns, controls,
14 or holds with power to vote, 25 per cent or
15 more of the outstanding voting securities of
16 the bankrupt, or (C) a corporation 25 per
17 cent or more of whose outstanding voting se-
18 curities are directly or indirectly owned,
19 controlled, or held with power to vote, by a
20 person who directly or indirectly owns, con-
21 trols, or holds with power to vote, 25 per
22 cent or more of the outstanding voting se-
23 curities of the bankrupt, or (D) a person
24 substantially all of whose property is oper-
25 ated under lease or operating agreement by
26 the bankrupt, or (E) a person who operates
27 under lease or operating agreement substan-
28 tially all of the property of the bankrupt.
29 (4) "Application" includes any request to
30 the court for relief that is not a pleading or

31 proof of claim. An application not made in
32 open court shall be in writing unless a writ-
33 ing is excused by the court. An application
34 for an order against another party may be
35 required to be made by motion.
36 (5) "Attorney" includes a law partner-
37 ship or corporation.
38 (6) "Bankrupt." When any act is required
39 by these rules to be performed by a bankrupt [or when it is necessary to compel attendance of a bankrupt for examination]
40 and the bankrupt is not a natural person:
41 (A) if the bankrupt is a corporation, "bank-
42 rupt" includes [, if designated by the court,] any or all of its officers, mem-
43 bers of its board of directors or trustees or
44 of a similar controlling body, a controlling
45 stockholder or member, or any other person
46 in control; (B) if the bankrupt is a partner-
47 ship, "bankrupt" includes any or all of its
48 general partners [or, if designated by the court,] ~~and~~ any other person in
49 control.
50 (7) "Bankruptcy judge" means the ref-
51 eree of the court of bankruptcy in which a
52 bankruptcy case is pending, or the district
53 judge of that court when issuing an injunc-
54 tion under § 2a(15) of the Act and when act-
55 ing in lieu of a referee under § 43c of the
56 Act or under Rule 102.
57 (8) "Judgment" includes any order ap-
58 pealable to the district court [or, if entered by a district judge when acting as a bankruptcy judge, appealable to the court of appeals.]
59 (9) "Motion" means an application to the
60 court for an order in an adversary proceed-
61 ing or in a proceeding on a contested peti-
62 tion, to vacate an adjudication, or to deter-
63 mine any other contested matter. Unless
64 made during a hearing or trial, a motion
65 shall be made in writing, shall conform sub-

66 stantially to a pleading in form, shall state
67 with particularity the grounds therefor, and
68 shall set forth the relief or order sought.
69 (10) "Pleadings" include those allowed by
70 Rule 7(a) of the Federal Rules of Civil Pro-
71 cedure and the petition and the responsive
72 pleadings allowed by Rule 112.

Advisory Committee's Note

~~The definitions of words and phrases in § 1 of the Act apply throughout the rules.~~ Except for its definition of "bankrupt," which supplements the definition in § 1(4) of the Act, this rule defines words and phrases not included in the Act's definitions.

(1) & (5). The definitions of "accountant" and "attorney" recognize that a professional firm as well as an individual may act as an accountant or attorney under these rules. For these purposes no distinction is drawn between a professional partnership, a professional corporation, and an individual who practices the profession. The development of professional corporations, motivated primarily by tax considerations, is discussed in Deering, *Incorporation by Attorneys*, 42 Ore.L.Rev. 93 (1963); Frost, *Some Comments as to Professional Corporation Statutes*, 4 Ariz. L.Rev. 169 (1963); Comment, *Professional Associations and Professional Corporations*, 16 Sw.L.J. 462 (1962).

(3). The definition of "affiliate" is derived from the definitions of "subsidiary company" and "affiliate" in the Public Utility Holding Company Act of 1935 in 15 U.S.C. § 79b(a) (8) (A) & (11), and the definition of "subsidiary" in § 106(13) of the Bankruptcy Act. The minimum percentage of ownership, control, or holding of the outstanding voting securities in clauses (A), (B), and (C) is set at 25% rather than the lesser percentages found in the cited provisions of the Public Utility Holding Company Act or the majority of the stock having power to vote prescribed by § 106(13) of the Act. *Cf.* 15 U.S.C. § 80a-2(a) (9), where beneficial ownership of more than

25% of the voting securities of a company constitutes presumptive control for the purposes of the Investment Company Act of 1940. An "affiliate" of a bankrupt includes not only its "subsidiary" as defined in § 1(19) of the Act but also a "parent" when a subsidiary is the bankrupt. Moreover the definition explicitly recognizes that an "affiliate" of the bankrupt may include a corporation having a common parent with the bankrupt by virtue of the parent's control of the voting securities of both subsidiary corporations. Clauses (D) and (E) are adaptations of the first clause of § 1(19), embracing the lessor as well as the lessee within the term "affiliate." The definition of "subsidiary" in the Act has served the limited purpose of indicating the permissible scope of the special venue provision in § 129 of the Act, which is applicable only when a petition by or against a parent corporation has been approved. 6 Collier ¶ 2.17 (1965). The definition of "affiliate" in this rule gives substantially more liberal scope to the special venue and transfer provisions of Rule 116(a)(1) and (c) and to the authorization for joint administration in Rule 117(b).

(2) Many proceedings in a bankruptcy case are purely administrative, involving no adverse parties and requiring none of the formalities and safeguards of notice and hearing [illegible] litigation. When the bankrupt [illegible] other party seeks an order involving no adverse parties [illegible] will ordinarily need only to file an "application" conforming to the definition in this rule. See, e.g., Rules 515 (application to reopen a case) and 606(a)(2) (application for private sale). Special requirements may apply to particular applications. See, e.g., Rules 107(b)(1) (application for permission to pay filing fees in installments), 201(b) (application for receiver), and 219(a) (application for compensation). On occasion an application may be contested, and in such case the court [illegible] the applicant [illegible] pleading. See Rule 914. The definition [illegible] generally to [illegible] Act [illegible] Form [illegible] 19[illegible]

and 21a (application for an examination), 57n (application for extension for filing claim), and 58a(8) (application for compensation) of the Act. The application for discharge referred to in §§ 7a(1) and 14 of the Act and in Official Form No. 41, and the application for amendments to the petition and schedules referred to in General Order 11 have been eliminated as unnecessary formalities.

(6). The definition of "bankrupt" in § 1(4) of the Act applies under these rules. Clause (6) of this rule supplements the statutory definition by incorporating into it the meanings given the word in certain contexts by §§ 7b and 1[illegible] of the Act.

(7). Since Rule 102 requires all bankruptcy cases to be referred, the judical and administrative functions assigned the court by the Act and these rules will be performed by a referee in all but a few instances. The term "bankruptcy judge" has been employed throughout the rules as a useful designation of the referee or the district judge when he acts in lieu of a referee. The term also applies to the referee or the judge when either issues an injunction in a bankruptcy case pursuant to § 2a(15), but the statutory provision restricting the power to enjoin a court to the judge still applies under these rules. Clarity is served by distinguishing between the referee and the district judge in some rules. See, *e.g.*, Rule 115 which governs the hearing on a contested petition, including a jury trial when one is requested, and Rule 920, which governs hearings in contempt proceedings.

(8). The definition of "judgment," like that in Rule 902(5), is adapted from Rule 54(a) of the Federal Rules of Civil Procedure. Notwithstanding the seemingly unlimited scope of appealability under §§ 2a(10) and 39c of the Act, the courts have recognized that some orders lack sufficient finality to be subject to review under those sections. See 2 Collier ¶ 39.21 (1968).

(9). The definition of "motion" is derived from Rule 7(b) of the Federal Rules of Civil Procedure, which has generally been held applicable in contested proceedings in a bankruptcy case. The use of the term in these ru...

is restricted to proceedings involving adverse parties and conforms to general usage in this regard. Compare the definition of "application" *supra*. See, *e.g.*, *In re J. & M. Doyle Co.*, 130 F.2d 340, 341 (3d Cir. 1942) (oral motion for extension of time for filing petition for review of allowance of claim held insufficient); *In re Long Island Properties, Inc.*, 125 F.2d 206, 207 (2d Cir. 1942) (motion seeking approval of contract between trustee and building contractor held insufficient for lack of particularity); *cf. Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 366 (5th Cir. 1962) (recognizing that failure to follow Fed.R.Civ.P. 7(b)(1) literally in making motions for amendment of petition may be cured).

(10). Since Rule 707 makes Rule 7(a) of the Federal Rules of Civil Procedure applicable in adversary proceedings, the pleadings allowed in such proceedings are those listed in subdivision (a) of the latter rule. When the term "pleadings" is used generally in the rules, as in Rules 904(a) and 911(a), it includes the "petition" as defined in § 1(24) of the Act and the pleadings permitted by Rule 112.

Rule 902. Meanings of Words in the Federal Rules of Civil Procedure When Applicable in ~~a~~ Bankruptcy ~~Case.~~ Cases

1 The following words and phrases used in
2 the Federal Rules of Civil Procedure made
3 applicable in bankruptcy cases ~~or in proceed-~~
4 ~~ings therein~~ by these rules ~~or by an order en-~~
5 ~~tered pursuant to these rules~~ have the mean-
6 ings herein indicated unless they are
7 inconsistent with the context:
8 (1) "Action" or "civil action" means an
9 adversary proceeding or, when appropriate,
10 a proceeding on a contested petition, to va-
11 cate an adjudication, or to determine any
12 other contested matter.

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includes

13 (2) "Appeal" ~~means~~ appeal from the ref-
14 eree to the district court, and "appellate
15 court" means the district court.
16 (3) "Clerk" or "clerk of the district
17 court" means an assistant employed by the
18 referee and designated as his clerk by the
19 referee's order, unless the offices of the clerk
20 of the district court and the referee are con-
21 solidated or a proceeding is before the dis-
22 trict judge.
23 (4) "District court," "trial court," or
24 "judge" means bankruptcy judge.

"court,"

25 (5) "Judgment" includes any order ap-
26 pealable to the district court,

or, if entered by a district judge when acting as a bankruptcy judge, appealable to the court of appeals.

ADVISORY COMMITTEE'S NOTE

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

In particular, the Federal Rules of Civil Procedure largely govern an adversary proceeding, which is to be read for "action" or "civil action" whenever either of these terms appears in any of the Civil Rules made applicable by the Bankruptcy Rules in Part VII. Rule 121 also makes many of the Civil Rules applicable to a proceeding on a contested petition or to vacate an adjudication, and for this purpose "action" or "civil action" is to be read as referring to such a proceeding. When the Civil Rules are made applicable to a contested matter by or pursuant to Rule 914, "action" or "civil action" refers to the contested matter in this context.

Rule 903. Rule of Construction

1 These rules shall be construed to secure
2 the expeditious and economical administra-

3 tion of every bankrupt estate and the just,
4 speedy, and inexpensive determination of
5 every proceeding in bankruptcy.

ADVISORY COMMITTEE'S NOTE

The objective of "expeditious and economical administration" of bankrupt estates has frequently been recognized by the courts to be "a chief purpose of the bankruptcy laws." See *Katchen v. Landy*, 382 U.S. 323, 328 (1966); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346–47 (1874); *Ex parte Christy*, 44 U.S. (3 How.) 292, 312–14, 320–22 (1845). The rule also incorporates the wholesome mandate of the last sentence of Rule 1 of the Federal Rules of Civil Procedure. 1 Moore ¶ 1.13 (1967); 4 Wright & Miller, *Federal Practice and Procedure—Civil* § 1029 (1969).

Rule 901. General Requirements of Form

1 *(a) Legibility; Abbreviations.* All plead-
2 ings, schedules, and other papers shall be
3 clearly legible. Abbreviations in common use
4 in the English language may be used.
5 *(b) Caption.* Each paper filed shall con-
6 tain a caption setting forth the name of the
7 court, the title of the case, the bankruptcy
8 docket number, and a brief designation of
9 the character of the paper.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule relaxes restrictions on the use of abbreviations and interlineations that have been imposed by General Order 5(1). Common abbreviations and interlineations may have special justification when circumstances require alterations in official forms printed for [illegible]

Subdivision (b) derives from General Order 5(3). Additional requirements applicable to the caption for a petition are found in Rule 106, the caption for notices to creditors in Rule 203(h), and to the caption for a pleading in an adversary proceeding in Rule 710. A caption for an application in an uncontested matter or for a motion filed in a proceeding involving the petition or the adjudication need comply only with this rule. A caption for a motion filed in an adversary proceeding or contested matter not involving the petition or adjudication may be adapted from Official Form No. 25.

Effect of noncompliance. Noncompliance by a party with this or any other rule imposing a merely formal requirement does not ordinarily result in the loss of his rights. See Rule 905.

Rule 905. Harmless Error

1 Rule 61 of the Federal Rules of Civil Pro-
2 cedure applies in bankruptcy cases. When
3 appropriate, the court may order or effect
4 correction of such an error or defect.

Advisory Committee's Note

Rule 61 of the Federal Rules of Civil Procedure has been followed in bankruptcy cases. *Manhattan Shirt Co. v. Tomlinson*, 327 F.2d 449, 453 (9th Cir. 1961); *Rogers v. Raffe*, 141 F.2d 374, 376 (2d Cir.), cert. denied, 323 U.S. 721 (1944); *In re Westermann Co.*, 51 F.Supp. 776, 777 (S.D.N.Y. 1943), aff'd sub nom. *Oldden v. Tonto Realty Corp.*, 143 F.2d 926 (2d Cir. 1944). The second sentence of this rule recognizes that procedural convenience may sometimes be served as well by a ministerial correction in the office of the referee as by requiring a party to comply with an applicable requirement, as, for example, when an erroneous caption has been used or an obvious typographical error has been made. *Cf.* Rule 509(e) and § 39a(9) of the Act

Rule 906. Time

1 *(a) Computation.* In computing any pe-
2 riod of time in a bankruptcy case ~~subdivi-~~
3 ~~sion (a) of~~ Rule 6 of the Federal Rules of
4 Civil Procedure applies.
5 *(b) Enlargement.* When by these rules or
6 by a notice given thereunder or by order of
7 court an act is required or allowed to be
8 done at or within a specified time, the court
9 for cause shown may at any time in its dis-
10 cretion (1) with or without application or no-
11 tice order the period enlarged if request
12 therefor is made before the expiration of the
13 period originally prescribed or as extended
14 by a previous order or (2) upon application
15 made after the expiration of the specified pe-
16 riod permit the act to be done where the fail-
17 ure to act was the result of excusable ne-
18 glect; but it may not extend the time for
19 taking any action under Rules 115(b)(4) in-
20 sofar as it makes Rule 50(b) of the Federal
21 Rules of Civil Procedure applicable in bank-
22 ruptcy cases, 302(e), 403(c), 607, 752(b), 802,
23 923, and 924, except to the extent and under
24 the conditions stated in them.
25 *(c) Reduction.* When by these rules or by
26 a notice given thereunder or by order of
27 court an act is required or allowed to be done
28 at or within a specified time, the court for
29 cause shown may in its discretion with or
30 without application or notice order the period
31 shortened; but it may not reduce the time
32 for taking any action under Rules 203(a)
33 [illegible] 302[illegible] [illegible] and [illegible] and 802

34 except to the extent and under the conditions
35 stated in them.
36 *(d) For Motions—Affidavits.* ~~A written~~
37 ~~motion, other than one which may be heard~~
38 ~~*ex parte*, and notice of the hearing thereof~~
39 ~~shall be served not later than 10 days before~~
40 ~~the time specified for the hearing, unless a~~
41 ~~different period is fixed by these rules or by~~
42 ~~order of the court. Such an order may for~~
43 ~~cause shown be made on *ex parte* applica-~~
44 ~~tion. When a motion is supported by affida-~~
45 ~~vit, the affidavit shall be served with the mo-~~
46 ~~tion; and except as otherwise provided in~~
47 ~~Rule 923, opposing affidavits may be served~~
48 ~~not later than 1 day before the hearing, un-~~
49 ~~less the court permits them to be served at~~
50 ~~some other time.~~

Rule 6(d) applies in bankruptcy cases, except that the reference to Rule 59(c) shall be read as a reference to Bankruptcy Rule 923.

(e) Time of Service or Notice by Mail. Service or notice by mail is complete upon mailing.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is an adaptation of Rule 6 of the Federal Rules of Civil Procedure. It governs the time for acts to be done and proceedings to be had in bankruptcy cases and, to that extent, supersedes § 31 of the Act. The cases and commentators are in conflict as to whether Rule 6 of the Federal Rules of Civil Procedure governs the computation of any period of time preceding the commencement of an action. See 2 Moore ¶ 6.06, at 1470–72 (1960); 4 Wright & Miller, *Federal Practice and Procedure—Civil* §§ 1163–64 (1969). In any event the court may resort to this Rule 906(a) as an appropriate guide for such a situation in the absence of a conflicting federal or state statute.

Subdivision (b) follows Rule 6(b) of the Federal Rules of Civil Procedure and Rule 26(b) of the Federal Rules of Appellate Procedure [illegible] in granting discretion generally to authorize extensions of time for the doing of acts required [illegible] by the rules and [illegible]

certain post-judgment acts from those that can be the subject of such an extension. In the interest of expediting proceedings in bankruptcy the last clause of subdivision (b) adds a number of acts for which more time cannot be granted under the first part of the subdivision. Thus the time periods allowed by Rule 107(b)(2) for the payment of filing fees in installments cannot be extended because of the disproportionate costs and delay to bankruptcy administration that result from such extensions. Similar considerations underlie the limitations on the extension of time for filing claims (Rule 302(e)), for objecting to the trustee's report setting apart exemptions (Rule 403(c)), for assuming an executory contract (Rule 607), and for serving affidavits in support of and in opposition to a motion for new trial (Rule 923 insofar as it makes Rule 59(c) of the Federal Rules of Civil Procedure applicable in bankruptcy cases). Case law has generally been in accord in respect to the limitations on the filing of claims prescribed by § 57n of the Act. 3 Collier ¶ 57.27[2] (1961).

Subdivision (c) incorporates into the rules the general authority conferred by the last sentence of General Order 37 to shorten time limitations prescribed by the Federal Rules of Civil Procedure when they are applied in bankruptcy cases. The authority to reduce the time allowable for doing of an act is extended so as to apply generally in such cases but is subject to specific exceptions: Rule 203(a) follows § 58a of the Act, from which it is derived, in detailing the conditions under which it is appropriate to reduce the 10-day period prescribed for notice to creditors. An order for holding the first meeting of creditors under Rule 204(a)(1) within less than 10 days after adjudication would be incompatible with the premise of creditor control that underlies the provisions for such a meeting. The references in the last clause of [illegible] Rules [illegible] and [illegible] are [illegible] with the case law that has developed under the [illegible] [illegible] [illegible] [illegible] [illegible]

the deadline for filing such objections are not subject to reduction by court order. See 3 Collier, *supra* at 375 76, 510. Reduction of the period allowed for filing notice of an appeal under Rule 802 would operate with undue severity against a party entitled to appeal.

Subdivision (d) follows Rule 6(d) of the Federal Rules of Civil Procedure, ~~except that a 10 day limit is substituted for the 5 day limit prescribed by the latter rule. The 10 day period limit conforms to the time limitation prescribed generally for notices to creditors by Rule 203(a) and takes into account additional time that may be needed when the motion is served by mail on a person in a distant place. Shorter time limits are prescribed by Rule 601(d) and by Rule 765, which makes applicable in adversary proceedings the provision in Rule 65(b) of the Federal Rules of Civil Procedure for a 2 days' notice of a motion to dissolve or modify a temporary restraining order. See also Rule 715, which makes the provision for "reasonable notice" of a motion for service of supplemental pleadings in Rule 15(d) of the Federal Rules of Civil Procedure applicable in adversary proceedings.~~

but directs a reference to Bankruptcy Rule 923 [illegible] of the reference to Rule 59(e) because of the exception in Bankruptcy Rule 923 that [illegible] inapplicable [illegible] to reconsider [illegible] allowing and [illegible] claims.

~~*Time for service after mail.*~~ The provision for additional time for service by mail in Rule 6(e) of the Federal Rules of Civil Procedure does not apply in bankruptcy cases for the reason that this mode of service [illegible] conventional in proceedings subject to these rules (see, *e.g.*, Rules 203(a), 404(b), and 704(c)), and time [illegible] have been prescribed on the assumption that notices [illegible] other papers will be served by mail. See the Notes to Rules 712 and 730.

Subdivision (e). This subdivision is derived from [illegible] reference of Rule [illegible] Federal Rules [illegible] Procedure. See [illegible] Rule [illegible] of the Federal [illegible] Appellate [illegible] All [illegible] applicable [illegible] proceedings [illegible] of Bankruptcy [illegible] 705(a), and in all [illegible] filings relat[illegible] petit[illegible] adjud[illegible] Rule [illegible] subdi[illegible] this rule [illegible] of [illegible] appli[illegible] matte[illegible] by m[illegible] notic[illegible]

(a)

Rule 907. General Authority to Regulate Notices

1 Whenever notice is to be given under the
2 rules, the court shall designate, if not [illegible]
3 wise specified herein, the time with[illegible]
4 the persons to whom and [illegible]
5 [illegible]

6 ever feasible, the court may order any no-
7 tices under these rules to be combined.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of §§ 120, 315, 415, and 615 of the Act. Subject to the paramount provisions of Rule 203 and other rules dealing specifically with notice, this rule gives the court the same authority respecting the giving of notice in straight bankruptcy that it has had in proceedings under Chapters X, XI, XII, and XIII.

Rule 908. Publication

1 Whenever these rules require or authorize
2 service or notice by publication, the court
3 shall, to the extent not otherwise specified in
4 these rules, determine the form and manner
5 thereof, including the newspaper or other
6 medium to be used and the number of publi-
7 cations.

ADVISORY COMMITTEE'S NOTE

This rule supersedes § 28 of the Act. Publication is authorized by Rules 111, 203(g), and 701(d)(2). [h]

Rule 909. Forms

1 The official forms annexed to these rules
2 shall be observed and used, with such altera-
3 tions as may be ~~necessary~~ appropriate to suit the circum-
4 stances. Forms may be combined and their
5 contents rearranged to permit economies in
6 their use. The Director of the Administra-
7 tive Office of the United States Courts may
8 promulgate illustrative forms for use under
9 the Act.

ADVISORY COMMITTEE'S NOTE

The first sentence of this rule is a paraphrase of General Order 38. The rule continues the obligatory character of the official forms in the interest of facilitating the processing of the paperwork of bankruptcy administration. See 2 Collier 1288 (1966). The use of the official forms has generally been held subject to a "rule of substantial compliance." *Id.* ¶ 30.04. See also Rules 904 and 905. The second sentence explicitly recognizes the propriety of combining and rearranging official forms to take advantage of technological developments and resulting economies. The number of official forms has been reduced, but the third sentence, which is new, authorizes the Director of the Administrative Office to develop and promulgate illustrative forms in addition to those that are prescribed as official forms.

Rule 910. Representation and Appearances; Powers of Attorney

1 *(a) Authority to Act Personally or by At-*
2 *torney.* A bankrupt, creditor, or other party
3 may appear in a bankruptcy case and act ei-
4 ther in his own behalf or by an attorney au-
5 thorized to practice in the court. A creditor
6 may also ~~act by a duly~~ [perform any act not constituting the practice of law, by an] authorized agent, at-
7 torney in fact, or proxy
8 *(b) Notice of Appearance.* An attorney
9 appearing for a party shall file a notice of
10 appearance with his name and business ad-
11 dress unless his appearance is otherwise
12 noted in the record.
13 *(c) Power of Attorney.* The authority of
14 any agent, attorney in fact, or proxy to rep-
15 resent a creditor for any purpose other than
16 the execution and filing of a proof of claim
17 shall be evidenced by a power of attorney

18 conforming substantially to Official Form
19 No. 13 or Official Form No. 14. The execu-
20 tion of any such power of attorney shall be
21 acknowledged before one of the officers enu-
22 merated in Bankruptcy Rule 912.

Advisory Committee's Note

Subdivisions (a) and (b). The first 2 subdivisions of this rule are a revision of General Order 4. Service of notices and orders, which is dealt with by the last sentence of General Order 4, is governed under these rules by Rule 765(a).

Attorney at law and attorney in fact. The word "attorney" as used in this rule means attorney at law unless qualified by the addition of the words "in fact." The second sentence of subdivision (a) recognizes the implications of the definition of "creditor" in § 1(11) of the Act but is not intended to authorize laymen to engage in the practice of law. The newly added requirement of subdivision (b) that an attorney file a notice of appearance conforms to general practice. Compliance with the filing requirement is excused if the attorney's appearance is otherwise a matter of record in the case, as by a notation on a paper filed in the case, on the docket or claim-register, or in a stenographic record of proceedings in the case. The requirement of General Order 4 that orders contain the name of the moving party or attorney is omitted as the imposition of an unnecessary formality.

Subdivision (c) is an adaptation of General Order 21(5). The subdivision requires explicitly what has been uniform practice in respect to powers of attorneys executed by creditors, *viz.*, substantial compliance with the requisites of the appropriate official form. Acknowledgment before an officer is required in recognition of the solemn character of the instrument and of the desirability of assuring the creditor who executes it an opportunity to reflect on the scope of the authority being vested in the grantee of the power. The requirement heretofore imposed by General Order 21(5) that any person execut-

ing a power of attorney on behalf of a partnership also take an oath that he is a duly authorized officer, has been deleted as excessively formalistic and not warranted by any safeguard it affords bankruptcy administration. Official Forms No. 13 and 14 have been revised at the same time to require a statement of the authority of the person executing a power of attorney on behalf of a corporation or a partnership to be acknowledged. The burden imposed by the last sentence of General Order 21(5) on the person executing a power of attorney to establish his identity by satisfactory proof when not personally known to the officer taking his acknowledgment probably goes no further than to state the law applicable without the sentence and is omitted as unnecessary.

Rule 911. Signing and Verification of Pleadings and Other Papers

1 *(a) Signature.* Every pleading and every
2 written motion of a party represented by an
3 attorney shall be signed by at least one at-
4 torney of record in his individual name,
5 whose address shall be stated, A party who
6 is not represented by an attorney shall sign
7 his pleading or written motion or application
8 and state his address. The signature of an
9 attorney on any pleading, motion, or appli-
10 cation served in a bankruptcy case consti-
11 tutes a certificate by him that he has read
12 the paper; that to the best of his knowledge,
13 information, and belief, there is good ground
14 to support it; and that it is not interposed
15 for delay or other improper purpose. If a
16 pleading, or written motion or application, is
17 not signed with intent to defeat the purpose
18 of this rule, it may be stricken as sham and
19 false, and the case may proceed as though

[Marginal insertion at line 5: ", and every written application must be so signed by an attorney or by the party making it."]

[Marginal insertion at line 10: "or filed"]

[Marginal insertion at line 17: "or is signed"]

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20 the paper had not been served [or filed]. For a wilful
21 violation of this rule an attorney may be
22 subjected to appropriate disciplinary action.
23 Similar action may be taken if scandalous or
24 indecent matter is inserted.
25 *(b) Verification.* Except as otherwise spe-
26 cifically provided by these rules, papers filed
27 in a bankruptcy case need not be verified.
28 *(c) Copies of Signed or Verified Papers.*
29 When these rules require copies of a signed
30 or verified paper, it shall suffice if the origi-
31 nal is signed or verified and the copies are
32 conformed to the original.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 11 of the Federal Rules of Civil Procedure.

Subdivision (a) follows Rule 7(b)(2) of the Federal Rules of Civil Procedure in subjecting written motions to the rules respecting signatures that govern signatures to pleadings. Any written application must also be signed but is not required to be signed by the party's attorney. An attorney's signature on any pleading, motion, or application served in a bankruptcy case certifies to the same facts respecting it as does an attorney's signature on a pleading under Rule 11 of the Federal Rules of Procedure. In addition his signature certifies that the paper is not filed for any improper purpose. The provisions regarding signature and verification have been placed in seperate subdivisions. The sentence in Civil Rule 11 abolishing the equity rule as to what is required to overcome a verified answer is omitted as unnecessary.

Subdivision (b) extends to all papers filed in bankruptcy cases the policy of minimizing reliance on the formalities of verification which is reflected in the third sentence of Rule 11 of the Federal Rules of Civil Procedure. Bankruptcy Rules explicitly requiring verification or an affidavit [illegible] 105 (petitions, schedules, statements

of affairs, and amendments thereof), 206(a) (application to compel attendance for examination), 208(d) (list of multiple proxies and statement of the circumstances regarding their acquisition), 601(d) (motion for *ex parte* relief from stay), and 765 (incorporating requirement of Fed.R.Civ.P. 65(b) applicable when temporary restraining order sought).

Subdivision (c) is intended to relieve parties of the burden of signing or verifying multiple copies of papers to be filed in bankruptcy cases. A bankrupt has typically been required to sign his name over 50 times in completing a voluntary petition, schedules, and statement of affairs. The inconvenience imposed thereby is disproportionate to any resultant benefit to bankruptcy administration.

Rule 912. Oaths and Affirmations

1 *(a) Persons Authorized to Administer*
2 *Oaths*. A referee, a person designated by the
3 referee in an order filed in the office of the
4 clerk of the district court, an officer author-
5 ized to administer oaths in proceedings be-
6 fore the courts of the United States or under
7 the laws of the state where the oath is to be
8 taken, or a diplomatic or consular officer of
9 the United States in any foreign country,
10 may administer oaths and affirmations and
11 take acknowledgments.
12 *(b) Affirmation in Lieu of Oath*. When-
13 ever in a bankruptcy case an oath is re-
14 quired to be taken, a solemn affirmation may
15 be accepted in lieu thereof.

Advisory Committee's Note

Subdivision (a) is a revision of § 20a of the Bankruptcy Act, adding to the classes of persons authorized to administer oaths persons duly designated by referees.

and including affirmations and acknowledgments in the acts authorized to be executed before the persons named. *Cf.* 28 U.S.C. §§ 459 and 953, authorizing justices, judges, clerks of court, and their deputies to administer oaths and affirmations and to take acknowledgments.

Subdivision (b) is derived from Rule 43(d) of the Federal Rules of Civil Procedure and §§ 1(21) and 20b of the Act. See also 1 U.S.C. § 1 and Rule 603 of the ~~proposed~~ Federal Rules of Evidence.

Rule 913. Habeas Corpus ~~for Performance of Duties Under the Act~~

¶ (a) For Performance of Duties Under the Act.

1 The bankruptcy judge may issue a writ of
2 habeas corpus when appropriate to bring a
3 person before the court for examination or
4 to testify or to perform a duty imposed upon
5 him under the Act.

¶ (b) For Release of Bankrupt from Imprisonment. If the bankrupt is arrested or imprisoned on process in any civil action, the bankruptcy judge may issue a writ of habeas corpus and, after hearing on notice to the adverse party in such action, may order the bankrupt's release if the process is found to have been issued for the collection of a dischargeable debt.

Advisory Committee's Note

~~This~~ Subdivision (a) of this rule is an adaptation of General Order 30 but goes beyond it in recognizing the availability of habeas corpus to bring not only the bankrupt but any other person in custody before the court of bankruptcy for the purpose of testifying. It also codifies the view of the cases which recognize the propriety of issuance of a writ to bring a person before the court for the purpose of enabling him to perform a duty imposed upon him under the Act. *E.g., Rose v. Mongano*, 111 F.2d 114, 115 (2d Cir. 1940); *In re Thomashefsky*, 51 F.2d 1040, 1041–42 (2d Cir. 1931); 1 Collier 1087 (1940). When resorted to for such a purpose, habeas corpus is not "the high prerogative writ of habeas corpus, the great object of which is deliverance from unlawful imprisonment," but "merely the ancient common-law precept." *In re Thaw*, 166 Fed. 71, 74 (3d Cir. 1908). The availability of the writ of habeas corpus ~~under this rule~~ for this purpose rests within the discretion of the court. If a deposition would serve the need for the person's testimony, the writ should ordinarily be denied.

In re Thaw, 172 Fed. 288, 289 (W.D.Pa. 1908); 4 Moore ¶ 26.11 (1962).

~~The provisions of General Order 30 regulating the use of habeas corpus to test the legality of custody of the bankrupt and authorizing his discharge from imprisonment upon process in a civil action are not carried into this rule. Exercise of the authority recognized in these provisions appears to implement a substantive policy and to involve a delicate aspect of federal-state relations. Such matters are more appropriately left to Congress. See generally 1A Moore ¶ 0.230[2] (1959); Wright, *Federal Courts* 185–86 (1969).~~ ← SEE ATTACHMENT

Rule 914. Procedure in Contested Matters Not Otherwise Provided For

1 In a contested matter in a bankruptcy
2 case not otherwise governed by these rules,
3 relief shall be requested by motion, and rea-
4 sonable notice and opportunity for hearing
5 shall be afforded the party against whom re-
6 lief is sought. In all such matters, unless the
7 court otherwise directs, the following rules
8 shall apply: 721, 725, 726, 728–737, 741,
9 742, 744.1, 752, 754–756, 762, [764, 769,] and 771. The
10 court may at any stage in a particular mat-
11 ter direct that one or more of the other rules
12 in Part VII shall apply. A person who de-
13 sires to perpetuate his own testimony or that
14 of another person regarding any matter that
15 may be cognizable and relevant in a con-
16 tested matter in a pending bankruptcy case
17 may proceed in the same manner as provided
18 in Rule 727 for the taking of a deposition be-
19 fore an adversary proceeding. For the pur-
20 poses of this rule a reference in the rules in
21 Part VII to adversary proceedings shall be

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Subdivision (b) is derived from § 9 of the Act and provisions of General Order 30 that authorize discharge of a bankrupt from a commitment on process in a civil action. Section 9 purports to exempt a bankrupt only from arrest on civil process issued on a dischargeable claim, but case law has generally afforded the bankrupt relief from custody commencing prior to bankruptcy as well as from arrest on such process during the pendency of the bankruptcy case. See 1A Collier ¶ 9.05 (1940). An implication of General Order 12(1) that a bankrupt requires no protection by the bankruptcy court from arrest after a determination of his right to discharge is undermined by the legislation of 1970 that enacted §§ 14f(2) and 17c(4) of the Act. By § 14f(2) an order of discharge constitutes an injunction against all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts. As pointed out in the Note accompanying Rule 401, § 17c(4) further authorizes the bankruptcy court to enjoin any creditor from instituting or continuing any action on any debt, whether or not dischargeable. While subdivision (b) follows § 9(2) of the Act in recognizing the propriety of releasing a bankrupt imprisoned on process to collect a nondischargeable debt, the rule constitutes no limitation on the powers vested in the court by §§ 2a(15) and 17c(4) of the Act to protect a bankrupt and the administration of the estate against proceedings that interfere with the enforcement or offend the policy of the Act. See 1 Collier ¶¶ 2.61-2.63 (1971).

22 read as a reference to contested matters. No-
23 tice of an order or direction under this rule
24 shall be given when necessary or appropriate
25 to assure to the parties affected a reasonable
26 opportunity to comply with the procedures
27 made applicable by the order.

ADVISORY COMMITTEE'S NOTE

The [illegible] of due process [illegible] must be [illegible] which parties [illegible] a dispute determined in the bankruptcy court. Litigation of a particular dispute, although not an adversary proceeding as defined in Rule 701, may become sufficiently serious and complicated to warrant the court's direction that the procedure be governed by rules that govern such proceedings. Thus, the court may on occasion direct that the rules should govern a hearing on an objection to the trustee's report setting apart exemptions, *cf.* 1 Collier ¶ 6.22 (1960), or an objection to a proof of claim, *see* 3 *id.* ¶ 57.18 (1961). The rules in Part VII referred to in this rule are adaptations of the Federal Rules of Civil Procedure for the purpose of governing procedure in adversary proceedings in bankruptcy cases. See the Note accompanying Rule 701 [illegible]. Certain terms used in the Federal Rules of Civil Procedure have altered meanings when made applicable in bankruptcy cases by these rules. See Rule 902 [illegible]. Another rule, Rule 121, makes certain of the rules of Part VII applicable in proceedings relating to a contested petition and proceedings to vacate an adjudication.

Rule 915. Objection to Jurisdiction of Court of Bankruptcy

1 (a) *Waiver of Objection to Jurisdiction.*
2 Except as provided in Rule 112 and subject
3 to Rule 928, a party waives objection to ju-
4 risdiction of an adversary proceeding or a
5 contested matter and [illegible]

6 such jurisdiction if he does not make objec-
7 tion by a timely motion or answer, which-
8 ever is first served.
9 *(b) Dismissal or Transfer.* If an objection
10 to the jurisdiction of an adversary proceed-
11 ing, a contested matter, or a severable part
12 of either, is sustained, the bankruptcy judge
13 shall dismiss such proceeding, matter, or
14 part thereof, or transfer it to the civil docket
15 of the district court, as may be appropriate.
16 On transfer pursuant to this rule, the pro-
17 ceeding, matter, or part thereof shall con-
18 tinue as if filed as a civil action in the dis-
19 trict court on the date it was filed in the
20 court of bankruptcy.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). If a petition is filed by or against a person who is neither entitled to the benefits of bankruptcy nor amenable to adjudication under section 4 of the Act, an objection to the jurisdiction of the court over the proceeding so commenced may be filed as provided in Rule 112. That rule generally incorporates the provisions of Rule 12 of the Federal Rules of Civil Procedure, including subdivision (h) thereof, which permits lack of jurisdiction of the subject matter to be raised "by suggestion of the parties or otherwise" at any time. The Act's definition of persons who may become bankrupts limits the jurisdiction of subject matter, which cannot be enlarged by consent or waiver. *Woolsey v. Security Trust Co.*, 74 F.2d 334 (5th Cir. 1935); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 36, 38 [illegible] (1962). Section 2a(7) of the Act, on the other hand, constitutes the failure to make appropriate objection a consent sufficient under the statute to support jurisdiction of the bankruptcy court over any controversy arising in a proceeding under the Act. Rule 915(a), implementing this statutory provision, does not apply to the making of

an objection to the jurisdiction of the court to adjudicate and administer the estate of an ineligible bankrupt. Nor does the rule apply to the making of an objection to the court's jurisdiction over a controversy that does not arise in the course of or relate to the administration of the estate of an adjudicated bankrupt or his discharge. See Rule 928.

The premise of subdivision (a) is that a party to any controversy being litigated in the bankruptcy court must object to the court's jurisdiction at the first opportunity in order to avoid being deemed to have consented thereto. If he makes any objection or defense of the kind that may be made by a pre-pleading motion under Rule 12(b) of the Federal Rules of Civil Procedure, he is required by this rule to include therein any objection he has to the bankruptcy court's retention of jurisdiction of the case. If no such motion is made, the objection may be made only if included in a timely answer. In order for a motion or answer to be timely under this rule, it must be served within the time limits allowed by Rule 712 when they are applicable.

Subdivision (a) of this rule does not purport to be a limitation on the ways of consenting to jurisdiction of the bankruptcy court. Consent may be found in conduct of various kinds amounting to submission of an issue or a matter to the court's determination. *In re Reed-York, Inc.*, 152 F.2d 313, 316 (7th Cir. 1945); 2 Collier ¶ 23.08 (1961).

Subdivision (b). The bankruptcy court may have jurisdiction of a proceeding involving the bankrupt estate if the defendant consents, even when the defendant could not otherwise have been sued at all in the federal court. See, *e.g.*, *In re Penn. Co.*, 98 F.2d 952, 959 (7th Cir. 1938), cert. denied, 305 U.S. 678 (1939), where the trustee sued two banks for losses caused by their agent's mismanagement of the debtor and the bankruptcy court's jurisdiction of the action was [illegible]

timely objection to proceeding before the referee. Such a possibility is presented, for example, when the trustee sues a transferee in possession under § 60b, 67d, or 70e of the Act, or when he sues under § 70a of the Act to recover more than the jurisdictional minimum from a defendant whose citizenship is different from that of the bankrupt. See, *e.g.*, *Harrison v. Chamberlain*, 271 U.S. 191 (1926). Subdivision (b) recognizes the possibility illustrated by *In re Prima Co.* that it may be appropriate for the court to dismiss a party and the proceeding against him but retain jurisdiction insofar as the proceeding is against a consenting party or is otherwise subject to the court's jurisdiction. Heretofore when timely objection to the bankruptcy court's jurisdiction has been made, the court has dismissed the proceeding, or so much of it as was vulnerable to the objection, and subjected the trustee to the necessity of commencing a plenary action, although it might have been brought in the United States district court sitting in the same courthouse. *Harrison v. Chamberlain*, *supra;* 5 Moore 69 n.27 (1951). This rule recognizes that the proceeding, or a severable part of it, may appropriately be transferred to the civil docket kept by the clerk pursuant to Rule 79 of the Federal Rules of Civil Procedure. If no ground of independent federal jurisdiction exists, dismissal would be warranted, unless it appears that the defendant would consent to a determination in the district court pursuant to § 23b of the Act.

Rule 916. Subpoena

1 Rule 45 of the Federal Rules of Civil Pro-
2 cedure applies in bankruptcy cases, except
3 that subpoenas may be issued in the name
4 and under the authority of the bankruptcy
5 judge and need not be under the seal of the
6 court.

ADVISORY COMMITTEE'S NOTE

Rule 45 of the Federal Rules of Civil Procedure has frequently been applied in bankruptcy cases. See, *e.g.*, *Freeman v. Seligson*, 405 F.2d 1326, 1334–36, 1348 (D.C.Cir. 1968); *Herron v. Blackford*, 264 F.2d 723, 725 (5th Cir. 1959); 2 Collier ¶ 21.20 (1964). This rule supersedes the proviso of § 41a of the Act and General Order 8 and, as explained in the Note to Rule 205, overrules such cases as *In re Totem Lodge & Country Club*, 134 F.Supp. 158 (S.D.N.Y. 1955). The form for a subpoena to a witness is prescribed in Official Form No. 27.

General Order 3 and the territorial limitation imposed by

on the effectiveness of a subpoena requiring attendance of a witness before a referee. See the Note accompanying Rule 205(e). An ancillary proceeding may be necessary or appropriate for examining a witness other than the bankrupt who cannot be served a subpoena within the limits prescribed by Rule 45 of the Federal Rules of Civil Procedure. See Rule 217(b); 2 Collier ¶¶21.20, 21.23 (1964).

Rule 917. Evidence

1 The Federal Rules of Evidence apply to
2 cases and proceedings in bankruptcy.

in bankruptcy

,

subject to specific provisions in these rules governing matters of evidence.

ADVISORY COMMITTEE'S NOTE

This rule is correlated with Rule 1101(b) of the proposed Federal Rules of Evidence, which provides that the Evidence Rules apply "to cases and proceedings under the Bankruptcy Act." Since the scope of these Bankruptcy Rules is confined to ordinary bankruptcy cases, this Rule 917 is similarly circumscribed in its application. These rules go beyond and supplement the Federal Rules of Evidence in prescribing the evidentiary effect to be accorded particular writings and recordings. See, *e.g.*, Rules 212(g), 301(b), and 511(c).

proceedings and

Rule 918. Secret, Confidential, Scandalous, or Defamatory Matter

On

1 Upon application or on its own initiative
2 the court may make any order which justice
3 requires (1) to protect the estate or any per-
4 son in respect of a trade secret or other con-
5 fidential research, development, or commer-
6 cial information, or (2) to protect any person

7 against scandalous or defamatory matter
8 contained in any paper filed in a bankruptcy
9 case. If an order is entered under this rule
10 without notice, any person affected thereby
11 may move to vacate or modify the order, and
12 upon notice the court shall determine such
13 motion.

ADVISORY COMMITTEE'S NOTE

This rule is new. It recognizes that on occasion the court may be warranted in entering a protective order on behalf of a person or the estate. The first classification of protective orders is of the kind authorized to be entered by the court under Rule 26(c)(7) of the Federal Rules of Civil Procedure when discovery is sought. The second classification recognizes that the public character of papers filed in a bankruptcy case does not preclude the court from protecting persons who may be unnecessarily harmed by scandalous or defamatory matter contained in such papers. *Cf. Dubnoff v. Goldstein* 385 F.2d 717 (2d Cir. 1967). Rule 26(c) of the Federal Rules of Civil Procedure is suggestive of the range of orders that may be entered without compromising the principle underlying Rule 508 that all papers filed in a bankruptcy case are public records. See also *Freeman v. Seligson*, 405 F.2d 1326, 1348–52 (D.C.Cir. 1968); *Digital Data Systems, Inc. v. Carpenter*, 387 F.2d 529, 533 (5th Cir. 1967); 4 Moore ¶¶ 26.70–27.78 (1970); *cf. Dubnoff v. Goldstein*, 385 F.2d 717, 724 (2d Cir. 1967). Rule 911(a) also authorizes disciplinary action for the insertion of scandalous or indecent matter in a pleading or written motion or application by an attorney. The last sentence of this rule affords to any person affected by a protective order entered without notice to him an opportunity to move for its vacation or modification.

Rule 919. Compromise and Arbitration

1 *(a) Compromise.* On application by the
2 trustee or receiver and after hearing on no-

3 tice to the creditors as provided in Rule
4 204(a) and to such other ~~parties~~ as the court
5 may designate, the court may approve a
6 compromise or settlement.

persons

3

7 *(b) Arbitration.* On stipulation of the par-
8 ties to any controversy affecting the estate
9 the court may authorize the matter to be
10 submitted to final and binding arbitration.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is an adaptation of § 27 of the Act and the provisions of General Orders 28 and 33 that refer to compounding of claims and compromising of controversies. The provisions of General Order 28 dealing with redemption of property from a lien are carried into Rule 609.

Subdivision (b) is an adaptation of § 26 of the Act and language in General Order 33 referring to arbitration. The rule permits parties to a controversy to stipulate to final and binding arbitration if the court approves. The selection of the arbitrators is a matter to be covered by the stipulation but is likewise subject to the approval of the court.

Rule 920. Contempt Proceedings

1 *(a) Contempt Committed in Proceedings*
2 *Before Referee.*
3 *(1) Summary Disposition by Referee.*
4 Misbehavior prohibited by § 41a(2) of the
5 Act may be punished summarily by the ref-
6 eree as contempt if he saw or heard the con-
7 duct constituting the contempt and it was
8 committed in his actual presence. The order
9 of contempt shall recite the facts and shall
10 [illegible]
11

12 *(2) Disposition by Referee upon Notice*
13 *and Hearing.* Any other conduct prohibited
14 by § 41a of the Act may be punished by the
15 referee only after hearing on notice. The no-
16 tice shall be in writing and shall state the
17 time and place of hearing, allowing a reason-
18 able time for the preparation of the defense,
19 and shall state the essential facts constitut-
20 ing the contempt charged and whether the
21 contempt is criminal or civil or both. The no-
22 tice may be given on the referee's own initia-
23 tive or on motion by a party, by the United
24 States attorney, or by an attorney appointed
25 by the referee for that purpose. If the con-
26 tempt charged involves disrespect to or criti-
27 cism of the referee, he is disqualified from
28 presiding at the hearing except with the con-
29 sent of the person charged.
30 *(3) Limits on Punishment by Referee.* A
31 referee shall not order imprisonment nor im-
32 pose a fine of more than $250 as punishment
33 for any contempt, civil or criminal.
34 *(4) Certification to District Judge.* If it
35 appears to a referee that conduct prohibited
36 by § 41a of the Act may warrant punish-
37 ment by imprisonment or by a fine of more
38 than $250, he may certify the facts to the
39 district judge. On such certification the
40 judge shall proceed as for a contempt not
41 committed in his presence.
42 *(b) Contempt Committed in Proceedings*
43 *Before District Judge.* Any contempt com-
44 mitted in proceedings before a district judge
45 while acting as a bankruptcy judge shall [illegible]

46 prosecuted as any other contempt of the dis-
47 trict court.
48 *(c) Right to Jury Trial.* Nothing in this
49 rule shall be construed to impair the right to
50 jury trial whenever it otherwise exists.

ADVISORY COMMITTEE'S NOTE

Inherent power to punish for contempt. The power of a court to punish for contempt committed in proceedings before it has generally been recognized to be inherent. *Michaelson v. United States ex rel. Chicago, St. Paul, M & O. R.Co.*, 266 U.S. 42, 65–67 (1924). That the courts of bankruptcy are included among those vested with such power was early recognized in *Boyd v. Glucklich*, 116 Fed. 131, 135 (8th Cir. 1902). It has often been doubted that the inherent power of a court to punish for contempt is subject to any substantial restriction by statute. See Larremore, *Constitutional Regulation of Contempt of Court*, 13 Harv.L.Rev. 615, 618–20 (1900); Paul, *The Rule-Making Power of the Courts*, 1 Wash.L.Rev. 223, 231 (1926); Note, 34 Harv.L.Rev. 424, 425–26 (1921); *cf. Cohn v. Bonhard Affiliations*, 30 App.Div.2d 71, 75, 289 N.Y.S.2d 771, 775 (1st Dep't 1968); *Disruption of the Judicial Process, Report and Recommendations of the American College of Trial Lawyers*, Case & Comment, Sept.-Oct. 1970, at 28, 36–38. As recently noted in *Bloom v. Illinois*, 391 U.S. 194, 195 n.1 (1968), however, the power of Congress to regulate punishment for contempt of federal courts was upheld in *Michaelson v. United States ex rel. Chicago, St.P., M. & O. R. Co.*, 266 U.S. 42, 65-67 (1924). The Court in the *Michaelson* case was nevertheless careful to recognize that the inherent power to punish for contempt vested in the courts of the United States "when called into existence and vested with jurisdiction over any subject." *Id.* at 65-66.

Statutes and rules regulating contempt in federal courts. Contempt in federal courts is now regulated by both rule and statute. See, *e.g.*, Rule 42 of the Federal Rules of Criminal Procedure and Rule 37(b)(1), [illegible]

53(d)(2), 56(g), and 70 of the Federal Rules of Civil Procedure; 18 U.S.C. §§ 401, 402, 3691, 3692; 28 U.S.C. § 528; 42 U.S.C. § 1995. The Bankruptcy Act explicitly confers jurisdiction on courts of bankruptcy to "[e]nforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment" (§ 2a(13)) and to "[p]unish persons for contempts committed before referees" (§ 2a(16)). Section 41a of the Act, which prohibits certain conduct in proceedings before the referee, is substantially a paraphrase of 18 U.S.C. § 401, the general federal contempt statute. Section 41b of the Act, however, requires the referee to certify the facts as to any violation of § 41a to the district judge for summary hearing and disposition. This rule revises the procedure for minor contempts.

The certification provision of § 41b of the Act is comparable to that in Rule 42(b) of the Federal Rules of Criminal Procedure which disqualifies a judge from presiding at a hearing on a charge of contempt involving disrespect or criticism of the judge. The status of the referee as a court has been established by Congress in the Act (§§ 1(9), 2a(10), 38, 39), and the acts in proceedings before them that constitute contempt have been identified in § 41a of the Act. The method chosen for determining the facts and the punishment is manifestly a matter of procedure and the purpose of the punishment is to enable the court to protect its own processes and to effectuate its own judgments.

Referee's authority respecting minor contempts. Paragraph (4) of subdivision (a) of this rule retains for all but minor contempts the certification procedure of § 41b of the Act. If it appears to a referee that conduct in proceedings before him may warrant imprisonment or a fine of more than $250, the referee should proceed under this paragraph. The referee may proceed under paragraph (1) or (2) of the subdivision to determine and punish conduct prohibited by § 41a of the Act, but paragraph (2) limits the punishment that can be meted out by the referee to a fine of not more than $250. The premise of the change in procedure for dealing with minor contempts is

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that the certification requirement of § 41b of the Act has in effect deprived the referee of the necessary power to protect proceedings before him from petty disturbances and acts of disobedience because of the inordinate inconvenience entailed by the statutory procedure for the judge and the referee. "Peccadilloes too trifling to be worth the bother of sending to another court for prosecution should not for that reason be committed with impunity." Nelles, *Summary Power to Punish for Contempt*, 31 Col.L.Rev. 956, 964 (1931). See also *Disruption of the Judicial Process, supra* at 35-36.

Summary disposition by referee. The referee is authorized by paragraph (1) of subdivision (a) to proceed summarily only to punish acts of misbehavior that obstruct a hearing before him and occur in his actual presence and within his sight or hearing. The order of contempt he is required to sign and enter of record must contain his certification that he saw or heard the contemptuous conduct and that it was committed in his actual presence. The summary disposition authorized by this paragraph is to be distinguished from the "summary jurisdiction" authorized by §§ 2a(7), 571, 67a(4), and 70a of the Act and the "summary proceedings in bankruptcy" authorized and "determined by decisions of this [*i.e.*, the Supreme] Court after due consideration of the structure and purpose of the Bankruptcy Act as a whole." See *Katchen v. Landy*, 382 U.S. 323, 328 (1966). Summary proceedings in bankruptcy are governed generally by these rules and are to be contrasted with plenary proceedings, which are governed by the Federal Rules of Civil Procedure when commenced and maintained in the United States district court or by applicable state rules of procedure when commenced and maintained in a state court. See the Note accompanying Rule 701. The summary disposition referred to in paragraph (1) of subdivision (a), on the other hand, is to be contrasted with the proceedings on notice required by paragraph (2) of this subdivision. These two paragraphs parallel subdivisions (a) and (b) of Rule 42 of the Federal Rules of Civil Procedure, and the differences between the 2 modes of disposition permitted under these 2 subdivi-

sions are pertinent here. For a discussion of these differences see 8A Moore ¶ 42.04 (1969); 3 Wright, *Federal Practice and Procedure—Criminal* §§ 708, 710, 711 (1969). While the referee may preside at the proceeding on the contempt under either paragraph (1) or (2) of subdivision (a) of this rule, he may dispense with notice and the other procedural safeguards prescribed by paragraph (2) when confronted with contemptuous conduct of the kind prohibited by § 41a(2) of the Act. The limitations of paragraph (3) on the punishment that may be meted out by the referee apply whether he is proceeding under paragraph (1) or (2) of subdivision (a).

Disposition upon notice and hearing. Since in a proceeding where the referee certifies the facts to the district judge in accordance with paragraph (4) the contemptuous conduct will ordinarily not have been conducted in the actual presence of the judge, the contempt should be prosecuted and punished on notice and hearing rather than summarily as for direct contempts. *Cf. Cooke v. United States*, 267 U.S. 517, 534–37 (1925); Rule 42 of the Federal Rules of Criminal Procedure; 8A Moore ¶ 42.04[2] & [3] (1969); Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv.L.Rev 353, 360–62 (1959); Comment, *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L.J. 83, 87–89 (1947).

As noted above the first 2 paragraphs are adaptations of Rule 42 of the Federal Rules of Criminal Procedure. In view of the similarity of the impact of sanctions for civil and criminal contempt on the contemnor and the difficulty of distinguishing between the proceedings for the 2 varieties of contempt, however, the procedural safeguards provided by this rule should be available without differentiation by reference to the characterization of the contempt as civil or criminal. See Nelles, *The Summary Power to Punish for Contempt*, 31 Col.L.Rev. 956, 960–61 (1931); Note, 73 Harv.L.Rev. 353, 369 (1959); Comment, 57 Yale L.J. 83, 106–07 (1947). The requirement that the notice designate whether the contempt is criminal or civil is imposed in the interest of fairness in getting the earliest practicable clarification of the nature

and purpose of the proceeding. See *Gompers v. Bucks' Stove & Range Co.*, 221 U.S. 418, 444–52 (1911); *McCann v. New York Stock Exchange*, 80 F.2d 211, 214–15 (2d Cir.) cert. denied, 299 U.S. 603 (1935); *cf.* 9 Remington, *Bankruptcy* §§ 3530, 3546 (6th ed. 1955). Failure to include a reference to criminal contempt in the notice would not, however, be reversible error if the contemnor was accorded all the rights and privileges owing to a defendant in a criminal contempt proceeding. *United States v. United Mine Workers of America*, 330 U.S. 258, 298 (1947). "Even if it be the better practice to try criminal contempt alone and so avoid obscuring the defendant's privileges in any manner, a mingling of civil and criminal contempt proceedings must nevertheless be shown to result in substantial prejudice before a reversal will be required." 330 U.S. at 299–300. Nor does the fact that the notice erroneously identifies the proceeding as one for criminal contempt preclude the award of civil relief. See cases cited in Comment, 57 Yale L.J. 83, 98 n. 87 (1947).

Paragraph (2) of subdivision (a) follows prior bankruptcy practice rather than Rule 42(b) of the Federal Rules of Criminal Procedure in recognizing that a referee may initiate a contempt proceeding on his own initiative. See 1 Collier 319–20 (1968); 2 *id.* 1597 (1962); 9 Remington, *Bankruptcy* 187 (6th ed. 1955) (only in criminal contempt). The paragraph also departs from Criminal Rule 42(b) in requiring the notice to be in writing.

The last sentence of paragraph (2) adheres to the pattern of Rule 42(b) of the Federal Rules of Criminal Procedure in disqualifying the referee from presiding at a hearing involving disrespect to or criticism of the referee only when the disposition is on notice and hearing. When a referee is disqualified by this sentence, the facts may be certified by the referee to the judge, as provided in paragraph (1) of the subdivision; or, unless it appears that the conduct may warrant punishment by imprisonment or by a fine of more than $250, the proceeding may be transferred to another referee. Although contemptuous conduct in the actual presence of the referee is likely to be disrespectful or critical of him, the need for

summary disposition to vindicate the authority and dignity of the court and promptly to restore order overrides the interest in assuring impartiality by requiring certification to the district judge or reference to another referee. See Note, 73 Harv.L.Rev. 353, 362 (1959); *Disruption of the Judicial Process*, *supra* at 35-36. The limitation imposed by paragraph (3) on the punishment that may be ordered by the referee is a safeguard against excessive use of his power in circumstances when his personal feelings have become engaged.

It has been held that Federal Criminal Rule 42(b) does not preclude a judge from acting summarily in a case to punish a direct contempt although the accusing judge postponed the hearing until after the close of the trial in which the misconduct occurred. *Sacher v. United States*, 343 U.S. 1 (1952); *cf. Ungar v. Sarafite*, 376 U.S. 575 (1964), sustaining punishment for contempt in a post-trial hearing by the trial judge in a state court where the hearing was found to satisfy the requirements of due process. When the conduct charged includes a personal attack on the judge but the situation does not require an immediate disposition, however, the potentiality of prejudice to the defendant raises serious due process questions and invites reversal on review by an appellate court of punishment meted out by the accusing judge in a postponed proceeding. See, *e.g.*, *Mayberry v.* ~~*United States*~~ ~~39 U.S.L.W. 4133 (U.S. Jan. 20,~~ 1971); *Offutt v. United States*, 348 U.S. 11 (1954). See also 8A Moore 42-23 (1969); 3 Wright, *Federal Practice and Procedure – Criminal* § 707 (1969); Note, 73 Harv.L.Rev. 353, 362 (1959).

[Margin annotations: "... 455" and "Pennsylvania,"]

Subdivision (b) of this rule is declaratory of existing law. See *Mercer v. Pennsylvania Trust Co.*, 23 F.2d 303, 304 (3d Cir. 1927); *Biderman v. Cooper*, 273 Fed. 683 (3d Cir. 1921).

Subdivision (c) clarifies the intent in the rules to recognize and give effect to the guaranty of a jury trial in any proceeding for criminal contempt in which a punishment of 6 months or more is imposed. *Frank v. United States*, 395 U.S. 147 (1969).

Rule 921. Entry of Judgment ; District Court Record of Referee's Judgment

1 (a) *Original Entry on* Referee's *Docket.* A judg-
2 ment in an adversary proceeding or con-
3 tested matter shall be set forth on a separate
4 document. Every judgment shall be entered
5 forthwith in the referee's docket as provided
6 in Rule 504 or, if the judgment is by the dis-
7 trict judge, in the civil docket as provided in
8 Rule 79(a) of the Federal Rules of Civil Pro-
9 cedure. A judgment is effective only when
10 entered as required by this subdivision.
11 (b) ~~*Entry*~~ District Court Record *of Referee's Judgment* ~~*on Civil*~~
12 ~~*Docket*~~. On certification by the referee to the
13 clerk of the district court of a copy of a
14 judgment of the referee for the recovery of
15 money or property, the clerk shall keep and index the copy ~~enter the~~
16 ~~judgment in the civil docket of the district~~
17 ~~court~~ in substantially the form and manner
18 prescribed by Rule 79 of the Federal Rules
19 of Civil Procedure for ~~the entry of~~ judg-
20 ments of the district court. ~~Entry~~ Retention and indexing of a judg-
21 ment by the clerk ~~on the civil docket~~ under this subdivi-
22 sion shall not affect its appealability or
23 proceedings on appeal from the judgment
24 under the rules in Part VIII, the availability
25 of process to enforce the judgment under
26 Rule 769, or the availability of relief under
27 Rule 762 or 770, but after it has been so indexed, ~~entry on the civil~~
28 ~~docket~~ the referee's judgment shall have the
29 same effect and may be enforced as a judgment of the district
30 court so indexed. ~~entered~~.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) is derived from Rule 58 of the Federal Rules of Civil Procedure. The appropriateness of apply-

ing Civil Rule 58 in bankruptcy cases has been generally recognized. *In re California Associated Products Co.*, 182 F.2d 946, 949 (9th Cir. 1950); *In re D'Arcy*, 142 F.2d 313, 315 (3d Cir. 1944); *Rosenberg v. Heffron*, 131 F.2d 80 (9th Cir. 1942); 6A Moore ¶ 58.03[2] (1953). "Judgment" is defined in Rule 901(8) to include an appealable order. The purpose of the separate document requirement is to eliminate uncertainty as to whether an opinion or memorandum of the court constitutes a judgment if and when entered on the docket. See Advisory Committee Comment on the 1963 amendment of Rule 58 of the Federal Rules of Civil Procedure; 6A Moore ¶¶ 58.01[8], 58.02 (1969 supp.). The form and content of the separate document contemplated by Civil Rule 58 are illustrated by Forms 31 and 32 accompanying the Federal Rules of Civil Procedure. Neither the considerations underlying the requirement of a separate document by Civil Rule 58 nor sound bankruptcy administration warrants requiring orders entered on *ex parte* applications to be evidenced by a separate document.

Subdivision (b) establishes a procedure for entering a referee's judgment for the recovery of money or property ~~on the civil docket of~~ [in an index of judgments kept by the clerk of] the district court and clarifies the availability of the same remedies for the enforcement of such a judgment as those provided for the enforcement of a like judgment of the district court. See 28 U.S.C. §§ 1961–63. The procedure prescribed conforms to the practice followed under local rules in some districts. See Gendel, *Jurisdiction of a Referee in Bankruptcy to Render Affirmative Judgments on a Counterclaim in Favor of a Trustee*, 26 So.Cal.L.Rev. 167, 170 (1953) (referring to Bankruptcy Rule 213 of the Southern District of California). [INSERT] The procedures available in the district court are not exclusive, however, and the holder of a referee's judgment retains the option to rely on his remedies under Rules 769 and 770 notwithstanding ~~entry~~ [the indexing] of the judgment ~~on the civil docket~~ [by the clerk] of the district court.

Insert on Page 296

not

When indexed in accordance with subdivision (b) of this rule, the referee's judgment may be found by anyone searching for liens of record in the judgment records of the district court, and certification of the copy of the referee's judgment to the clerk provides a basis for registration of the judgment pursuant to 28 U.S.C. § 1963 in any other district. When so registered, the judgment may be enforced by issuance of execution and orders for supplementary proceedings that may be served anywhere within the state where the registering court sits. See 7 Moore 2409-11 (1971).

Rule 922. Notice of Judgment or Order

1 *(a) Judgment or Order of a Referee.* Im-
2 mediately upon the entry of a judgment or
3 order made by him, the referee shall serve a
4 notice of the entry by mail in the manner
5 provided by Rule 705 upon any party who
6 opposed the making of the judgment or
7 order and on such other persons as may be
8 designated by the referee. The service of
9 such notice shall be noted in the referee's
10 docket. Lack of notice of the entry does not
11 affect the time to appeal or relieve or author-
12 ize the court to relieve a party for failure to
13 appeal within the time allowed, except as
14 permitted in Rule 802.
15 *(b) Judgment or Order of District Judge.*
16 Notice of a judgment or order of a district
17 judge while acting in a bankruptcy case pur-
18 suant to Rule 102 is governed by Rule 77(d)
19 of the Federal Rules of Civil Procedure.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of this rule is an adaptation of Rule 77(d) of the Federal Rules of Civil Procedure, which is made directly applicable by subdivision (b) of this Bankruptcy Rule to the notice of the entry of a judgment or order of the district judge when he acts as a bankruptcy judge. The referee's docket referred to in the second sentence of subdivision (a) of this Bankruptcy Rule is prescribed by Rule 504(a).

Subdivisions (a)–(c) of Rule 77 of the Federal Rules of Civil Procedure have been adapted for the purposes of bankruptcy administration in Bankruptcy Rule 501.

Rule 923. New Trials; Amendment of Judgments

1 Except as provided in Rule 307, Rule 59
2 of the Federal Rules of Civil Procedure ap-
3 plies in bankruptcy cases.

Advisory Committee's Note

Rule 59 of the Federal Rules of Civil Procedure has generally been deemed applicable to a "petition for rehearing" of an order entered in bankruptcy cases. See, *e.g., Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 700 (10th Cir. 1964) (petition for rehearing of orders invalidating security interest, reducing unsecured claim, and refusing to compel compliance with Chapter X plan held timely under Fed.R.Civ.P. 59(b)); *In re Marachowsky Stores Co.*, 188 F.2d 686, 688–89 (7th Cir. 1951) (motion for rehearing of orders dismissing involuntary bankruptcy petition and directing payment of fees and expenses to custodian held not timely under Fed.R.Civ.P. 59(b) and denial thereof not appealable); Copenhaver, *Rehearing and Review in Bankruptcy*, 42 Ref.J. 101, 103 (1968). But *cf. American United Life Ins. Co v. Haines City, Fla.*, 117 F.2d 574, 576 (5th Cir. 1941) (Fed.R.Civ.P. 59 deemed inapplicable to order confirming a plan under Chapter IX of the Act); 2 Collier ¶ 25.07[2] (1969); 6A Moore ¶ 59.01[12] (1954). This rule resolves the doubts as to the applicability of the rule in bankruptcy

, but it does not restrict the discretion vested in the court by Rule 307 to reconsider an order allowing or disallowing a claim.

Rule 924. Relief From Judgment or Order

1 Rule 60 of the Federal Rules of Civil Pro-
2 cedure applies in bankruptcy cases, except
3 that a motion to reopen a case or for the re-
4 consideration of an order allowing or disal-
5 lowing a claim against the estate entered
6 without a contest is not subject to the one-
7 year limitation therein prescribed. This rule

8 does not permit extension of the time al-
9 lowed by § 15 of the Act for the filing of a
10 complaint to revoke a discharge.

ADVISORY COMMITTEE'S NOTE

The applicability of Rule 60(a) of the Federal Rules of Civil Procedure in bankruptcy cases has been generally accepted. See, *e.g.*, *Crosby v. Pacific S.S. Lines, Ltd.*, 133 F.2d 470, 473 (9th Cir. 1943). It has frequently been doubted, and sometimes denied, that subdivision (b) of this rule applies in bankruptcy. See, *e.g.*, *Conway v. Union Bank of Switzerland*, 204 F.2d 603, 609 (2d Cir. 1953); 1 Collier ¶ 2.12[2.1] (1968); 7 Moore ¶ 60.18[7] (1954). Most of the cases refusing to apply the rule, however, involved no more than a disregard of the 6-month limitation on the availability of relief under subdivision (b) as it read before amendment in 1946. See, *e.g.*, *Indemnity Ins. Co. v. Reisley*, 153 F.2d 296, 299 (2d Cir. 1945), cert. denied, 328 U.S. 857 (1946), where an order awarding a lien to a creditor was held subject to reconsideration 3 years after its entry; *In re Barnett*, 124 F.2d 1005 (2d Cir. 1942), where the court allowed relief from an order invalidating a transfer notwithstanding lapse of the period for seeking relief under Fed.R.Civ.P. 60(b). The amendment of 1946 adopted a one-year limitation in lieu of the original time prescription and specified a number of new grounds for relief, some of which are not subject to the one-year bar. Except for motions to reopen cases and to reconsider uncontested orders of allowance and disallowance of claims, the limitations prescribed by Rule 60(b) on the availability of relief by motion from a judgment or order are now entirely appropriate in bankruptcy cases. *Cromelin v. Markwalter*, 181 F.2d 948, 949 (5th Cir. 1950); *Norris v. Camp*, 144 F.2d 1, 4 (10th Cir. 1944); *cf. Grand Union Equipment Co. v. Lippner*, 167 F.2d 958, 961 (2d Cir. 1948). Motions to reopen cases are governed by Rule 515. Reconsideration of orders allowing and disallowing claims is governed by Rule 307.

These rules do not preserve the features of the practice pertaining to so-called "administrative orders," which have been regarded as subject at any time to reconsideration by the referee or to review by the district court without regard to the limitations of § 39c of the Act. See, *e.g.*, *Flaxman, Coleman, Gorman & Rosoff v. Cheek*, 355 F.2d 672, 674 (9th Cir.), cert.denied, 384 U.S. 954 (1966); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5th Cir. 1935); 2 Collier ¶ 39.18 (1968).

Cases holding that a bankrupt who was not served personally is absolutely entitled to have an adjudication by default set aside within a year thereafter (*In re Mistrot*, 147 F.Supp. 423 (S.D.Tex. 1956), aff'd sub nom. *Hollywood Youths, Inc. v. Mistrot*, 246 F.2d 399 (5th Cir. 1957); *In re Miller*, 262 F.Supp. 295 (E.D.Ill. 1967)) do not apply to adjudications entered in accordance with these rules. These cases rested on a doubtful construction of 28 U.S.C. § 1655, which was deemed applicable by virtue of the language of § 18a of the Bankruptcy Act. See Seligson, *Creditors' Rights in 1967 Ann. Survey of American Law* 425–27 (1968). Rule 111, which governs service in involuntary proceedings, does not incorporate this provision of the Judicial Code.

The last sentence of the rule makes clear that it affords no basis for circumvention of the time limitations prescribed by § 15 of the Act for the commencement of any proceeding to revoke a discharge. *Cf. Gerber v. Fruchter*, 147 F.2d 120, 122 (2d Cir. 1945).

Rule 925. Security: Proceedings Against Sureties

1 Whenever these rules require or permit
2 the giving of security by a party, and secu-
3 rity is given in the form of a bond or stipu-
4 lation or other undertaking with one or more
5 sureties, each surety submits himself to the
6 jurisdiction of the court, and his liability
7 may be enforced in an adversary proceeding
8 governed by the rules in Part VII.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 65.1 of the Federal Rules of Civil Procedure but assimilates the proceeding to enforce liability on a bond to those governed by Part VII. This rule applies to sureties on bonds given pursuant to Rules 201, 212, 762, 765, and 805. Jurisdiction of the subject matter of such a proceeding is conferred by § 50n of the Act.

Rule 926. Exceptions Unnecessary

1 Rule 46 of the Federal Rules of Civil Pro-
2 cedure applies in bankruptcy cases.

Rule 927. Local Bankruptcy Rules

1 Each district court by action of a majority
2 of the judges thereof may from time to time
3 make and amend rules governing practice
4 and procedure under the Act not inconsist-
5 ent with these rules. Copies of rules and
6 amendments so made shall upon their pro-
7 mulgation be furnished to the Administra-
8 tive Office of the United States Courts. The
9 clerk of each court shall make appropriate
10 arrangements, subject to the approval of the
11 Director of the Administrative Office of the
12 United States Courts, for making copies of
13 such rules available to members of the public
14 who may request them. In all cases not pro-
15 vided for by rule, the district court may reg-
16 ulate its practice in any manner not incon-
17 sistent with these rules.

ADVISORY COMMITTEE'S NOTE

This rule is an adaptation of Rule 83 of the Federal Rules of Civil Procedure and Rule [illegible] of the Federal

Rules of Criminal Procedure. Distribution requirements applicable to copies of local bankruptcy rules heretofore imposed by General Order 56 have been simplified in recognition of the fact that the Administrative Office of the United States Courts is the logical centralized repository of such rules for official use and reference and that the clerk of each district court is the appropriate officer to charge with the responsibility for meeting local needs and requests from the public.

Rule 928. Jurisdiction Unaffected

1 These rules shall not be construed to
2 extend or limit the jurisdiction of courts of
3 bankruptcy over subject matter.

Advisory Committee's Note

An unexpressed limitation on the grant of rule-making power by 28 U.S.C. § 2075, pursuant to which these rules are promulgated, is made explicit by this rule. *Cf* Fed.R.Civ.P. 82; *United States v. Sherwood*, 312 U.S. 584, 590–91 (1941); 7 Moore 1602 (1954).

~~Rule 929. Title~~

~~1 These rules may be known and cited as the~~
~~2 Bankruptcy Rules. The forms may be known~~
~~3 and cited as the Official Forms in Bank-~~
~~4 ruptcy.~~

[NOTE. These official forms shall be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 909.]

OFFICIAL BANKRUPTCY FORMS
~~OFFICIAL FORMS IN BANKRUPTCY~~

FORM NO. 1

PETITION FOR VOLUNTARY BANKRUPTCY

1 United States District Court
2 for the ________ District of ________
3 In re
4 ______________,
5 *Bankrupt* [*include*
6 *here all names* Bankruptcy No.______
7 *used by bank-*
8 *rupt within last*
9 *6 years*]

10 VOLUNTARY PETITION

11 1. Petitioner's post-office address is ______
12 ______________________________.
13 2. Petitioner has resided [*or* has had his
14 domicile *or* has had his principal place of
15 business] within this district for the preced-
16 ing ~~six~~ months [*or* for a longer portion of the
17 preceding ~~six~~ months than in any other dis-
18 trict].
19 3. Petitioner is qualified to file this peti-
20 tion and is entitled to the benefits of the
21 Bankruptcy Act as a voluntary bankrupt.
22 Wherefore petitioner prays for relief as a
23 voluntary bankrupt under the Act.
24 Signed: ______________
25 *Attorney for Petitioner*

26 Address: ________________,
27 ________________
28 [*Petitioner signs if not represented*
29 *by attorney.*]
30 ________________ ____________,
31 *Petitioner.*
32 State of ______________
33 County of ______________ *ss.*
34 I, ____________ ____ _____, the petitioner
35 named in the foregoing petition, do hereby
36 ~~make solemn oath~~ [swear] that the statements contained therein are true according to the best
38 of my knowledge, information, and belief.
39 ____________ ____________,
40 *Petitioner.*
41 Subscribed and sworn to before me on
42 ____________________.
43 ________ _____ ______________,
44 ________ ____________________
45 [Official character]
46 [*Unless further time is granted by the*
47 *court pursuant to Rule 108, this petition*
48 *must be accompanied by a schedule of the pe-*
49 *titioner's debts and property, his claim for*
50 *such exemptions as he may be entitled to, and*
51 *a statement of his affairs. These additional*
52 *statements shall be submitted on official*
53 *forms, shall include the information about*
54 *the petitioner's property and debts required*
55 *by the Bankruptcy Rules and by the forms,*
56 *and shall be verified under oath.*]

ADVISORY COMMITTEE'S NOTE

This form is a revision of Official Form No. 1. Numerous changes have been made in the interest of clarity

ing unnecessary words and reducing the number of formal entries to be made by the petitioner.

Rule 106 requires the caption in which the name of the bankrupt is given to include all the names used by him within 6 years before the filing of the petition.

The recitals in paragraph 2 of the form, which establish the venue for the case, include the possibilities that are appropriate for most petitioners. Other factual bases for choice of venue under Rule 116(a) may be shown by minor adaptations of the form.

References to the schedules and claim for exemptions, which are not part of the petition, are stricken from the body of the form, but a note at the foot of the form calls the petitioner's attention to the necessity of filing these accompanying papers and the statement of affairs as provided in Rule 108.

Blanks for the signature and address of the petitioner's attorney are added in conformity with Rule 911(a). Verification of a petition on behalf of a corporation by an officer or agent, or of a petition on behalf of a partnership by a member or agent should conform to Official Form No. 4 or 5 whichever is appropriate.

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

FORM NO. 2

Application to Pay Filing Fees in Installments

1 [*Caption, other than designation, as in Form*
2 *No. 1*]

3 APPLICATION TO PAY FILING FEES IN
4 INSTALLMENTS

5 1. Applicant is filing herewith a voluntary
6 petition in bankruptcy.
7 2. ~~It is necessary for him~~ He is unable to pay the filing
8 fees in installments ~~because~~ ______________
9 ______________________________

10 3. He proposes to pay such fees to the
11 clerk of the district court upon the following
12 terms:
13 ------------------------------------
14 ------------------------------------
15 4. He has paid no money to his attorney [and transferred no property]
16 for services in connection with this case or
17 any pending case under the Act, and he will
18 make no payment [or transfer] to his attorney for such
19 services until the filing fees are paid in full.
20 Wherefore applicant prays that he be per-
21 mitted to pay the filing fees in installments.
22 Dated: ------------------.
23 Signed: --------- ---------,
24 *Applicant.*
25 Address: -------------------,
26 -------------------

ADVISORY COMMITTEE'S NOTE

This form is new. The application for permission to pay filing fees in installments may be filed in accordance with Rule 107(b).

FORM NO. 3

ORDER ~~PERMITTING~~ [FOR] PAYMENT OF FILING FEES IN INSTALLMENTS

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 ORDER ~~PERMITTING~~ [FOR] PAYMENT OF FILING
4 FEES IN INSTALLMENTS
5 The application of the bankrupt for per-
6 mission to pay the filing fees in this case
7 in installments having been ~~duly~~ heard;

8 It is ordered that the bankrupt pay the fil-
9 ing fees still owing, namely, $ ____________,
10 as follows: ________________________
____
________________________________.

11 It is further ordered that all payments be
12 made at the office of the clerk of the United
13 States District Court located at __________
14 __________, and that until the filing fees are
15 paid in full, the bankrupt shall pay no money
16 [and shall transfer no property] to his attorney, and his attorney shall ac-
17 cept no money [or property] from the bankrupt for serv-
18 ices in connection with this case.
19 Dated: __________________.
20 ________________________,
21 *Bankruptcy Judge.*

ADVISORY COMMITTEE'S NOTE

This form is new. Issuance of an order permitting payment of filing fees in installments is governed by Rule 107(b).

FORM NO. 4

VERIFICATION ON BEHALF OF A CORPORATION

1 State of ________________
2 County of ______________ *ss.*
3 I, ________________________, the presi-
4 dent [*or other officer or* ~~*duly authorized*~~ [an authorized agent]
5 ~~*agent*~~] of the corporation named as peti-
6 tioner in the foregoing petition, do hereby
7 ~~make solemn oath~~ [swear] that the statements con-
8 tained therein are true according to the best
9 of my knowledge, information, and belief,
10 and that ~~I have been duly authorized to sign~~ [the filing of this petition on behalf of the corporation has been authorized]

11 ~~and verify this petition on behalf of the cor-~~
12 ~~poration~~.
13 ------------ ------------
14 Subscribed and sworn to before me on
15 --------------------.
16 ---- ----- --------------,
17 ---- --------------------
18 [Official character] ← Enlarge

ADVISORY COMMITTEE'S NOTE

Rule 109 requires all petitions to be verified. This form is to be used for the verification on behalf of a corporation. It may be adapted for use in connection with other papers required by these rules to be verified. See the Note to Rule 911.

FORM NO. 5

VERIFICATION ON BEHALF OF A PARTNERSHIP

1 State of ----------------
2 County of -------------- *ss.*
3 I, ------------ ------------, a member
4 [*or* ~~duly~~ an authorized agent] of the partnership
5 named as petitioner in the foregoing peti-
6 tion, do hereby ~~make solemn oath~~ swear that the
7 statements contained therein are true ac-
8 cording to the best of my knowledge, infor-
9 mation, and belief, and that ~~I have been duly~~ the filing of this petition
10 ~~authorized to sign and verify this petition~~
11 on behalf of the partnership has been authorized.
12 ------------ ------------
13 Subscribed and sworn to before me on
14 ----------------------
15 ---- ---- --------------,
16 ---- ------- -----------
17 [Official character] ← Enlarge

ADVISORY COMMITTEE'S NOTE

Rule 109 requires all petitions to be verified. This form is to be used for the verification on behalf of a partnership. It may be adapted for use in connection with other papers required by these rules to be verified. See the Note to Rule 911.

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FORM NO. 6

SCHEDULES

[*Caption, other than designation, as in ~~Official~~ Form No. 1*]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT

Schedules A–1, A–2, and A–3 must include all the claims against the bankrupt or his property as of the date of the filing of the petition by or against him.

Schedule A-1.—Creditors having priority.

Nature of claim	Name of creditor and residence or place of business [if unknown, so state]	Specify when claim was incurred and the consideration therefor; ~~whether~~ when claim is contingent, unliquidated, disputed, or subject to setoff, ~~whether~~ evidenced by ~~any~~ a judgment, negotiable instrument, or other writing, ~~whether~~ or incurred as partner or joint contractor ~~and, if so, with whom~~ , so indicate; specify name of any partner or joint contractor on any debt	Amount of claim
a. Wages and commissions owing to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, not exceeding $600 to each, earned within 3 months before filing of petition			$
b. Taxes owing [itemize by type of tax and taxing authority]			
(1) To the United States			
(2) To any state			
(3) To any other taxing authority			
c. (1) Debts owing to any person, including United States, entitled to priority by laws of United States [itemize by type]			
(2) Rent owing to a landlord entitled to priority by laws of any state accrued within 3 months before filing of petition, for actual use and occupancy			
Total			

Schedule A-2.– Creditors holding security.

Name of creditor and residence or place of business (if unknown, so state)	Description of security and date when obtained by creditor	Specify when claim was incurred and the consideration therefor, ~~whether~~ when claim is contingent, unliquidated, disputed, ~~or~~ subject to setoff, ~~whether~~ evidenced by ~~any~~ a judgment, negotiable instrument or other writing, or ~~whether~~ incurred as partner or joint contractor ~~and if so, with whom~~, so indicate, specify name of any partner or joint contractor on any debt	~~Value~~ Market value of security	Amount of claim without deduction of value of security
			$	$

Total

Schedule A-3.—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and residence or place of business (if unknown, so state)	Specify when claim was incurred and the consideration therefor; ~~whether~~ claim [illegible] ~~whether~~ evidenced by ~~any~~ [illegible] instrument, or other writing; whether incurred as partner or joint contractor, ~~and, if so, with whom~~	Amount of claim
		$
Total		

a

and

when

,

, or

so indicate;
specify name of
any partner or
joint contractor
on any debt

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT

Schedules B-1, B-2, B-3, and B-4 must include all property of the bankrupt as of the date of the filing of the petition by or against him.

Schedule B-1.—Real property.

Market value

Description and location of all real property in which bankrupt has an interest [including equitable and future interests, interests in community property, life estates, leaseholds, and rights and powers exercisable for his own benefit]	Nature of interest [specify all deeds and written instruments relating thereto]	Value of bankrupt's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4
		$
Total		

estates by the entirety,

Schedule B-2.—Personal property.

Market value

Type of property	Description and location	Value of bankrupt's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4
a. Cash on hand		$
b. Deposits of money with banking institutions, savings and loan associations, credit unions, public utility companies, landlords, and others		
c. Household goods, supplies, and furnishings		
d. Books, pictures, and other art objects; stamp, coin, and other collections		
e. Wearing apparel, jewelry, firearms, sports equipment, and other personal possessions		
f. Automobiles, trucks, trailers, and other vehicles		
g. Boats, motors, and their accessories		
h. Livestock, poultry, and other animals		
i. Farming supplies and implements		
j. Office equipment, furnishings, and supplies		
k. Machinery, fixtures, equipment, and supplies [other than those listed in Items j and l] used in business		
l. Inventory		
m. Tangible personal property of any other description.		
n. Patents, copyrights, franchises, and other general intangibles [specify all documents and writings relating thereto]		
o. Government and corporate bonds and other negotiable and nonnegotiable instruments		
p. Other liquidated debts owing bankrupt or debtor		
q. Contingent and unliquidated claims of every nature, including counterclaims of the bankrupt or debtor [give estimated value of each]		
r. Interests in insurance policies [itemize surrender or refund values of each]		
s. Annuities		
t. Stocks and interests in [illegible] rated companies [illegible]		
u. Interests in partnerships [illegible]		
v. Equitable and [illegible] rights or [illegible] bankrupt or debtor [illegible] relating thereto]		
Total		

Schedule B–3.—Property not otherwise scheduled.

Type of property	Description and location	~~Value~~ of bankrupt's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4	Market value
a. Property transferred under assignment for benefit of creditors, within 4 months prior to filing of petition [specify date of assignment, name and address of assignee, amount realized therefrom by the assignee, and disposition of proceeds so far as known to bankrupt]		$	
b. Property of any kind not otherwise scheduled			

Total

Schedule B-4. Property claimed as exempt.

Type of property	[illegible] exemption, present use of property	Reference to statute creating the exemption	Value claimed exempt
			$

Summary of debts and property.
[From the statements of the bankrupt in Schedules A and B]

Schedule		Total
	DEBTS	
A-1/a	Wages having priority	
A-1/b(1)	Taxes owing United States	
A-1/b(2)	Taxes owing States	
A-1/b(3)	Taxes owing other taxing authorities	
A-1/c(1)	Debts having priority by laws of United States	
A-1/c(2)	Rent having priority under State law	
A-2	Secured claims	
A-3	Unsecured claims without priority	
	Schedule A, total	
	PROPERTY	
B-1	Real property [total value]	
B-2/a	Cash on hand	
B-2/b	Deposits	
B-2/c	Household goods	
B-2/d	Books, pictures, and collections	
B-2/e	Wearing apparel and personal possessions	
B-2/f	Automobiles and other vehicles	
B-2/g	Boats, motors, and accessories	
B-2/h	Livestock and other animals	
B-2/i	Farming supplies and implements	
B-2/j	Office equipment and supplies	
B-2/k	Machinery, equipment, & supplies used in business	
B-2/l	Inventory	
B-2/m	Other tangible personal property	
B-2/n	Patents and other general intangibles	
B-2/o	Bonds and other instruments	
B-2/p	Other liquidated debts	
B-2/q	Contingent and unliquidated claims	
B-2/r	Interests in insurance policies	
B-2/s	Annuities	
B-2/t	Interests in corporations and unincorporated companies	
B-2/u	Interests in partnerships	
B-2/v	Equitable and future interests, rights, and powers in personality	
B-3/a	Property assigned for benefit of creditors	
B-3/b	Property not otherwise scheduled	
B-4	Property claimed as exempt $	
	Schedule B, total	

and

OATH OF INDIVIDUAL TO SCHEDULES A AND B

State of ....
County of .... ss.

I, ..., do hereby ~~make solemn oath~~ swear that I have read the foregoing schedules, consisting of .... sheets, and that they are a statement of all my debts and all my property in accordance with the Bankruptcy Act, to the best of my knowledge, information, and belief.

Signed: ....

Subscribed and sworn to before me on ....

....,
....
[Official character] ← Enlarge

OATH ON BEHALF OF CORPORATION TO SCHEDULES A AND B

State of ....
County of .... ss.

I, ..., the president [*or other officer or* ~~*duly authorized agent*~~ an authorized agent] of the corporation named as bankrupt in this proceeding, do hereby ~~make solemn oath~~ swear that I have read the foregoing schedules, consisting of .... sheets, and that they are a statement of all the debts and all the property of the corporation in accordance with the Bankruptcy Act, to the best of my knowledge, information, and belief.

Signed: ....

Subscribed and sworn to before me on ....

....,
....
[Official character] ← Enlarge

OATH ON BEHALF OF PARTNERSHIP TO SCHEDULES A AND B

State of ....
County of .... ss.

I, ..., a member [*or* ~~duly~~ [an] authorized agent] of the partnership named as bankrupt in this proceeding, do hereby ~~make solemn oath~~ [swear] that I have read the foregoing schedules, consisting of .... sheets, and that they are a statement of all the debts and all the property of the partnership in accordance with the Bankruptcy Act, to the best of my knowledge, information, and belief.

Signed: ....

Subscribed and sworn to before me on ....

........................,
....
[Official character] [Enlarge]

ADVISORY COMMITTEE'S NOTE

This form is a revision of the Official Forms for Schedules A and B [illegible] Official Form No. 1. It is intended for use by the bankrupt, or whoever may be required to prepare a schedule of property and list of creditors to accompany a petition filed under the Act. See Rule 108.

The number of schedules ~~for property~~ [of debts] has been reduced from 5 to 3 and the number of schedules of ~~debts~~ [property] from 6 to 4 in the interest of simplification. No significant change in the information required to be disclosed is intended by this reduction. Numerous changes of format have been made to permit easier adaptability for individual cases, and columnar headings and categories of claims and property have been revised to make them more comprehensive and clear.

Ledger or voucher references and identification of places where debts were contracted or incurred are no

longer required to be entered on ~~Schedules A-1 to A-5.~~ the schedules of his debts. To eliminate an overlap of Schedule A-2 with Schedule B-1, which has required inclusion of information as to encumbrances on real property of the estate, the headings in the latter schedule have been revised to make clear that all statements regarding secured claims are to be entered in Schedule A-2. Liabilities on notes and bills heretofore supposed to be entered on Schedules A-4 and A-5 are to be included in Schedule A-3 or, if the creditor is entitled to priority or is secured, on Schedule A-1 or A-2, as the case may be. Elimination of Schedules A-4 and A-5 will effect little or no change in practice.

Schedule B-3, on which choses in action belonging to the estate have heretofore been scheduled, has been merged into Schedule B-2 for personal property, thereby eliminating a needless classification. The space provided in Schedule B-1 for "Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge" has been eliminated, and such property should be included as real property on Schedule B-1 or as personal property on Schedule B-2. Information as to fees paid counsel in contemplation of bankruptcy, heretofore also required to be included in Schedule B-4, is to be obtained by questions included in the Statement of Affairs.

The official forms for the schedules have heretofore required a signature on each of the 11 schedules (A-1 to A-5 and B-1 to B-6) and an oath to accompany the Schedule of Debts as well as another to accompany the Schedule of Property. Schedules are required to be executed and filed in the same number as the petition they accompany. Rule 108(a). A single oath for all the schedules requiring no more than one signature by the bankrupt for ~~each copy~~ the original has been substituted for the multiple subscription requirements heretofore imposed. The oath requires a specification of the number of sheets included in the schedules and an acknowledgment that the affiant has read them. The copies should be conformed to the original as provided in Rule 911(c). Separate forms of oath are provided for individuals, corporations, and partnerships.

FORM NO. 7

STATEMENT OF AFFAIRS FOR BANKRUPT NOT ENGAGED IN BUSINESS

1 [*Caption, other than designation, as in Form*
2 *No. 1*]

3 STATEMENT OF AFFAIRS
4 FOR BANKRUPT NOT ENGAGED IN BUSINESS

5 [Each question should be answered or the
6 failure to answer explained. If the answer is
7 "none," this should be stated. If additional
8 space is needed for the answer to any ques-
9 tion, a separate sheet, properly identified
10 and made a part hereof, should be used and
11 attached.
12 The term, "original petition," as used in
13 the following questions, shall mean the peti-
14 tion filed under Rule 103, 104, or 105.]
15 *1. Name and residence.*
16 a. What is your full name and social secu-
17 rity number?
18 b. Have you used, or been known by, any
19 other names within the 6 years immediately
20 preceding the filing of the original petition
21 herein? (If so, give particulars.)
22 c. Where do you now reside?
23 d. Where else have you resided during the
24 6 years immediately preceding the filing of
25 the original petition herein?
26 *2. Occupation and income.*
27 a. What is your occupation?
28 b. Where are you now employed? (Give
29 the name and address of your employer, or

30 the address at which you carry on your
31 trade or profession, and the length of time
32 you have been so employed.)
33 c. Have you been in a partnership with
34 anyone, or engaged in any business during
35 the 6 years immediately preceding the filing
36 of the original petition herein? (If so, give
37 particulars, including names, dates, and
38 places.)
39 d. What amount of income have you
40 received from your trade or profession
41 during each of the 2 years immediately preceding the filing of the original petition
42 ceding the filing of the original petition
43 herein?

calendar

44 e. What amount of income have you
45 received from other sources during each of
46 these 2 years? (Give particulars, including
47 each source, and the amount received there-
48 from.)
49 *3. Tax returns and refunds.*
50 a. Where did you file your last federal
51 and state income tax returns for the 2 years
52 immediately preceding the filing of the origi-
53 nal petition herein?
54 b. What tax refunds (income and other)
55 have you received during the year immedi-
56 ately preceding the filing of the original
57 petition herein?
58 c. To what tax refunds (income or other),
59 if any, are you, or may you be, entitled?
60 (Give particulars, including information as
61 to any refund payable jointly to you and
62 your spouse or any other person.)
63 *4. Bank accounts and safe deposit boxes.*
64 a. What bank accounts have you main

65 tained, alone or together with any other
66 person, and in your own or any other name
67 within the 2 years immediately preceding
68 the filing of the original petition herein?
69 (Give the name and address of each bank,
70 the name in which the deposit maintained,
71 and the name and address of every other
72 person authorized to make withdrawals from
73 such account.)
74 b. What safe deposit box or boxes or other
75 depository or depositories have you kept or
76 used for your securities, cash, or other valu-
77 ables within the 2 years immediately preced-
78 ing the filing of the original petition herein?
79 (Give the name and address of the bank or
80 other depository, the name in which each box
81 or other depository was kept, the name and
82 address of every other person who had the
83 right of access thereto, a brief description of
84 the contents thereof, and, if the box has been
85 surrendered, state when surrendered, or, if
86 transferred, when transferred, and the
87 name and address of the transferee.)
88 5. *Books and records.*
89 a. Have you kept books of account or
90 records relating to your affairs within the 2
91 years immediately preceding the filing of the
92 original petition herein?
93 b. In whose possession are these books or
94 records? (Give names and addresses.)
95 c. If any of these books or records are not
96 available, explain.
97 d. Have any books of account or records
98 relating to your affairs been destroyed, lost,
99 or otherwise disposed of within the 2 years

100 immediately preceding the filing of the origi-
101 nal petition herein? (If so, give particulars,
102 including date of destruction, loss, or dispo-
103 sition, and reason therefor.)
104 *6. Property held for another person.*
105 What property do you hold for any other
106 person? (Give name and address of each
107 person, and describe the property, or value
108 thereof, and all writings relating thereto.)
109 *7. Prior bankruptcy.*
110 What proceedings under the Bankruptcy
111 Act have previously been brought by or
112 against you? (State the location of the bank-
113 ruptcy court, the nature and number of each
114 proceeding, the date when it was filed, and
115 whether a discharge was granted or refused,
116 the proceeding was dismissed, or a composi-
117 tion, arrangement, or plan was confirmed.)
118 *8. Receiverships, general assignments, and*
119 *other modes of liquidation.*
120 a. Was any of your property, at the time
121 of the filing of the original petition herein,
122 in the hands of a receiver, trustee, or other
123 liquidating agent? (If so, give a brief descrip-
124 tion of the property, the name and address
125 of the receiver, trustee, or other agent, and,
126 if the agent was appointed in a court pro-
127 ceeding, the name and location of the court
128 and the nature of the proceeding.)
129 b. Have you made any assignment of your
130 property for the benefit of your creditors, or
131 any general settlement with your creditors,
132 within one year immediately preceding the
133 filing of the original petition herein? (If so,
134 give dates, the name and address of the

135 assignee, and a brief statement of the terms
136 of assignment or settlement.)
137 *9. Property in hands of third person.*
138 Is any other person holding anything of
139 value in which you have an interest? (Give
140 name and address, location and description
141 of the property, and circumstances of the
142 holding.)
143 *10. Suits, executions, and attachments.*
144 a. Were you a party to any suit pending
145 at the time of the filing of the original peti-
146 tion herein? (If so, give the name and loca-
147 tion of the court and the title and nature of
148 the proceeding.)
149 b. Were you a party to any suit termi-
150 nated within the year immediately preceding
151 the filing of the original petition herein? (If
152 so, give the name and location of the court,
153 the title and nature of the proceeding, and
154 the result.)
155 c. Has any of your property been
156 attached, garnished, or seized under any
157 legal or equitable process within the 4
158 months immediately preceding the filing of
159 the original petition herein? (If so, describe
160 the property seized or person garnished, and
161 at whose suit.)
162 *11. Loans repaid.*
163 What repayments on loans in whole or in
164 part have you made during the year immedi-
165 ately preceding the filing of the original
166 petition herein? (Give the name and address
167 of the lender, the amount of the loan and
168 when received, the amounts and dates of

169 payments and, if the lender is a relative, the
170 relationship.)
171 *12. Transfers of property.*
172 a. Have you made any gifts, other than
173 ordinary and usual presents to family mem-
174 bers and charitable donations, during the
175 year immediately preceding the filing of the
176 original petition herein? (If so, give names
177 and addresses of donees and dates, descrip-
178 tion, and value of gifts.)
179 b. Have you made any other transfer,
180 absolute or for the purpose of security, or
181 any other disposition, of real or tangible per-
182 sonal property during the year immediately
183 and preceding the filing of the original peti-
184 tion herein? (Give a description of the prop-
185 erty, the date of the transfer or disposition,
186 to whom transferred or how disposed of,
187 and, if the transferee is a relative, the rela-
188 tionship, the consideration if any, received
189 therefor, and the disposition of such consid-
190 eration.)
191 *13. Repossessions and returns.*
192 Has any property been returned to, or
193 repossessed by, the seller or by a secured
194 party during the year immediately preced-
195 ing the filing of the original petition herein?
196 (If so, give particulars including the name
197 and address of the party getting the prop-
198 erty and its description and value.)
199 *14. Losses.*
200 a. Have you suffered any losses from fire,
201 theft, or gambling during the year immedi-

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202 ately preceding the filing of the original
203 petition herein? (If so, give particulars,
204 including dates, names, and places, and the
205 amounts of money or value and general
206 description of property lost.)
207 b. Was the loss covered in whole or part
208 by insurance? (If so, give particulars.)
209 *15. Payments or transfers to attorneys.*
210 a. Have you consulted an attorney during
211 the year immediately preceding or since the
212 filing of the original petition herein? (Give
213 date, name, and address.)
214 b. Have you during the year immediately
215 preceding or since the filing of the original
216 petition herein paid any money or trans-
217 ferred any property to the attorney or to
218 any other person on his behalf? (If so, give
219 particulars, including amount paid or value
220 of property transferred and date of payment
221 or transfer.)
222 c. Have you, either during the year imme-
223 diately preceding or since the filing of the
224 original petition herein, agreed to pay any
225 money or transfer any property to an attor-
226 ney at law, or to any other person on his
227 behalf? (If so, give particulars, including
228 amount and terms of obligation.)

229 State of ....
230 County of .... ss.
231 I, ..., do hereby
232 [swear] ~~make solemn oath~~ that I have read the an-
233 swers contained in the foregoing statement

234 of affairs and that they are true and com-
235 plete to the best of my knowledge, informa-
236 tion, and belief.

237 ______________ ______________,

238 *Bankrupt.*

239 Subscribed and sworn to before me on

240 ____ ________________.

241 ____ ______________,

242 ______ ______________

243 [Official character]

ADVISORY COMMITTEE'S NOTE

This Statement of Affairs is a revision of Official Form No. 2. Most of the changes are intended to make the requests for information more specific and certain in their references. Thus, the bankrupt is required to give his social security number to facilitate his identification, particularly by the Internal Revenue Service and other agencies which maintain records by reference to this number. Information as to other names used in the last 6 years serves a similar purpose.

Inquiry as to most transactions and developments affecting the financial condition of the bankrupt is limited to the year preceding the filing of the petition, and the time span covered by the question regarding general assignments and other modes of general settlement with creditors (formerly #7c, renumbered as #8b) has been reduced from 2 years to one year. The scope of examination at the first meeting or at any other meeting is in no way restricted, of course, by the scope of the inquiries in the Statement of Affairs.

New questions have been added concerning tax refunds (#3), property in the hands of trustees, bailees, and other third persons (#9), repossessions and returns of property by the bankrupt (#10), losses covered by insurance (#11), and payments or transfers to attorneys (#15). The questions asked in this last paragraph seek information relevant to the examination authorized to be conducted by the court pursuant to Rule 220. The refer-

ence to sums paid to counsel heretofore included in Schedule B-4 is deleted by this series of proposals.

The question regarding transfers (formerly #10a, now #12a & b) has literally required the bankrupt to disclose every payment as well as exchange of property during the preceding year. The question has been revised to develop information only as to (1) gifts that exceed the bounds of ordinary and usual presents to family members and charitable contributions, and (2) transfers of realty or tangible personalty. The range of inquiry covers the year before the filing of the petition as before, but no accounting is required by the question as to payments of cash and by check except when out-of-the-ordinary gifts are effected in this way.

Inquiry is made as to relevant writings in numerous instances. Schedule B-6 on which all books, papers, and writings, have heretofore been listed has been deleted.

The bankrupt is required to sign only the oath to the statement, but he must verify that he has read the statement as well as that it is true to the best of his knowledge, information, and belief.

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

When the schedules and statement of affairs are filed simultaneously, as they ordinarily will be (see Rule 108(b)), the oaths may be conmbined, as provided in Rule 909.

FORM NO. 8

STATEMENT OF AFFAIRS
FOR BANKRUPT ENGAGED IN BUSINESS

1 [*Caption, other than designation, as in Form*
2 *No. 1*]

3 STATEMENT OF AFFAIRS
4 FOR BANKRUPT ENGAGED IN BUSINESS

5 [Each question should be answered or the
6 failure to answer explained. If the answer is
7 "none," this should be stated. If additional

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8 space is needed for the answer [illegible] ques-
9 tion, a separate sheet properly identified and
10 made a part hereof, should be [illegible] and
11 attached.
12 If the bankrupt is a partnership or a cor-
13 poration, the questions shall be deemed to be
14 addressed to, and shall be answered on
15 behalf of, the partnership or corporation;
16 and the statement shall be verified by a
17 member of the partnership or by a duly
18 authorized officer of the corporation.
19 The term, "original petition," as used in
20 the following questions, shall mean the peti-
21 tion filed under Rule 103, 104, or 105.]
22 *1. Nature, location, and [illegible] of business.*
23 a. Under what name and where do you
24 carry on your business?
25 b. In what business are you engaged? (If
26 business operations have been terminated,
27 give the date of such termination.)
28 c. When did you commence such business?
29 d. Where else, and under what other
30 names, have you carried on business within
31 the 6 years immediately preceding the filing
32 of the original petition herein? (Give street
33 addresses, the names of any partners, joint
34 adventurers, or other associates, the nature
35 of the business, and the periods for which it
36 was carried on.)
37 e. What is your employer identification
38 number? Your social security number?
39 *2. Books and records.*
40 a. By whom, or under whose supervision,
41 have your books of account and records been
42 kept during the [illegible] immediately preceding

43 ing the filing of the original petition herein?
44 (Give names, addresses, and periods of time.)
45 b. By whom have your books of account
46 and records been audited during the 2 years
47 immediately preceding the filing ot the origi-
48 nal petition herein? (Give names, addresses,
49 and dates of audits.)
50 c. In whose possession are your books of
51 account and records? (Give names and
52 addresses.)
53 d. If any of these books or records are not
54 available, explain.
55 e. Have any books of account or records
56 relating to your affairs been destroyed, lost,
57 or otherwise disposed of within the 2 years
58 immediately preceding the filing of the origi-
59 nal petition herein? (If so, give particulars,
60 including date of destruction, loss, or dispo-
61 sition, and reason therefor.)
62 3. *Financial statements.*
63 Have you issued any written financial
64 statements within the 2 years immediately
65 preceding the filing of the original petition
66 herein? (Give dates, and the names and
67 addresses of the persons to whom issued,
68 including mercantile and trade agencies.)
69 4. *Inventories.*
70 a. When was the last inventory of your
71 property taken?
72 b. By whom, or under whose supervision,
73 was this inventory taken?
74 c. What was the amount, in dollars, of the
75 inventory? (State whether the inventory was
76 taken at cost, market, or otherwise.)

77 d. When was the next prior inventory of
78 your property taken?
79 e. By whom, or under whose supervision,
80 was this inventory taken?
81 f. What was the amount, in dollars, of the
82 inventory? (State whether the inventory was
83 taken at cost, market, or otherwise.)
84 g. In whose possession are the records of
85 the 2 inventories above referred to? (Give
86 names and addresses.)
87 *5. Income other than from operation of*
88 *business.*
89 What amount of income, other than from
90 operation of your business, have you
91 received during each of the 2 years immedi-
92 ately preceding the filing of the original
93 petition herein? (Give particulars, including
94 each source, and the amount received there-
95 from.)
96 *6. Tax returns and refunds.*
97 a. In whose possession are copies of your
98 federal and state income tax returns for the
99 3 years immediately preceding the filing of
100 the original petition herein?
101 b. What tax refunds (income or other)
102 have you received during the 2 years imme-
103 diately preceding the filing of the original
104 petition herein?
105 c. To what tax refunds (income or other),
106 if any, are you, or may you be, entitled?
107 (Give particulars, including information as
108 to any refund payable jointly to you and
109 your spouse or any other person.)
110 *7. Bank accounts and safe deposit boxes.*
111 a. What bank accounts have you main-

112 tained, alone or together with any other
113 person, and in your own or any other name,
114 within the 2 years immediately preceding
115 the filing of the original petition herein?
116 (Give the name and address of each bank,
117 the name in which the deposit was main-
118 tained, and the name and address of every
119 person authorized to make withdrawals from
120 such account.)
121 b. What safe deposit box or boxes or other
122 depository or depositories have you kept or
123 used for your securities, cash or other valua-
124 bles, within the 2 years immediately preced-
125 ing the filing of the original petition herein?
126 (Give the name and address of the bank or
127 other depository, the name in which each box
128 or other depository was kept, the name and
129 address of every person who had the right of
130 access thereto, a description of the contents
131 thereof, and, if the box has been surren-
132 dered, state when surrendered or, if trans-
133 ferred, when transferred and the name and
134 address of the transferee.)
135 *8. Property held for another person.*
136 What property do you hold for any other
137 person? (Give name and address of each
138 person, and describe the property, the
139 amount or value thereof and all writings
140 relating thereto.)
141 *9. Prior bankruptcy proceedings.*
142 What proceedings under the Bankruptcy
143 Act have previously been brought by or
144 against you? (State the location of the bank-
145 ruptcy court, the nature and number of pro-
146 ceeding, and whether a discharge

147 granted or refused, the proceeding was dis-
148 missed, or a composition, arrangement or
149 plan was confirmed.

150 *10. Receiverships, general assignments, and*
151 *other modes of liquidation.*

152 a. Was any of your property, at the time
153 of the filing of the original petition herein,
154 in the hands of a receiver, trustee or other
155 liquidating agent? (If so, give a brief
156 description of the property and the name
157 and address of the receiver, or trustee, or
158 other agent, and, if the agent was appointed
159 in a court proceeding, the name and location
160 of the court and the nature of the proceed-
161 ing.)

162 b. Have you made any assignment of your
163 property for the benefit of your creditors, or
164 any general settlement with your creditors,
165 within the 2 years immediately preceding
166 the filing of the original petition herein? (If
167 so, give dates, the name and address of the
168 assignee, and a brief statement of the terms
169 of assignment or settlement.)

170 *11. Property in hands of third person.*

171 Is any other person holding anything of
172 value in which you have an interest? (Give
173 name and address, location and description
174 of the property, and circumstances of the
175 holding.)

176 *12. Suits, executions, and attachments.*

177 a. Were you a party to any suit pending
178 at the time of the filing of the original peti-
179 tion herein? (If so, give the name and loca-
180 tion of the court and the title and nature of
181 the proceeding.)

182 b. Were you a party to any suit termi-

183 nated within the year immediately preceding
184 the filing of the original petition herein? (If
185 so, give the name and location of the court
186 the title and nature of the proceeding, and
187 the result.)
188 c. Has any of your property been
189 attached, garnished, or seized under any
190 legal or equitable process within the 4
191 months immediately preceding the filing of
192 the original petition herein? (If so, describe
193 the property seized or person garnished, and
194 at whose suit.)
195 *13. Payments on loans and installment pur-*
196 *chases.*
197 What repayments on loans in whole or in
198 part, and what payments on installment
199 purchases of goods and services, have you
200 made during the year immediately preceding
201 the filing of the original petition herein?
202 (Give the names and addresses of the per-
203 sons receiving payment, the amounts of the
204 loans and of the purchase price of the goods
205 and services, the dates of the original trans-
206 actions, the amounts and dates of payments,
207 and, if any of the payees are your relatives,
208 the relationship; if the bankrupt is a part-
209 nership and any of the payees is or was a
210 partner or a relative of a partner, state the
211 relationship; if the bankrupt is a corpora-
212 tion and any of the payees is or was an
213 officer, director, or stockholder, or a relative
214 of an officer, director, or stockholder, state
215 the relationship.)
216 *14. Transfers of property.*
217 a. Have you made any gifts, other than
218 ordinary and usual presents to family mem-

219 bers and charitable donations, during the
220 year immediately preceding the filing of the
221 original petition herein? (If so, give names
222 and addresses of donees and dates, descrip-
223 tion, and value of gifts.)
224 b. Have you made any other transfer,
225 absolute or for the purpose of security, or
226 any other disposition which was not in the
227 ordinary course of business during the year
228 immediately preceding the filing of the origi-
229 nal petition herein? (Give a description of
230 the property, the date of the transfer or dis-
231 position, to whom transferred or how dis-
232 posed of, and, state whether the transferee is
233 a relative, partner, shareholder, officer, or
234 director, the consideration, if any, received
235 therefor, and the disposition of such consid-
236 eration.)
237 *15. Accounts and other receivables.*
238 Have you assigned, either absolutely or as
239 security, any of your accounts or other re-
240 ceivables during the year immediately
241 preceding the filing of the original petition
242 herein? (If so, give names and addresses of
243 assignees.)
244 *16. Repossessions and returns.*
245 Has any property been returned to, or
246 repossessed by, the seller or by a secured
247 party during the year immediately preced-
248 ing the filing of the original petition herein?
249 (If so, give particulars, including the name
250 and address of the party getting the prop-
251 erty and its description and value.)
252 *17. Business leases.*
253 If you are a tenant of business property,
254 what are the name and ad[illegible]

255 lord, the amount of your rental, the date to
256 which rent had been paid at the time of the
257 filing of the original petition herein, and the
258 amount of security held by the landlord?
259 *18. Losses.*
260 a. Have you suffered any losses from fire,
261 theft, or gambling during the year immedi-
262 ately preceding the filing of the original
263 petition herein? (If so, give particulars,
264 including dates, names, and places, and the
265 amounts of money or value and general
266 description of property lost.)
267 b. Was the loss covered in whole or part
268 by insurance? (If so, give particulars.)
269 *19. Withdrawals.*
270 a. If you are an individual proprietor of
271 your business, what personal withdrawals of
272 any kind have you made from the business
273 during the year immediately preceding the
274 filing of the original petition herein?
275 b. If the bankrupt is a partnership or cor-
276 poration, what withdrawals, in any form
277 (including compensation or loans) have been
278 made by any member of the partnership, or
279 by any officer, director, managing executive,
280 or shareholder of the corporation, during the
281 year immediately preceding the filing of the
282 original petition herein? (Give the name and
283 designation or relationship to the bankrupt
284 of each person, the dates and amounts of
285 withdrawals, and the nature or purpose
286 thereof).
287 *20. Payments or transfers to attorneys.*
288 a. Have you consulted an attorney during
289 the year immediately preceding or since the

290 filing of the original petition herein? (Give
291 date, name, and address.)
292 b. Have you during the year immediately
293 preceding or since the filing of the original
294 petition herein paid any money or trans-
295 ferred any property to the attorney, or to
296 any other person on his behalf? (If so, give
297 particulars, including amount paid or value
298 of property transferred and date of payment
299 or transfer.)
300 c. Have you, either during the year imme-
301 diately preceding or since the filing of the
302 original petition herein, agreed to pay any
303 money or transfer any property to an attor
304 ney at law, or to any other person on his
305 behalf? (If so, give particulars, including
306 amount and terms of obligation.)
307 *(If the bankrupt is a partnership or corpo-*
308 *ration, the following additional questions*
309 *should be answered.)*
310 *21. Members of partnership; officers, direc-*
311 *tors, managers, and principal stockhold-*
312 *ers of corporation.*
313 a. What is the name and address of each
314 member of the partnership, or the name,
315 title, and address of each officer, director,
316 and managing executive, and of each stock-
317 holder holding 25 per cent or more of the
318 issued and outstanding stock, of the corpo-
319 ration?
320 b. During the year immediately preceding
321 the filing of the original petition herein, has
322 any member withdrawn from the partner-
323 ship, or any officer, director, or managing
324 executive of the corporation terminated

325 relationship, or any stockholder holding 25
326 per cent or more of the issued stock disposed
327 of more than 50 per cent of his holdings? (If
328 so, give name and address and reason for
329 withdrawal, termination, or disposition, if
330 known.)
331 c. Has any person acquired or disposed of
332 25 per cent or more of the stock of the corpo-
333 ration during the year immediately preced-
334 ing the filing of the petition? (If so, give
335 name and address and particulars.)

336 State of ________________
337 County of ______________ *ss.*
338 I, ________________________, do hereby
339 ~~make solemn oath~~ swear that I have read the an-
340 swers contained in the foregoing statement
341 of affairs and that they are true and com-
342 plete to the best of my knowledge, informa-
343 tion, and belief.
344 ________________________
345 *Bankrupt.*
346 Subscribed and sworn to before me on
347 ____________________
348 ________________________
349 ________________________
350 [Official character]
351 *[Person verifying for partnership or cor-*
352 *poration should indicate position or relation-*
353 *ship to bankrupt.]*

ADVISORY COMMITTEE'S NOTE

This is a revision of Official Form No. [illegible]. Most of the changes made in the form are identical or similar to those made in Official Form No. 2 and explained in [illegible]

note accompanying the Statement of Affairs for a Bankrupt Not Engaged in Business.

The inquiry regarding tax returns here (#6a) extends back 3 years before the filing of the petition because of the possible relevance of the returns for all 3 years in determining the tax liability of a business bankrupt for the year in which the petition is filed.

The inclusion of the questions regarding suits, executions, and attachments (#12) cures a *casus omissus* in Official Form No. 3.

The question regarding loans repaid (#13) has been extended to cover payments on installment credit sales of goods and services. The purpose of this question is to develop information regarding possible preferences, and the Statement of Affairs is incomplete in this respect if it refers only to repayments of loans.

Information regarding business leases (#17) will be helpful in determining whether rental arrangements should be terminated or extended and whether the landlord may have a basis for asserting a lien or priority or may be liable for the return of a deposit to the estate.

The question regarding withdrawals (formerly #14, renumbered #19) has been elaborated to get information from individual proprietors comparable to that heretofore sought from partnerships and corporate bankrupts or debtors. This information will supplement that obtained pursuant to the questions regarding nonbusiness income (#5), payment of loans (#13), and other kinds of transfers in providing a picture of the disposition of assets during the year preceding the filing of the petition.

The question regarding the membership and management of a partnership or corporation (formerly #15, now #21) has been elaborated to develop information regarding significant changes during the year prior to the filing of the petition. Such information is likely to be of considerable assistance in discovering the reasons for the stringent financial condition of the bankrupt and in determining the disposition of its assets during the year preceding the filing of the petition.

The bankrupt is required to sign only the oath to the statement, but he must verify that he has read the statement as well as that it is true to the best of his knowledge, information, and belief. When the schedules and statement of affairs are filed simultaneously, as they ordinarily will be (see Rule 108(b)), the oaths may be combined, as provided in Rule 909. Only the original need be signed and verified, but the copies must be conformed to the original. See Rule 911(c).

FORM NO. 9

CREDITORS' PETITION FOR BANKRUPTCY

1 [*Caption, other than designation, as in Form*
2 *No. 1*]

3 CREDITORS' PETITION

4 1. Petitioners, ________________________,
5 of *________________, and ______________,
6 of *________________, and ______________,
7 of *________________, are creditors of ____
8 ____________, of *________________, having
9 provable claims against him, not contingent
10 as to liability, amounting in the aggregate,
11 in excess of the value of securities held by
12 them, to $500 or over. The nature and
13 amount of petitioners' claims are as follows:
14 ______________________________________
15 ______________________________________

alleged

16 2. The bankrupt has had his principal place
17 of business [*or* has resided] within this dis-
18 trict for the 6 months preceding the filing
19 of this petition [*or* for a longer portion of
20 the 6 months preceding the filing of this peti-
21 tion than in any other district].

alleged

22 3. The bankrupt owes debts to the amount
23 of $1,000 or over and is a person who may be
24 adjudged an involuntary bankrupt under the
25 Bankruptcy Act.

alleged

26 4. Within the 4 months preceding the filing
27 of this petition, the bankrupt committed an
28 act of bankruptcy in that he did on ______
29

30 Wherefore petitioners pray that ________
31 ________ be adjudged a bankrupt and ... the
32 Act.
33 Signed: ____________________,
34 *Attorney for Petitioners.*
35 Address: ____________________,
36 ____________________
37 *[Petitioners sign if not represented*
38 *by attorney.]*
39 ____________________,
40 ____________________,
41 ____________________,
42 *Petitioners.*
43 State of ________________
44 County of ______________ ss.
45 ____________________, ______________
46 ______________ and ______________
47 the petitioners named in the foregoing peti-
48 tion, do hereby ~~make solemn~~ oath that the
49 statements contained therein are true ac-
50 cording to the best of ~~their~~ knowledge, in-
51 formation, and belief.
52
53 ____________________
54 ____________________
55 *Petitioners.*
56 Subscribed and sworn to before me on
57 ____________________
58
59

Advisory Committee's Note

This form, a revision of Official Form ..., is author-
ized for use by creditors as petitioners ...

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adjudged an involuntary bankrupt. The form [illegible] that there are 12 or more creditors and that at [illegible] petitioners are therefore required by § 59b of the A[illegible] The form may be adapted in cases appropriate for [illegible] by one or 2 qualified petitioners by adding a statement at the end of paragraph 1 that "all of the creditors of the bankrupt are less than 12 in number."

Changes have been made in the interest of clarifying and shortening the form and of minimizing the number of entries necessary to be made by the person preparing the petition for filing. Recitals respecting the nature of the petitioners' claims conform to the requirement of § 59b as amended in 1952 and 1962. Paragraph 2, which sets out the basis for venue of the case, includes the alternatives appropriate for most bankrupts. Other factual bases recognized by Rule 116(a) may be shown by minor adaptations of the form.

The negation heretofore contained in paragraph 2 of Official Form No. 5 that the debtor is a wage-earner or a farmer is insufficient to allege that he is a qualified petitioner since there are several other categories of persons ineligible to be adjudicated bankrupt who are not mentioned. A statement that the debtor is a person who may be adjudged an involuntary bankrupt is both simple and adequate.

The pra[illegible] for service of the petition with a subpoena is deleted as unnecessary.

FORM NO. 10

SUMMONS TO BANKRUPT

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 SUMMONS
4 To the above-named Bankrupt:
5 A petition in bankruptcy having been filed
6 on ...., [illegible] this court of bank-
7 ruptcy, praying th[illegible] y[illegible] be adjudged a
8 bankrupt under the [illegible]kruptcy Act,

9 You are hereby summoned and required
10 to file with this court and to serve upon the
11 petitioners' attorney, whose address is ______
12 ________________, a motion or an answer[1]
13 to the petition which is herewith served upon
14 you, on or before ____________________.
15 If you fail to do so, you will be adjudged a
16 bankrupt by default.
17 ________________________,
18 *Clerk of District Court.*
19 [Seal of the United States District Court]
20 Date of issuance: ________________.

[1] If you make a motion, as you may in accordance with Bankruptcy Rule 112 that rule governs the time within which your answer must be served

ADVISORY COMMITTEE'S NOTE

This form is a revision of Official Form No. 6. It is to be used as provided in Rule 111.

FORM NO. 11

ADJUDICATION OF BANKRUPTCY

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 ADJUDICATION
4 On consideration of the petition filed on
5 ____________________, it is adjudged that
6 ________________________ is a bankrupt.
7 Dated: ________________________.
8 ________________________,
9 *Bankruptcy Judge.*

ADVISORY COMMITTEE'S NOTE

This form is an adaptation of Official Form No. 11. It is appropriate for use when a debtor is adjudged a bankrupt on an involuntary petition filed under Rule 104 or

105(c) or on a petition for adjudication of a partnership under Rule 105(b) or 105(d).

If a contested petition is tried by the court without a jury (or with an advisory jury), the findings of fact and conclusions of law thereon must be stated separately. See Rule 752(a), which is made applicable to proceedings on a contested petition by Rule 121. The adjudication is required by Rule 115(d) to be set forth on a document conforming substantially to this form and to be entered in the referee's docket as provided by Rule 504(a) or, if made by the district judge, in the civil docket as provided by Rule 79(a) of the Federal Rules of Civil Procedure.

A certified copy of the order of adjudication may be recorded as provided in Rule 602(a) for the purpose of giving constructive notice of the pendency of the bankruptcy to subsequent purchasers and lienors of the bankrupt's realty pursuant to § 21g of the Act.

FORM NO. 12

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

1 *[Caption, other than designation, as in Form*
2 *No. 1]*
3 ORDER FOR FIRST MEETING OF CREDITORS AND
4 FIXING TIMES FOR FILING OBJECTIONS TO
5 DISCHARGE AND FOR FILING COMPLAINT
6 TO DETERMINE DISCHARGEABILITY OF
7 CERTAIN DEBTS, COMBINED WITH NOTICE
8 THEREOF AND OF AUTOMATIC STAY
9 To the bankrupt, his creditors, and other
10 parties in interest: ________________
11 of *________________, having been
12 adjudged a bankrupt on a petition filed by

Indent as for new ¶

13 [*or against*] him on ________, it is ordered,
14 and notice is hereby given, that:
15 1. The first meeting of creditors shall be
16 held at ____________________________, on
17 _______________, at ___ o'clock __.m.;
18 2. The bankrupt shall appear in person
19 [*or, if the bankrupt is a partnership*, by a
20 general partner, *or, if the bankrupt is a cor-*
21 *poration*, by its president or other executive
22 officer] before the court at that time and
23 place for the purpose of being examined ~~as~~
24 ~~provided by the Bankruptcy Act~~; ~~and~~
25 3. ______________ is fixed as the last day
26 for the filing of objections to the discharge
27 of the bankrupt.

You are further notified that:

28 4. ______________ is fixed as the last day
29 for the filing of a complaint to determine the
30 dischargeability of any debt pursuant to
31 § 17c(2) of the Bankruptcy Act.

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

32 At the meeting the creditors may file their
33 claims, elect a trustee, elect a committee of
34 creditors, examine the bankrupt as permit-
35 ted by the court, and transact such other
36 business as may properly come before the
37 meeting.
38 As a result of this bankruptcy, certain acts
39 and proceedings against the bankrupt and
40 his property are stayed as provided in Bank-
41 ruptcy Rules 401 and 601.
42 If no objection to the discharge of the
43 bankrupt is filed on or before the last day
44 fixed therefore as stated in subparagraph 3
45 above, the bankrupt will be granted his dis-
46 charge. If no complaint to determine the dis-
47 chargeability of a debt under clause (2), (4),

Unless the court extends the time, any objection to the report of exempt property must be filed within 15 days after the report has been filed.

48 or (8) of § 17a of the Bankruptcy Act is filed
49 within the time fixed therefor as stated in
50 subparagraph 4 above, the debt may be dis-
51 charged.
52 In order to have his claim allowed so that
53 he may share in any distribution from the
54 estate, a creditor must file a claim, whether
55 or not he is included in the list of creditors
56 filed by the bankrupt. Claims which are not
57 filed within 6 months after the above date set
58 for the first meeting of creditors will not be
59 allowed, except as otherwise provided by
60 law. A claim may be filed in the office of the
61 undersigned bankruptcy judge ~~upon~~ an offi-
62 cial form prescribed for a proof of claim.
63 [*If a no-asset or nominal asset case, the*
64 *following paragraph may be used in lieu of*
65 *the preceding paragraph*] It appears from
66 the schedules of the bankrupt that there are
67 no assets from which any dividend can be
68 paid to creditors. It is unnecessary for any
69 creditor to file his claim at this time in order
70 to share in any distribution from the estate.
71 If it subsequently appears that there are as-
72 sets from which a dividend may be paid,
73 creditors will be so notified and given an
74 opportunity to file their claims.
75 Dated: ....
76 ....,
77 *Bankruptcy Judge.*

ADVISORY COMMITTEE'S NOTE

This form combines and revises Official Forms No. 42B and 43B. The alternative last paragraph is to be used when the court exercises the option under Rule

203(c) to notify the creditors that no dividends are to be anticipated and no claims need be filed.

The inclusion in the official form of information regarding the effect of the bankruptcy as a stay, the effect of the failure to file complaints objecting to discharge and to determine the dischargeability of debts, and the necessity of the filing of claims is new. It should be helpful to the creditors and reduce the number of inquiries directed at referees' offices by recipients of the notice of the first meeting.

and objections to the report of exempt property

FORM NO. 13

General Power of Attorney

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 GENERAL POWER OF ATTORNEY
4 To ________________________________
5 of *______________________________, and
6 __________________________________
7 of *______________________________:
8 The undersigned claimant hereby author-
9 izes you, or any one of you, as attorney in
10 fact for the undersigned and with full power
11 of substitution, to vote on any question that
12 may be lawfully submitted to creditors of
13 the bankrupt in the above-entitled case; [*if*
14 *appropriate*] to vote for a trustee of the
15 estate of the bankrupt and for a committee
16 of creditors; to receive dividends; and in
17 general to perform any act not constituting
18 the practice of law for the undersigned in all
19 matters arising in this case.
20 Dated: ________________
21 Signed: ________________

22 [*If appropriate*] By ________ ________
23 as ________________
24 Address: ________________,
25 ____________________
26 [*If executed by an individual*] Acknowl-
27 edged before me on ____________________.
28 [*If executed on behalf of a partnership*]
29 Acknowledged before me on ____________
30 ____________, by __________ __________,
31 who says that he is a member of the partner-
32 ship named above and is ~~duly~~ authorized to
33 execute this power of attorney in its behalf.
34 [*If executed on behalf of a corporation*]
35 Acknowledged before me on ____________
36 ____________, by __________ __________,
37 who says that he is ______________ of the
38 corporation named above and ~~has been duly~~ is
39 authorized to execute this power of attorney
40 in its behalf.
41 __________ ____________,
42 ______________________________
43 [Official character] Enlarge

ADVISORY COMMITTEE'S NOTE

Rule 910(c) requires a general power of attorney to be prepared substantially in conformity with this form, which is a revision of Official Form No. 18. Formal changes have been made to eliminate redundancy in the recitals, the implied requirement of a seal, and technical discrepancies in the form. While a power of attorney may of course be executed in favor of an attorney at law who is also retained as such to represent the creditor executing the form, the power of attorney does not purport to confer the right to act as an attorney at law. The corollary is that one not an attorney at law may act under a general power of attorney within the limitations prescribed in the form.

The statement respecting authority required in the acknowledgement accompanying a power of attorney executed on behalf of a partnership or corporation is in lieu of the requirement of General Order 21(5) heretofore existing that such an instrument be accompanied by an oath that the person executing is a member of the partnership or a duly authorized officer of the corporation.

FORM NO. 14

SPECIAL POWER OF ATTORNEY

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 SPECIAL POWER OF ATTORNEY
4 To ________________ ________________
5 of *________________________________, and
6 ________________ ________________
7 of *________________________________:
8 The undersigned claimant hereby author-
9 izes you, or any one of you, as attorney in
10 fact for the undersigned [*if desired:* with
11 full power of substitution,] to attend the first
12 meeting of creditors of the bankrupt or any
13 adjournment thereof, and to vote in my be-
14 half on any question that may be lawfully
15 submitted to creditors at such meeting or ad-
16 journed meeting, and for a trustee or trus-
17 tees of the estate of the bankrupt.
18 Dated: ________________.
19 Signed: __________ __________
20 [*If appropriate*] By __________ __________
21 as ____________________
22 Address: ____________________,
23 ____________________
24 [*If executed by an individual*] Acknowl-

*State post office address

25 edged before me on ____________________.
26 [*If executed on behalf of a partnership*]
27 Acknowledged before me on ____________
28 _________________, by _______________
29 _________________, who says that he is a
30 member of the partnership named above and
31 is ~~duly~~ authorized to execute this power of
32 attorney in its behalf.
33 [*If executed on behalf of a corporation*]
34 Acknowledged before me on ____________
35 _________________, by _______________
36 __________, who says that he is ___________
37 of the corporation named above and ~~has been~~ is
38 ~~duly~~ authorized to execute this power of at-
39 torney in its behalf.
40 _________________________,
41 _________________________
42 [*Official character*] Enlarge

ADVISORY COMMITTEE'S NOTE

A special power of attorney shall conform substantially with this official form, as provided in Rule 910(c), but it may grant either more or less authority in accordance with the language used. The form is a revision of Official Form No. 19.

FORM NO. 15

PROOF OF CLAIM

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 PROOF OF CLAIM
4 1. [*If claimant is an individual claiming*
5 *for himself*] The undersigned, who is the
6 claimant herein, resides at *___ ____ ____

*State [illegible]

7 [*If claimant is a partnership claiming*
8 *through a member*] The undersigned, who
9 resides at *______________________________,
10 is a member of ________________________,
11 a partnership, composed of the undersigned
12 and ________________ ________________,
13 of *_________________________________, and
14 doing business at *______________________,
15 and is ~~duly~~ authorized to make this proof of
16 claim in behalf of the partnership.
17 [*If claimant is a corporation claiming*
18 *through ~~a duly~~* an *authorized officer*] The under-
19 signed, who resides at *__________________,
20 is the ______________ of _____________,
21 a corporation organized under the laws of
22 __________________ and doing business at
23 *________________________________, and is
24 ~~duly~~ authorized to make this proof of claim
25 on behalf of the corporation.
26 [*If claim is made by agent*] The under-
27 signed, who resides at *_________________
28 _________________, is the agent of __________
29 ________________, of *_____________________
30 _________________, and is ~~duly~~ authorized
31 to make this proof of claim on behalf of the
32 claimant.
33 2. The bankrupt was, at the time of the
34 filing of the petition initiating this case, and
35 still is indebted [*or* liable] to this claimant,
36 in the sum of $____________.
37 3. The consideration for this debt [*or*
38 ground of liability] is as follows: _________
39 ______________________________________
40 ______________________________________

*State post-office address.

41 4. [*If the claim is founded upon writing*]
42 The writing upon which this claim is founded
43 (or a duplicate thereof) is attached hereto
44 [*or* cannot be attached for the reason set
45 forth in the statement attached hereto].
46 5. [*If appropriate*] This claim is founded
47 upon an open account, which became [*or* will
48 become] due on ____________________,
49 as shown by the itemized statement attached
50 hereto. Unless it is attached hereto or its
51 absence is explained in an attached state-
52 ment, no note or other negotiable instru-
53 ment has been received for the account or
54 any part of it.
55 6. No judgment has been rendered upon
56 the claim, except ____________________
57 ____________________________________.
58 7. ~~No part of this claim or of the indebted-~~
59 ~~ness out of which it arises has been paid~~
60 ~~except~~ ______________________________
61 ____________________________________.

The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

62 8. This claim is not subject to any set-off
63 or counterclaim except ________________
64 ____________________________________.
65 9. No security interest is held for this claim except
66 ____________________________________. INSERT
67 10. This claim is a general unsecured
68 claim, except to the extent that the security interest,
69 if any, described in paragraph 9 is sufficient
70 to satisfy the claim. [*If priority is claimed,*
71 *state the amount and basis thereof.*] ______
72 ____________________________________
73 ____________________________________.
74 Dated: ____________________.
75 Signed: ____________________

INSERT AT END OF LINE 66 ON PAGE 353

[If security interest in property of the debtor is claimed] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [or under a separate writing which (or a duplicate of which) is attached hereto, or under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

76 *Penalty for Presenting Fraudulent Claim.*
77 Fine of not more than $5,000 or imprison-
78 ment for not more than ~~five~~ 5 years or both—
79 Title 18, U.S.C., § 152.

ADVISORY COMMITTEE'S NOTE

This form combines the functions of Official Forms No. 28, 29, 30, and 31. It may be used by any claimant, including a wage earner for whom ~~a~~ short ~~form has~~ alternative forms have been specially provided (~~Form No. 16~~ Forms No. 16 and No. 16A), or by an agent or attorney for any claimant. Such a combined form is commonly used in practice.

Paragraph 10, requiring explicitness as to whether the claim is filed as a general, prior, or secured claim, will also facilitate administration and minimize troublesome litigation over the question whether a proof of claim was intended as a waiver of security. See, *e.g., United States National Bank v. Chase National Bank,* 331 U.S. 28, 35–36 (1947); 3 Collier ¶ 57.07[3.1] (1961).

If a security interest in the debtor's property is claimed, paragraph 9 requires any security agreement (if not included in the writing on which the claim is founded and which is required by paragraph 4 to be attached) be attached to the proof of claim or that the reason why it cannot be attached be set forth. Paragraph 9 further requires evidence of perfection of the security interest to be attached to the proof of claim. See the note to Rule 302 as to what constitutes satisfactory evidence of perfection. The information so required will expedite determination of the validity of any claimed security interest as against the trustee.

FORM NO. 16

PROOF OF CLAIM FOR WAGES, SALARY, OR COMMISSIONS

1 [*Caption, other than designation, as in Form*
2 *No. 1*]
3 PROOF OF CLAIM FOR WAGES, SALARY,
4 OR COMMISSIONS
5 1. The bankrupt owes the claimant $____
6 computed as follows:
7 (a) wages, salary, or commis-
8 sions for services performed
9 from ____________________
10 to ______________________,
11 at the following rate or rates of

12 compensation ______________
13 ______________________ $_____
14 ~~[If appropriate, include:]~~ [if appropriate]
15 (b) allowances and benefits,
16 such as vacation and severance
17 pay [specify]
18 ________________________
19 ________________________ $_____
20 Total amount claimed $_____
21 2. The claimant demands priority to the
22 extent permitted by § 61a(2) of the Bank-
23 ruptcy Act.
24 3. The claimant has received no payment,
25 no security, and no check or other evidence
26 of this debt except as follows: ___________
27 ____________________________________
28 Dated: ___________________
29 Signed: ______ _______,
30 *Claimant.*
31 Social Security Number: ______________
32 Address: ______________,
33 ______________
34 *Penalty for Presenting Fraudulent Claim:*
35 Fine of not more than $5,000 or imprison-
36 ment for not more than ~~five~~ 5 years or both—
37 Title 18, U.S.C., § 152.

ADVISORY COMMITTEE'S NOTE

This form is new. It is an adaptation of Official Form No. 15 for the exclusive use of claimants for personal earnings in ordinary bankruptcy. Its limited purpose permits elimination of recitals that are appropriate for other classes of claimants. Most claimants using the form will be entitled to priority under § 61a(2) of the Act. If the claim as filed includes an amount not entitled to priority because, for example, not earned within the