(Rev. 07-31-98)
Agenda F-18 (Summary)
Rules
September 1998

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-6.

2-8. Approve proposed action on eight rules-related items contained in the National Bankruptcy Review Commission's report, including proposed action on the Commission's Recommendation 1.3.1, which is set out in the report of the Committee on the Administration of the Bankruptcy System. ..... pp. 6-16

9. Approve the proposed amendments to Civil Rule 6(b) and Form 2 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. ..... p. 18

10. Approve the proposed amendments to Criminal Rules 6, 11, 24, and 54 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. ..... pp. 22-25

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

- Rules Governing Attorney Conduct ..... pp. 28-29
- Shortening the Rulemaking Process ..... p. 29
- Report to the Chief Justice ..... p. 29
- Status of Proposed Amendments ..... p. 29

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on June 18-19, 1998. The Department of Justice was represented by Eric H. Holder, Deputy Attorney General and Deborah S. Smolover, Assistant to the Deputy Attorney General, who attended part of the meeting.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Fern M. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, Deputy Chief of the Administrative Office's Rules Committee Support Office; Thomas E. Willging and Marie Leary of the Federal Judicial Center; Professor Mary P. Squiers, Director of

the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action. A comprehensive revision of the appellate rules is now before Congress and will take effect on December 1, 1998, unless Congress acts otherwise. The advisory committee approved proposed amendments to several rules, but stayed further action on them until the bench and bar have had an opportunity to become familiar with the restylized rules and until a sufficient number of proposed amendments are accumulated in the future to be forwarded to the Committee for its consideration.

The advisory committee did remove several items from its study agenda, including proposals governing use, electronic dissemination, citation, and precedential value of unpublished opinions. The committee understands that other committees of the Judicial Conference are examining practices governing unpublished opinions, but it was convinced that no rule amendments on the items were advisable at this time.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 together with Committee Notes explaining their purpose and intent.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of

creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would be sent only to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, and Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim under Rule 3002; (3) provide that the court may fix a time for filing preconversion administrative expense claims; and (4) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003(d) (Meeting of Creditors or Equity Security Holders) would require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report — rather than from the date of the meeting of creditors — to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days, unless the court orders otherwise, an order granting relief from the automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days, unless the court orders otherwise, an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days, unless the court orders otherwise, an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code, so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to conform to the abrogation of Rule 1017(b)(3).

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Bankruptcy Procedure, as recommended by your Committee, are in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

National Bankruptcy Review Commission

The Bankruptcy Reform Act of 1994 contained a provision authorizing the creation of a National Bankruptcy Review Commission to "investigate and study issues and problems" and report to Congress, the Chief Justice, and the President its findings and conclusions "together with its recommendations for ... legislative and administrative actions." The Commission filed its final report, containing 172 recommendations, on October 20, 1997. As part of a judiciary-wide effort, the advisory committee was requested to review and exercise primary committee jurisdiction over eight specific items in the report that might affect the Bankruptcy Rules. The rules-related Commission recommendations are set out below with the advisory committee's discussion and recommendations following. The Committee concurred with the advisory committee's recommendations, including the one on Commission Recommendation 1.3.1 relating to reaffirmation agreements and the treatment of secured debt. That recommendation is set out in the report of the Committee on the Administration of the Bankruptcy System at Agenda F-4.

Chapter 1: Consumer Bankruptcy — System Administration

Recommendation 1.1.4: Rule 9011

The Commission endorses the amended Rule 9011 of the Federal Rules of Bankruptcy Procedure, to become effective on December 1, 1997, which will make an attorney's

presentation to the court of any petition, pleading, written motion, or other paper a certification that the attorney made a reasonable inquiry into the accuracy of that information, and thus will help ensure that attorneys take responsibility for the information that they and their clients provide.

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Recommendation: That the Judicial Conference express thanks for the endorsement of the 1997 amendments to Rule 9011 and follow the procedures set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077, for considering further amendments and recommending them to the Supreme Court.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules drafted and proposed the amended rule and recognizes that the current rule implicitly may include an obligation on the part of the debtor's attorney to make reasonable inquiry into the facts reported on the schedules, statements, lists and amendments, even though these documents are signed only by the debtor.

The Judicial Conference recommended the amended rule to the Supreme Court in October 1996.

The Advisory Committee on Bankruptcy Rules at its October 1998 meeting will consider amending the rule further to expressly provide that the attorney's obligation to make reasonable inquiry extends to a debtor's schedules, lists, statements, and amendments thereto. If the advisory committee determines that any amendments should be proposed, the Rules Enabling Act (28 U.S.C. § 2071 et seq.) specifies the procedures by which the amendments would become effective.

Chapter 2: Partnerships

Recommendation 2.3.2 Consent of Former Partners

The Bankruptcy Code and Rules should be amended to clarify that, notwithstanding Recommendation 1 (defining "general partner"), a former general partner of a partnership is not, absent a specific court order to the contrary, required to consent to a voluntary petition by a partnership, to be served with a petition or summons in an involuntary case

against a partnership, or to perform the duties of disclosure or procedural duties imposed on a general partner of a debtor partnership.

Recommendation: That the Judicial Conference urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act for any procedural rules that may be required to implement changes in the Bankruptcy Code.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules, as a policy matter, does not anticipate legislation but only proposes rules to implement legislation that has been enacted. In accordance with this policy, the Advisory Committee on Bankruptcy Rules at its March 1998 meeting adopted a "wait and see" position concerning this recommendation.

At its March 1994 meeting, the Judicial Conference restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077. JCUS-MAR 94, p.14.

Recommendation 2.3.2 clarifies that the expanded definition of "general partner" set out in the preceding recommendation (Recommendation 2.3.1) is not intended to encumber the commencement of voluntary or involuntary bankruptcy cases by or against a partnership by involving in the pleadings and service of process partners that have withdrawn from the partnership. Likewise, this recommendation relieves former partners of disclosure duties, unless the court orders otherwise.

This recommendation would require amending Rules 1004 and 1007(g) of the Federal Rules of Bankruptcy Procedure, but only if Congress were to amend the Bankruptcy Code by enacting the revised definition of "general partner" also recommended by the Commission. Although Congress has the authority to enact procedural rules for the courts directly, the Judicial

Conference traditionally has opposed such congressional initiatives and exhorted Congress to defer to the provisions of the Rules Enabling Act.

Chapter 2: General Issues in Chapter 11

Recommendation 2.4.9 Employee Participation in Bankruptcy Cases

Changes to Official Forms, the U.S. Trustee program guidelines and the Federal Rules of Bankruptcy Procedure, are recommended to the Administrative Office of the U.S. Courts, the Executive Office of the U.S. Trustee, and the Rules Committee, as appropriate, in order to improve identification of employment-related obligations and facilitate the participation by employee representatives in bankruptcy cases. The Official Forms for the bankruptcy petition, list of largest creditors, and/or schedules of liabilities should solicit more specific information regarding employee obligations. The U.S. Trustee program guidelines for the formation of creditors' committees should be amended to provide better guidance regarding employee and benefit fund claims. The appointment of employee creditors' committees should be encouraged in appropriate circumstances as a mechanism to resolve claims and other matters affecting the employees in a Chapter 11 case.

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Recommendation: That the Judicial Conference inform Congress that the schedules that must be filed by a debtor (Official Form 6) already require disclosure of employee-related obligations and that action on the Commission's recommendation is unnecessary.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules at its March 1998 meeting considered whether to refer this recommendation to its Subcommittee on Forms with instructions to draft proposed amendments to the official forms. The advisory committee determined that disclosure of employee-related obligations such as wages, benefits, and pension fund obligations already is required by the current schedules and, accordingly, that no amendments are necessary.

Recommendation 2.4.10 *Enhancing the Efficacy of Examiners and Limiting the Grounds for Appointment of Examiners in Chapter 11 Cases*

Congress should amend section 327 to provide for the retention of professionals by examiners for cause under the same standards that govern the retention of other professionals.

The Advisory Committee on Bankruptcy Rules of the Judicial Conference should consider a recommendation that Federal Rule of Bankruptcy Procedure 2004(a) be amended to provide that "On motion of any party in interest or of an examiner appointed under section 1104 of title 11, the court may order the examination of any entity."

Congress should eliminate section 1104(c)(2), which requires the court to order appointment of an examiner upon the request of a party in interest if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes or owing to an insider, exceed $5,000,000.

Recommendation: That the Judicial Conference: (a) restate its support for limiting the circumstances under which a trustee or trustee's own firm can be retained as a professional by the trustee but take no position on this recommendation to permit examiners to retain professionals under the same standards that govern the retention of other professionals, because such a change in substantive bankruptcy law concerns a matter of public policy that is best addressed by Congress; and (b) with respect to the recommendation to consider an amendment to Rule 2004, note that the recommendation is addressed directly to the Advisory Committee on Bankruptcy Rules, which has considered the matter and determined, for the time being, simply to monitor any case law that develops and, accordingly, urge Congress to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules at its March 1998 meeting considered this recommendation and declined to consider at this time proposing an amendment to Rule 2004 to include an examiner among those who may request an order authorizing an examination under Rule 2004, in part because the almost unlimited scope of such examinations conflicts with the limited duties of an examiner under section 1106(b) of the Bankruptcy Code. The advisory

committee will monitor any case law that develops on the issue, so the advisory committee can reconsider its position, if appropriate.

The Judicial Conference has no prior position concerning the Commission's proposals for amending the Bankruptcy Code to provide for the retention of professionals by examiners and limit the grounds for appointment of examiners in cases under chapter 11. At its March 1994 meeting, however, the Judicial Conference approved a recommendation of the Committee on the Administration of the Bankruptcy System that the circumstances under which a trustee, or trustee's firm, may also be retained as a professional by the trustee be restricted to four specific circumstances and agreed to seek a legislative amendment at an appropriate time. JCUS-MAR 94, p.11. At its March 1994 meeting, the Judicial Conference also restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

Chapter 2: Small Business Proposals

Recommendation 2.5.2 Flexible Rules for Disclosure Statement and Plan

Give the bankruptcy courts authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Bankruptcy Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors which would exist if the full requirements of § 1125 were imposed:

The Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") shall be called upon to adopt, within a reasonable time after enactment, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate. These forms would not preclude parties from using documents drafted by themselves or other forms, but would be propounded as one choice that plan proponents could make, which if used and completed accurately in all material respects, would be presumptively deemed upon filing to comply with all applicable requirements of Bankruptcy Code §§ 1123 and 1125. The forms shall be designed to fulfill the most practical balance between (i) on the one hand, the reasonable needs of the courts, the U.S. Trustee, and creditors and other parties in interest for reasonably complete information to

arrive at an informed decision and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors; and

Repeal those provisions of 11 U.S.C. § 105(d) which are inconsistent with the proposals made herein, *e.g.*, those setting deadlines for filing plans.

Amend the Bankruptcy Code to expressly provide for combining approval of the disclosure statement with the hearing on confirmation of the plan.

Recommendation: That the Judicial Conference express support for authorizing the bankruptcy courts to exercise greater flexibility in managing small business cases under chapter 11, but urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077, for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules, as a policy matter, does not anticipate legislation but only proposes rules to implement legislation that has been enacted. In accordance with this policy, the advisory committee at its March 1998 meeting adopted a "wait and see" position concerning this recommendation.

The Committee on the Administration of the Bankruptcy System in June 1993 approved a recommendation of its Subcommittee on Long Range Planning that Congress should consider amending § 1125 of the Bankruptcy Code to authorize the bankruptcy court to grant conditional approval of a disclosure statement, in order to streamline the processing of small chapter 11 cases. At its June 1995 meeting, the Bankruptcy Committee noted that the conditional approval process had been enacted in the Bankruptcy Reform Act of 1994 for very small cases in which the debtor had elected special treatment as a small business. In light of the congressional action, the Bankruptcy Committee determined that its earlier recommendation should be reworded as a query for inclusion in a list of issues to be forwarded to the Commission for consideration.

At its March 1994 meeting, however, the Judicial Conference restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

The Bankruptcy Code in § 1125 specifies that the proponent of a chapter 11 plan must provide to creditors and equity holders, through a disclosure statement approved by the court, all the information a typical investor would require to cast an informed vote on the plan. The Commission's view was that this prospectus-type disclosure statement, which is appropriate in large corporate reorganizations, is more of a costly burden than an aid to reorganization in small chapter 11 cases. The Bankruptcy Committee supports the Commission's proposals to (1) allow the bankruptcy court, after notice and a hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases, and (2) grant the court broad discretion to combine the disclosure and confirmation hearings in all small business cases.

This recommendation also would require amending the Federal Rules of Bankruptcy Procedure and prescribing a new official form, but only if Congress first amends the Bankruptcy Code to authorize the bankruptcy court, after notice and hearing, to waive the requirement for, or simplify the contents of, a disclosure statement and to combine approval of a disclosure statement with the hearing on confirmation of a plan. Although Congress has the authority to enact procedural rules for the courts directly, the Judicial Conference traditionally has opposed such congressional initiatives and exhorted Congress to defer to the provisions of the Rules Enabling Act.

Chapter 2: Small Business Proposals

Recommendation 2.5.3 Reporting Requirements

To create uniform national reporting requirements to permit U.S. Trustees, as well as creditors and the courts, better to monitor the activities of Chapter 11 debtors, the Rules

Committee shall be called upon to adopt, with (sic) a reasonable time after enactment, amended rules requiring small business debtors to comply with the obligations imposed thereunder. The new rules will require debtors to file periodic financial and other reports, such as monthly operating reports, designed to embody, upon the basis of accounting and other reporting conventions to be determined by the Rules Committee, the best practical balance between (i) on the one hand, the reasonable needs of the court, the U.S. Trustee, and creditors for reasonably complete information and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors. Specifically, the Rules Committee, shall be called upon to prescribe uniform reporting as to:

a. the debtor's profitability, *i.e.*, approximately how much money the debtor has been earning or losing during current and relevant recent fiscal periods;

b. what the reasonably approximate ranges of projected cash receipts and case disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of order for relief) for the debtor appear likely to be over a reasonable period in the future;

c. how approximate actual cash receipts and disbursements compare with results from prior reports;

d. whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not what the failures are, and how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and

e. such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.

Recommendation: That the Judicial Conference take no position on the merits of this recommendation, but urge Congress, if it enacts legislation on the subject of small business cases under chapter 11 of the Bankruptcy Code, to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077, for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code.

Rationale for Rules Committee Recommendation

Recommendation 2.5.3 is part of a series on the subject of small business bankruptcy cases. Amendments to the Federal Rules of Bankruptcy Procedure would be triggered only if legislation is enacted as suggested by the Commission in other recommendations. Although a majority of districts already require regular financial reporting similar to that recommended, the Commission noted the lack of any express, national requirement in either the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Current law assigns to the United States trustee program administered by the Department of Justice the responsibility for supervising the administration of estates in bankruptcy cases. 28 U.S.C. § 586. Regional United States trustees perform this function in all but six federal judicial districts; in the six districts of Alabama and North Carolina, bankruptcy administrators appointed by the circuit councils supervise the administration of bankruptcy estates. Accordingly, it might be more appropriate to assign to the Executive Office for United States Trustees the development of uniform reporting requirements for small business debtors in chapter 11.

Chapter 4: Taxation and the Bankruptcy Code

Recommendation 4.2.3

The Commission should submit to the Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") a recommendation that the Federal Rules of Bankruptcy Procedure require that notices demanding the benefits of rapid examination under 11 U.S.C. § 505(b) be sent to the office specifically designated by the applicable taxing authority for such purpose, in any reasonable manner prescribed by such taxing authority.

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Recommendation: That the Judicial Conference express general support for the principle of facilitating adequate and effective notice in bankruptcy cases to governmental units and note that proposed amendments to the Federal Rules of Bankruptcy Procedure that would provide better notice to all federal and state governmental units have been published for comment.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules, at its March 1998, meeting approved preliminary draft amendments to the bankruptcy rules that would require the clerk of the bankruptcy court to maintain a register of mailing addresses for federal and state governmental units. The mailing address for any particular agency would be provided by the agency and use of that address would be conclusively presumed to constitute effective notice on the agency. The advisory committee has forwarded the proposed amendments to the Committee on Rules of Practice and Procedure ("Standing Committee") with a request that they be published for comment. If ultimately prescribed by the Supreme Court and not blocked or altered by Congress, amendments to the bankruptcy rules implementing this recommendation would become effective December 1, 2000.

The advisory committee has been working for several years, independently of the work of the Commission, on proposals to improve notice in bankruptcy cases to all governmental units. Preliminary draft amendments to the bankruptcy rules designed to accomplish that purpose have been forwarded to the Standing Committee with a request that they be published for comment. The proposed amendments will have a much broader effect than would have been accomplished by addressing only this recommendation.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 1006, 1007, 1014, 1017, 2001, 2002, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 4003, 4004, 5003, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034, and to Official Bankruptcy Forms 1 and 7 with a recommendation

that they be published for public comment. Many of these involve proposals to change motion practice and litigation in bankruptcy court.

At the request of the advisory committee, the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks, and other participants in the bankruptcy system to determine their satisfaction with the Federal Rules of Bankruptcy Procedure. The survey results indicated general satisfaction with the rules, but identified motion practice and litigation as areas of significant dissatisfaction. In particular, the lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these disputes were major criticisms expressed often in the survey.

The advisory committee devoted more than two years: (1) studying the rules relating to motion practice and litigation in bankruptcy court; and (2) formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce substantially the number of local rules.

Several of the proposals amend rules that are now being considered for approval and submission to the Judicial Conference. The rules committees often defer action on a particular proposed amendment if changes to other parts of the same rule are also under consideration. But the advisory committee recommended that the submission of the amendments to the Conference not be delayed until action on the proposed amendments submitted for public comment was completed, because the latter set of proposals represents an integrated single "litigation package" that should stand alone. The advisory committee concluded that the two sets of proposed

amendments should proceed on separate tracks. Your Committee agreed with the advisory committee's recommendations.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 6(b) and Form 2. The advisory committee concluded that the proposed changes were "technical or conforming," under paragraph 6(b) of the "Procedures for the Conduct of Business by the Judicial Conference's Committees on Rules of Practice and Procedure" and recommended that they be submitted directly to the Judicial Conference without being published for comment.

The proposed amendment to Rule 6(b) (Time) would delete the reference to Rule 74(a), which was abrogated in 1997.

Form 2 (Allegation of Jurisdiction) would be amended to delete the reference to a specific monetary amount in the allegation of diversity jurisdiction. The present form is outdated and refers to "fifty thousand dollars." Instead of substituting seventy-five thousand dollars, which is the present adjusted amount, the proposed amendment references the underlying statute that sets the minimum dollar value for diversity jurisdiction. Under the proposed changes, the form would no longer need to be revised to account for future statutory changes in the jurisdictional amount.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and to Form 2 are in Appendix B together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rule 6(b) and Form 2 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Civil Rules 4, 5, 12, 14, 26, 30, 34, and 37 and to Supplemental Admiralty Rules B, C, and E with a recommendation that they be published for comment. Most of the amendments involve proposals to amend the discovery rules.

The advisory committee embarked on its study of discovery prompted by the same concerns regarding cost and delay in litigation that underlay the enactment of the "Civil Justice Reform Act." To more fully understand the issues, the advisory committee attended a conference on the bench and bar's experiences with the Civil Justice Reform Act at the University of Alabama, and it later sponsored a conference specifically on discovery issues at the Boston College School of Law.

In addition to the practical experience related at the conferences, the advisory committee requested RAND's Institute on Civil Justice to refine and expand its CJRA findings on discovery issues and asked the Federal Judicial Center to survey the bar on discovery. It also received input from numerous national bar associations, including the American Bar Association (ABA), the American College of Trial Lawyers, and the Association of Trial Lawyers of America. The committee found that discovery is working effectively and efficiently in "routine" cases, which represent a large majority of all cases. In cases where discovery was actively used, however, it was frequently thought to be unnecessarily expensive and burdensome. Plaintiffs' lawyers seemed most concerned with the length, number, and cost of depositions, and defendants' lawyers seemed most concerned by the number of documents required by document production and the cost of selecting and producing them. In districts where mandatory disclosure is being

practiced, it is generally liked, and the users believe that it lessens the cost of litigation. But there was an overwhelming and emphatic support for national uniformity of the disclosure rules.

The proposed rule amendments are not intended to reduce the breadth of discovery, nor are they intended to undermine the policy of full and fair disclosure in litigation. When the proposed amendments narrow the scope of attorney-managed discovery, the original scope of discovery has been preserved under court supervision. Under the proposed changes, for example, attorney-managed discovery is no longer allowed for all matters related to the "subject-matter" of the litigation, but rather, it must be related to the parties' "claims or defenses." Judges would retain the discretion to permit discovery "of any information relevant to the subject matter involved in the action."

Some of the highlights of the proposed discovery rule amendments include:

- The initial disclosure requirement would be limited to information supporting the disclosing party's position. Moreover, specified "non-complex" categories of cases (e.g., prisoner cases, student loan cases, etc.) that do not need disclosure would be exempted, while complex cases could be exempted from disclosure by the court on a party's motion. National uniformity would be established.
- The scope of discovery defined by Rule 26(b)(1) would be retained, but divided to distinguish between attorney-managed and court-managed discovery. Information relating to the "subject-matter involved in the action" would be subject to discovery but only on court order for good cause.
- A deposition would be presumptively limited to "one day of seven hours." The time could be extended by stipulation of the parties and deponent or by court order.

- Rule 34(b) would be amended to make explicit the power to allow a party to pursue a discovery request that would otherwise violate the limits of Rule 26(b)(2) if the requesting party pays part or all of the reasonable costs of responding.
- Discovery and disclosure materials must not be filed until they are used in the proceeding or the court orders filing.

In addition to the discovery rules, the advisory committee proposed for publication amendments to Rules 4 and 12 to provide for service on the United States and 60 days to answer in an action brought against a federal officer or employee in an individual capacity and to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims, with conforming amendments to Civil Rule 14.

The Committee voted to circulate the proposed amendments together with proposed amendments to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims and conforming amendments to Civil Rule 14 to the bench and bar for comment.

Working Group on Mass Torts

The Chief Justice authorized the establishment of a Mass Torts Working Group that is to study mass tort litigation and report early next year. The report will include three parts. The first will describe mass-tort litigation and identify any problems that deserve legislative and rulemaking attention. The second will identify the legislative and rulemaking approaches that might be taken to reduce these problems. And the third will recommend a protocol for proceeding forward. The Working Group has held two conferences with small groups of highly experienced judges, lawyers, and academics. A third and final conference is scheduled for this fall.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 7, 11, 24, 31, 32, 38, 54, and a new 32.2 together with Committee Notes explaining their purpose and intent. All except proposed new Rule 32.2, and the conforming amendments to Rules 7, 31, 32, and 38 are recommended for approval and transmission to the Supreme Court. The proposed amendments had been circulated to the bench and bar for comment in August 1997. A public hearing was held in Washington, D.C.

Rule 6 (Grand Jury Procedures)

Rule 6 (The Grand Jury) would be amended in subdivision (d) to allow the presence of an interpreter who is necessary to assist a juror who is hearing or speech impaired in taking part in the grand jury deliberations and voting. The scope of the proposal published for public comment was broader and would have authorized other types of interpreters, including language interpreters. On further consideration, the amendment was limited to permit only interpreters who assist hearing or speech impaired jurors.

The proposed change to subdivision (f) of Rule 6 would permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. A court might still require the presence of all the jurors if it had inquiries, for example, about the indictment.

Rule 11 (Change of Plea — Waiver of Appeal)

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee initially considered the proposed amendment at the request of the Committee on Criminal Law, which observed that prosecutors around the country were increasingly incorporating waivers of appeal rights in plea agreements. Although several courts of appeals have upheld these waivers against constitutional or other challenges, the rules provide no guidance to the sentencing judges on accepting them.

The proposed amendment ensures that a complete record exists regarding the waiver provision, and that the defendant voluntarily and knowingly agreed to it. The advisory committee heard testimony from witnesses at the public hearings objecting to the proposed amendments, because the committee's action might signal tacit "official" approval of these waiver provisions. In recognition of the growing practice of using these waiver provisions and the string of appellate decisions uniformly upholding them, the advisory committee believed that the amendment would be helpful to a sentencing judge who decides to accept such a plea agreement. The Note to the amendment, however, explicitly states that the "Committee takes no position on the underlying validity of such waivers."

The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors Not Discharged)

Rule 24 (Alternate Jurors) would be amended to permit a court to retain alternate jurors during deliberations if any regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations and a new trial would otherwise be required. If an alternate juror replaces a juror after deliberations have begun, the jurors must be instructed that they must begin their deliberations anew.

Rule 30 (Jury Instructions)

The proposed amendments to Rule 30 (Instructions), which would have permitted a court to require or permit the parties to file any requests for jury instructions before trial, were withdrawn. The advisory committee deferred consideration to coordinate further action on the proposed amendments with the Advisory Committee on Civil Rules, which is considering similar amendments to Civil Rule 51.

Rule 54 Technical Amendment

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

Rule 32.2 (Forfeiture Procedures)

The Committee voted not to approve new Rule 32.2. The proposed new Rule 32.2 (Forfeiture Procedures) would have set up a bifurcated post-guilt adjudication forfeiture procedure, consolidating several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). Under the proposal, a judge as part of the sentencing proceeding would enter an order forfeiting a defendant's ownership or

other interest in property that was subject to forfeiture. The defendant would no longer be entitled to a jury determination regarding the forfeiture.

In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have a jury decide any part of the forfeiture. Nonetheless, several committee members observed that *Libretti* may not reach all aspects of a defendant's right to a jury in a forfeiture proceeding, leaving some of the issues open to debate on policy grounds. In particular, they were uncertain that the elimination of a defendant's right to have a jury determine the nexus between a defendant's ownership or other property interests in property subject to forfeiture and the statutory requirements for forfeiture was conclusively resolved in *Libretti*. Several members expressed the view that although *Libretti* may not recognize a Sixth Amendment entitlement to a jury trial in these cases, a defendant should be provided a jury trial as a matter of policy. Other members voiced concerns regarding specific features of the proposed forfeiture procedures. In light of the Committee's vote not to approve the new rule, the chair of the advisory committee withdrew the proposed amendments to Rules 7, 31, 32, and 38, which were all grounded in the rejected new Rule 32.2.

The Committee concurred with the advisory committee's recommendations regarding proposed amendments to Rules 6, 11, 24, and 54. The proposed amendments, as recommended by your Committee, are in Appendix C together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 6, 11, 24, and 54 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

The advisory committee is working with the Standing Rules Committee Style Subcommittee to comprehensively revise the Federal Rules of Criminal Procedure. As a general policy matter, the advisory committee decided that unless the adoption of a particular amendment was urgent it should be deferred pending completion of the style project.

The advisory committee considered and approved proposed amendments to Criminal Rule 5(c) consistent with instructions of the Judicial Conference and proposed amendments to 18 U.S.C. § 3060, which were approved in concept by the Magistrate Judges Committee. The advisory committee also evaluated the need for the amendment to Rule 5(c) and concluded that it was not urgent. After notifying the Magistrate Judges Committee, which had no objection, the advisory committee voted to defer submission of the proposed Rule 5(c) amendment until the completion of the style project.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules proposed amendments to Evidence Rules 701, 702, and 703 and recommended that they be published for public comment.

Under the proposed amendments to Rule 701 (Opinion Testimony by Lay Witnesses), a witness' testimony must be scrutinized under the Evidence Rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the trier of fact. The proposed amendment is intended to eliminate the risk that the reliability factors contained in Rule 702 will be evaded through the simple expedient of proffering an expert as a lay witness. Any part of a witness' testimony that is based on scientific, technical, or other specialized knowledge would be governed explicitly by the standards of Rule 702 and the

corresponding disclosure requirements of the Civil and Criminal Rules. The representatives of the Department of Justice were particularly concerned with the disclosure requirements regarding law enforcement officers who were called to testify as lay witnesses, but whose testimony might also include expert testimony. The advisory committee carefully considered the department's concerns, but decided that the need to ensure the reliability of this type of testimony outweighed any disadvantages in disclosing a potential expert prior to trial.

Rule 702 (Testimony by Experts) would be amended in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). District courts and courts of appeals have reached different conclusions regarding *Daubert's* meaning and application in particular cases. The proposed amendments would affirm the trial court's role as gatekeeper and provide some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. In particular, the amendments require a showing of reliable methodology and sufficient basis, and that the expert's methodology must be applied properly to the facts of the case. The amendment provides that expert testimony of all types — not only the scientific testimony specifically addressed in *Daubert* — presents questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.

The proposed amendments to Rule 703 (Bases of Opinion Testimony by Experts) would emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference — and not the information — that is admitted as evidence. The underlying inadmissible information may be disclosed to the jury only if the trial court finds that the probative value of the information substantially outweighs its prejudicial effect. Under these circumstances, a limiting instruction must be given on request, which informs the jury that the underlying information can not be used for substantive purposes.

The Committee voted to circulate the proposed amendments for comment, along with proposed amendments to Rules 103, 404, 803(6), and 902 — which had been approved for publication at the Committee's January 1998 meeting.

Informational Items

Several bills were introduced in Congress that create evidentiary privileges, e.g., parent-child and taxpayer-preparer. The Judicial Conference has a longstanding policy opposing legislation that amends a federal rule of procedure or evidence outside the Rules Enabling Act rulemaking process. In accordance with that policy, the rules committees have opposed bills that directly create new privileges in the rules.

Some of the bills, however, create new privileges by statute. Ideally, all privileges should be contained in one place, preferably the Federal Rules of Evidence. But there is a general reluctance to authorize a specific privilege in the rules, because Rule 501 envisions a common-law development of privileges — the rules do not include any specific privilege. Moreover, Congress rejected a comprehensive treatment of privileges in the Evidence Rules in 1976, amending the Rules Enabling Act to require an Act of Congress to modify or create an evidentiary privilege. Most importantly, Rule 501 itself recognizes that privileges can be established by Congress directly by statute and not necessarily through the rulemaking process. As a result, the advisory committee has abstained from taking a position on legislation that codifies a privilege by statute.

RULES GOVERNING ATTORNEY CONDUCT

An ad hoc subcommittee consisting of members from each advisory committee was established to study proposed options involving rules governing attorney conduct. The Committee was advised of the current status of meetings between the Department of Justice and

the Conference of Chief Justices on contacting represented parties. In addition, the Committee was advised of the status of the ABA's Ethics 2000 project, which is undertaking a comprehensive revision of the ABA Model Rules.

SHORTENING THE RULEMAKING PROCESS

At the request of the Executive Committee, the advisory rules committees considered ways to shorten the rulemaking process. The duration of the rulemaking process is long (about three years) primarily because six institutional bodies are asked to separately review and approve proposed rule amendments, including the advisory rules committees, public, Standing Rules Committee, Judicial Conference, Supreme Court, and Congress.

The Committee considered various options that shortened the process by: (1) limiting or eliminating the current role of bodies responsible for reviewing and approving rule amendments, (2) reducing the time allocated for review, (3) increasing the frequency of publications, or (4) altering the effective date of rule changes. Each alternative raised serious policy issues. No consensus was readily reached, and the matter was deferred for further study.

REPORT TO THE CHIEF JUSTICE

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

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix E, which shows the status of the proposed amendments to the rules.

Respectfully submitted,

Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	James A. Parker
Geoffrey C. Hazard, Jr.	Morey L. Sear
Eric H. Holder, Jr.	Sol Schreiber
Phyllis A. Kravitch	A. Wallace Tashima
Gene W. Lafitte	E. Norman Veasey
Patrick F. McCartan	William R. Wilson, Jr.

APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix C —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix D —	Report to the Chief Justice on Proposed Rules Amendments Generating Controversy
Appendix E —	Chart Summarizing Status of Rules Amendments

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

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BANKRUPTCY RULES

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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

TO: **Honorable Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

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

DATE: **May 11, 1998**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

Introduction

The Advisory Committee on Bankruptcy Rules met on March 26-27, 1998, at the Winrock International Conference Center in Morrilton, Arkansas. The Advisory Committee considered public comments regarding proposed amendments to 16 Bankruptcy Rules that were published in August 1997, and, after making certain revisions, approved the proposed amendments for presentation to the Standing Committee for final approval and transmission to the Judicial Conference.

* * * * *

The Standing Committee has requested that the Advisory Committee consider certain questions relating to attorney conduct, local rules, electronic submission of public comments, and the rules promulgation timetable. The Advisory Committee's responses regarding these issues are discussed as "Information Items" in this report.

I. Action Items

A. Proposed Amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014, Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

The Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 1997.

The public hearing scheduled for January 30, 1998, was canceled for lack of witnesses, but the Advisory Committee received letters from 18 commentators. One commentator, Jack E. Horsley, Esq., of Illinois, commented generally that he favors all the proposed amendments. The other 17 commentators offered specific comments or suggestions relating to one or more of the published amendments. These letters are summarized on a rule-by-rule basis following the text of each rule in the GAP Report (see pages 6-37 below). These comments and recommendations were reviewed at the Advisory Committee meeting in Arkansas and, as a result, several revisions were made to the published draft. These post-publication revisions are identified in the GAP Report.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1017 is amended to specify the parties entitled to notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. Currently, all creditors are entitled to notice of a hearing on the motion if it is a chapter 7 case. To avoid the expense of sending notice to all creditors, the proposed amendments provide that the debtor, the trustee, and any other entities specified by the court, are the only parties entitled to notice. The rule is amended further to provide that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 is governed by Rule 9014. Other amendments are stylistic or designed to delete redundant provisions that are covered by other rules.

(b) Rule 1019 is amended (1) to clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires; (2) to provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim under Rule 3002; (3) to provide that the court may fix a time for filing preconversion administrative expense claims; and (4) to conform the rule to the 1994 amendment to § 502(b)(9) and to the 1996 amendment to Rule 3002(c)(1) regarding the 180-day period for filing a claim of a governmental unit. Other amendments are stylistic.

(c) Rule 2002(a)(4) is amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists,

schedules, and statements, must be sent to all creditors. This amendment conforms to the proposed amendments to Rule 1017 which requires that the notice be sent only to certain parties. This subdivision is amended further to delete the requirement that notice of a hearing on dismissal of a case based on the debtor's failure to pay the filing fee must be sent to all creditors. Rule 2002(f) is amended to provide for notice of the suspension of proceedings under § 305 of the Code.

(d) Rule 2003(d) is amended to require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. Also, the amended rule gives a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute. These amendments and other stylistic revisions are designed to conform to the 1997 amendments to Rule 2007.1(b)(3) on the election of a trustee in a chapter 11 case.

(e) Rule 3020(e) is added to automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

(f) Rule 3021 is amended to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

(g) Rule 4001(a)(3) is added to automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

(h) Rule 4004(a) is amended to clarify that the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to discharge must be filed before the time has expired. Other amendments are stylistic.

(i) Rule 4007 is amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. This rule is amended further to clarify that a motion for an extension of time for filing a complaint must be filed before the time has expired. Other amendments are stylistic.

(j) Rule 6004(g) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

(k) Rule 6006(d) is added to automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) so that parties will have sufficient time to request a stay pending appeal.

(l) Rule 7001 is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan. Other amendments are stylistic.

(m) Rule 7004(e) is amended to provide that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

(n) Rule 7062 is amended to delete the additional exceptions to Rule 62(a) F.R. Civ. P. The deletion of these exceptions — which are orders issued in contested matters rather than adversary proceedings — is consistent with the amendment to Rule 9014 that renders Rule 7062 inapplicable to contested matters. For proposed amendments that provide a new automatic ten-day stay of certain orders, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

(o) Rule 9006(b)(2) is amended to conform to the abrogation of Rule 1017(b)(3).

(p) Rule 9014 is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter. Rule 7062, which provides that Rule 62 F.R.Civ.P. is applicable in adversary proceedings, is not appropriate for most orders granting or denying motions governed by Rule 9014. For proposed amendments that provide a new automatic ten-day stay of certain orders so that parties will have sufficient time to obtain a stay pending appeal, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

3. *Text of Proposed Amendments Presented to the Standing Committee for Approval and Transmission to the Judicial Conference, GAP Report, and Summaries of Public Comments on Published Draft:*

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1017. Dismissal or Conversion of Case; Suspension

(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, ~~or~~ for want of prosecution or other cause, or by consent of the parties, before ~~prior to~~ a hearing on notice as provided in Rule 2002. For ~~such~~ the purpose of the notice, the debtor shall file a list of ~~all~~ creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it ~~the preparing and filing by the debtor or other entity~~.

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

(b) DISMISSAL FOR FAILURE TO PAY FILING FEE.

(1) ~~For failure to pay any installment of the filing fee,~~ If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case.

(2) If the case is dismissed or ~~the case~~ closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

~~(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 2002.~~

(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.

~~(c)~~ (d) SUSPENSION. The court shall not dismiss a case or suspend proceedings under § 305 before ~~A case shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to~~ a hearing on notice as provided in Rule 2002(a).

~~(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is~~

~~governed by Rule 9014. Conversion or dismissal pursuant to §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of applying §348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.~~

(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an ~~An~~ individual debtor's case ~~may be dismissed~~ for substantial abuse ~~pursuant to~~ under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the

debtor, the trustee, the United States trustee, and ~~such~~ any other ~~parties in interest~~ entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee ~~shall be filed not later than~~ only within 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a), unless, before the ~~such~~ time has expired, the court for cause extends the time for filing the motion. ~~The motion shall advise the debtor of~~ The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice ~~thereof~~ of the hearing shall be served on the debtor ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~pursuant~~

~~to~~ under § 341(a). The notice shall ~~advise the debtor of~~ set forth all matters to be considered by the court at the hearing.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).

(2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§1208(a) or 1307(a). The filing date of the notice becomes the date of the

conversion order for the purposes of applying §348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (b)(3), which provides that notice of dismissal for failure to pay the filing fee shall be sent to all creditors within 30 days after the dismissal, is deleted as unnecessary. Rule 2002(f) provides for notice to creditors of the dismissal of a case.

Rule 2002(a) and this rule currently require notice to all creditors of a hearing on dismissal of a voluntary chapter 7 case for the debtor's failure to file a list of creditors, schedules, and statement of financial affairs within the time provided in § 707(a)(3) of the Code. A new subdivision (c) is added to provide that the United States trustee, who is the only entity with standing to file a motion to dismiss under § 707(a)(3) or § 1307(c)(9), is required to serve the motion on only the debtor, the trustee, and any other entities as the court directs. This amendment, and the amendment to Rule 2002, will have the effect of avoiding the expense of sending notices of the motion to all creditors in a chapter 7 case.

New subdivision (f) is the same as current subdivision (d), except that it provides that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 under § 707(b) is governed by Rule 9014.

Other amendments to this rule are stylistic or for clarification.

Public Comment on Rule 1017:

(1) Prof. Michael Anthony Sabino of St. John's University College of Business Administration, New York, opposes the amendments to Rule 1017(c). He believes that creditors should receive notice of a motion to dismiss the case for failure to file lists, schedules, or statements because creditors have knowledge regarding the debtor's intentions, good or bad faith, and reasons for the failure to file these documents, and they should be able to furnish the court with this information.

(2) New Jersey Bar Association, Bankruptcy Law Section, opposes the amendments to Rule 1017(c) because it believes that the amendment eliminates notice to creditors of the dismissal of the case based on the failure to file lists, schedules, and statements, and it is important for creditors to have this information so that they do not unnecessarily spend funds to move for other relief in the case.

(3) Wade H. Logan, III, Esq., of South Carolina, commenting as a member of the American College of Trial Lawyers, is in favor of the proposed amendments in that they provide "greater specificity in setting forth the identity of the parties entitled to notice of a motion to dismiss" for failing to file the list of creditors, schedules, or statement of financial affairs. But he suggests that notice also be given to any party that files a notice of appearance in the case.

(4) Litigation Committee, Bar Association of the District of Columbia, commented that the amendment that eliminates the need to give all creditors notice of a motion to dismiss for failure to file schedules is appropriate and will save unnecessary costs. But they disagree with the deletion of Rule 1017(b)(3), which requires the clerk to give creditors notice of an order dismissing the case on this ground within 30 days after the dismissal. Rule 2002(f), which

requires that notice of dismissal be sent to creditors regardless of the basis for dismissal, does not have a time limit.

(5) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rules 1017(c).

(6) State Bar of California, Business Law Section, suggests that the list of entities specified in Rule 1017(c) (i.e., entities entitled to notice of a motion to dismiss a case for failure to file a list of creditors, schedules, or statement of financial affairs) should be expanded to include entities that have filed and served a request for special notice in the case. The letter also states that it is important that creditors receive notice that the case has been dismissed [Reporter's note: Rule 2002(f) requires that the clerk send creditors notice of the dismissal].

Gap Report on Rule 1017. No changes since publication, except for stylistic changes in Rule 1017(e) and (f).

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) FILING OF LISTS, INVENTORIES, SCHEDULES, STATEMENTS.

* * * * *

(B) If a statement of intention is required, it ~~The statement of intention, if required,~~ shall be filed within 30 days ~~following~~ after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an ~~An~~ extension of time ~~may be granted~~ for cause only on written motion filed, or oral request made during a hearing, ~~motion made~~ before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

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(6) ~~FILING OF~~ POSTPETITION CLAIMS; PRECONVERSION ADMINISTRATIVE EXPENSES; NOTICE. A request for payment of an

administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the court. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within the later of a time fixed by the court or 180 days after the date of the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)-(d) and 3002. ~~On~~ Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d). ~~notice to those entities, including the United States,~~

~~any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)-(d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(c) and 365(d) of the Code.~~

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COMMITTEE NOTE

Paragraph (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Subdivision (6) is amended to provide that a holder of an administrative expense claim incurred after the commencement of the case, but before conversion to chapter 7, is required to file a request for payment under § 503(a) within a time fixed by the court, rather than a proof of claim under § 501 and Rules 3001(a)-(d) and 3002. The 180-day period applicable to governmental units is intended to conform to § 502(b)(9) of the Code and Rule 3002(c)(1). It is unnecessary for the court to fix a time for filing requests for payment if it appears that there are not sufficient assets to pay preconversion administrative expenses. If a time for filing a request for payment of an administrative expense is fixed by the court, it may be enlarged as provided in Rule 9006(b). If an administrative expense claimant fails

to timely file the request, it may be tardily filed under § 503(a) if permitted by the court for cause.

The final sentence of Rule 1019(6) is deleted because it is unnecessary in view of the other amendments to this paragraph. If a party has entered into a postpetition contract or lease with the trustee or debtor that constitutes an administrative expense, a timely request for payment must be filed in accordance with this paragraph and § 503(b) of the Code. The time for filing a proof of claim in connection with the rejection of any other executory contract or unexpired lease is governed by Rule 3002(c)(4).

The phrase "including the United States, any state, or any subdivision thereof" is deleted as unnecessary. Other amendments to this rule are stylistic.

Public Comment on Rule 1019.

(1) Association of the Bar of the District of Columbia, Litigation Committee, supports the amendment to Rule 1019(1)(b) in that it clarifies that a request to extend the time to file a statement of intention may be made orally at a hearing.

(2) James Gadsden, Esq., of New York, opposes the proposed amendment to Rule 1019(6) (regarding requests for payment of preconversion administrative expenses) and suggests that the "present procedure of permitting the filing of a proof of claim should be continued, at least for entities making claims for ordinary course of business expenses." He comments that requiring a claimant to file a request for payment places a substantial additional burden on the claimant because the claimant will have to prepare a more elaborate pleading and file a motion requesting payment. Also, parties are unlikely at that time to be able to determine the likelihood of a

distribution with respect to preconversion administrative expense claims.

(3) Litigation Committee, Bar Association of the District of Columbia, opposes the amendment to Rule 1019(6). First, holders of small claims will not hire lawyers to file motions. Second, court dockets will be burdened by large numbers of motions seeking allowance of claims. Forcing claimants to file motions to establish priority is contrary to current practice, and is an "inefficient, burdensome and costly procedure upon both the Court and the creditors."

(4) Karen Cordry, Esq., of the District of Columbia, writing on her own behalf and not on behalf of National Association of Attorneys General (to which she is Bankruptcy Counsel), commented on the amendments to Rule 1019(6): (1) the committee note should alert practitioners that the deadline for filing preconversion administrative expense claims is new and did not exist before; (2) the amendment will require administrative expense claimants to file requests for payment even in no-asset cases; (3) why is there a need to have a bar date for preconversion administrative expense claims separate from a bar date for other administrative expenses set at the end of the case. "That said, I agree that it would be appropriate to provide a minimum period for filing of any expense request that should not be shorter than the time periods allotted deadline for filing a claim. The most appropriate deadline for such claims would be calculated from the confirmation date; however, it could be left up to the court to set an earlier date in special circumstances."

(5) New Jersey Bar Association, Bankruptcy Law Section, suggests that the proposed amendments to Rule 1019(6) be modified to provide that the 90-day deadline for filing administrative expense claims after conversion of the case shall apply only if the

administrative expense claimant received prior notice of the date set for the meeting of creditors.

Gap Report on Rule 1019. The proposed amendments to Rule 1019(6) were changed to delete the deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases, and to provide instead that the court may fix such a deadline. The committee note was revised to clarify that it is not necessary for the court to fix a deadline where there are insufficient assets to pay preconversion administrative expenses.

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

(a) TWENTY–DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code;

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(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or ~~and~~ a chapter 12 family farmer

debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) ~~of the Code~~ or is on dismissal of the case for failure to pay the filing fee~~, or the conversion of the case to another chapter~~;

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305;

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COMMITTEE NOTE

Paragraph (a)(4) is amended to conform to the amendments to Rule 1017. If the United States trustee files a motion to dismiss a case for the debtor's failure to file the list of creditors, schedules, or the statement of financial affairs within the time specified in § 707(a)(3), the amendments to this rule and to Rule 1017 eliminate the requirement that all creditors receive notice of the hearing.

Paragraph (a)(4) is amended further to conform to Rule 1017(b), which requires that notice of the hearing on dismissal of a case for failure to pay the filing fee be served on only the debtor and the trustee.

Paragraph (f)(2) is amended to provide for notice of the suspension of proceedings under § 305.

Public Comment on Rule 2002. The proposed amendments to Rule 2002(a)(4) and Rule 1017(c) would eliminate notice to all creditors of a motion to dismiss for failure to file lists, schedules, or statements. Six letters were received commenting on these amendments. See "Public Comment to Rule 1017" above.

Gap Report on Rule 2002. No changes since publication.

Rule 2003. Meeting of Creditors or Equity Security Holders

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(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE ~~TO THE COURT~~.

(1) *Report of Undisputed Election.* In a chapter 7 case, if the election of a trustee or a member of a creditors' committee is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed.

(2) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. ~~The presiding officer shall transmit to the~~

~~court the name and address of any person elected trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed no later than 10 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

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COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a

trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are designed to conform to the style of Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Public Comment on Rule 2003.

(1) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rule 2003(d).

(2) Association of the Bar of the District of Columbia, Litigation Committee, supports the amendment as providing "a more functional procedure to resolve disputed elections."

Gap Report on Rule 2003. No changes since publication.

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

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(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (e) is added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot. Unless the court orders otherwise, any transfer of assets, issuance of securities, and cash distributions provided for in the plan may not be made before the expiration of the 10-day period. The stay of the confirmation order under subdivision (e) does not affect the time for filing a notice of appeal from the confirmation order in accordance with Rule 8002.

The court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately. Alternatively, the court may order that the stay under Rule 3020(e) is for a fixed period less than 10 days.

Public Comment on Rule 3020.

(1) George C. Webster II, Esq., of California, wrote in support of this amendment. It will add a 10-day stay to Rule 3020 that will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush...."

(2) William E. Shmidheiser, III, Esq., of Virginia, opposes the addition of the 10-day stay to Rule 3020. It would represent a fundamental shift in the way business is conducted in bankruptcy cases, slowing down the already slow pace of business and probably killing many otherwise barely-viable deals.

(3) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), wrote that the bankruptcy judges in Oregon oppose the addition of the 10-

day stay in Rule 3020. This area is often time sensitive. Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order. Acknowledging that Rule 7062 is ambiguous with respect to its application to orders in contested matters, Judge Higdon suggests that this problem can be cured simply by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters.

(4) Wade H. Logan, Esq., of South Carolina, opposes the addition of the 10-day stay in Rule 3020 to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(5) Litigation Committee, Bar Association of the District of Columbia, supports the 10-day stay added to the rule. These matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Since the court would have discretion to impose or modify the stay, parties should not be prejudiced under the amended rules.

(6) New Jersey Bar Association, Bankruptcy Law Section, suggests that the new 10-day stay be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. Competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

Gap Report on Rule 3020. No changes since publication.

Rule 3021. Distribution Under Plan

Except as provided in Rule 3020(e), ~~After confirmation of a plan~~ after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims ~~pursuant to~~ under Rule 3003(c)(5) that have been allowed. For ~~the purpose~~ purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This amendment is to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

Public Comment on Rule 3021. This amendment merely conforms to the amendments to Rule 3020. See "Public Comment to Rule 3020."

Gap Report on Rule 3021. No changes since publication.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

* * * * *

(3) STAY OF ORDER. An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

* * * * *

COMMITTEE NOTE

Paragraph (a)(3) is added to provide sufficient time for a party to request a stay pending appeal of an order granting relief from an

automatic stay before the order is enforced or implemented. The stay under paragraph (a)(3) is not applicable to orders granted ex parte in accordance with Rule 4001(a)(2).

The stay of the order does not affect the time for filing a notice of appeal in accordance with Rule 8002. While the enforcement and implementation of an order granting relief from the automatic stay is temporarily stayed under paragraph (a)(3), the automatic stay continues to protect the debtor, and the moving party may not foreclose on collateral or take any other steps that would violate the automatic stay.

The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay. Alternatively, the court may order that the stay under Rule 4001(a)(3) is for a fixed period less than 10 days.

Public Comment on Rule 4001.

(1) George C. Webster II, Esq., of California, wrote in support of this amendment. It will add a 10-day stay that will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush...."

(2) William E. Shmidheiser, III, Esq., of Virginia, opposes the addition of the 10-day stay. It would represent a fundamental shift in the way business is conducted in bankruptcy cases, slowing down the already slow pace of business and probably killing many otherwise barely-viable deals.

(3) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), wrote that the bankruptcy judges in Oregon oppose the addition of the 10-

day stay in Rule 4001(a). This area is often time sensitive. Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order.

(4) Wade H. Logan, Esq., of South Carolina, opposes the addition of the 10-day stay in Rule 4001(a) to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(5) Litigation Committee, Bar Association of the District of Columbia, supports the 10-day stay added to the rule. These matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Since the court would have discretion to impose or modify the stay, parties should not be prejudiced under the amended rules.

(6) New Jersey Bar Association, Bankruptcy Law Section, suggests that the new 10-day stay be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. Competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

(7) Hon. David N. Naugle, Bankruptcy Judge (C.D. Cal.), wrote that the proposed 10-day stay of orders granting relief from the automatic

stay in foreclosure and unlawful detainers will vastly increase the number of cases filed and the misuse of the automatic stay.

(8) Hon. Leslie Tchaikovsky, Bankruptcy Judge (N.D. Cal.), opposes the proposed amendment to Rule 4001(a). "It would prejudice many to benefit only a few." In most cases, "each day of delay represents a quantifiable dollar loss to the creditor." Debtors do not often appeal such orders; "more often, they file a new bankruptcy case, thereby invoking a new automatic stay." When a debtor wishes to appeal, he or she may request a stay pending appeal.

(9) Arthur L. Rolston, Esq., of California, suggests that the new 10-day stays that will be added to Rules 4001(a) apply to matters that are actually contested. If the matter is uncontested, the order should be effective immediately unless the court orders otherwise.

(10) Eugene E. Derryberry, Esq., of Virginia, opposes the proposed amendment to Rule 4001(a). Creditors file relief from stay motions only when the debtor is in serious default, and usually a consent order is entered without a hearing. In many cases in which an agreed order cannot be obtained, "the debtor has been engaged in delaying tactics such as serial filings without ever proposing a Chapter 13 plan or making any payments...." The proposed amendment "grants an unreasonable delay to debtors who do not need or deserve such protection." He lists factors that the Committee should consider: (1) competent counsel for the debtor could obtain a stay pending appeal when appropriate; (2) the proposed rule is "in effect *ex parte*" with none of the showings usually made in considering stays; (3) the proposed rule "unfairly tilts the playing field against secured creditors" in favor of "bad faith filers"; (4) the imposition of sanctions for frivolous appeals "is an illusory deterrent seldom obtainable"; and (5) "the stay of a consent or agreed order is manifestly inappropriate."

(11) Prof. Anthony Michael Sabino of St. John's University College of Business Administration, New York, opposes the proposed amendment to Rule 4001(a)(3). A mandatory stay would "work exclusively to the significant harm of innocent creditors, would be of no value to the vast majority of debtors who do not appeal, and would be of inconsequential benefit to debtors who do appeal stay relief motions." These new 10-day stays will be a burden overly harmful to the bankruptcy system.

(12) State Bar of California, Federal Courts Committee, opposes the amendment. There is no justification for shifting the post-order burden. "[A]ll the proposed amendments do is to transfer the burden of requesting post-ruling relief from the losing party to the prevailing party. This shift is not wanted, warranted, or desirable."

(13) State Bar of California, Business Law Section, does not oppose the amendment, but commented that the language in proposed Rule 4001(a)(3) "unless the court orders otherwise" could cause confusion, and suggests that imposition of the stay should be "the rule" which should not be changed unless an extremely high standard (i.e., irreparable harm) is met, and urges the Advisory Committee to clarify in the committee notes that, absent exigent circumstances, judges should not have discretion to potentially moot an appeal to "get the deal done." Also, the committee note should state that the court may reduce the ten-day period, but may not extend it (except perhaps for extraordinary cause).

Gap Report on Rule 4001. No changes since publication.

Rule 4004. Grant or Denial of Discharge

(a) TIME FOR FILING COMPLAINT OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). In a chapter 11 reorganization case, ~~such~~ the complaint shall be filed ~~not~~ no later than the first date set for the hearing on confirmation. ~~Not less than 25 days~~ At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney.

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may ~~extend~~ for cause extend the time to file ~~for filing~~ a complaint

objecting to discharge. The motion shall be ~~made~~ filed before ~~such~~ the time has expired.

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COMMITTEE NOTE

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See, e.g., In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Other amendments to this rule are stylistic.

Public Comment on Rule 4004.

(1) William E. Shmidheiser, III, Esq., of Virginia, opposes the proposed amendments providing that the 60-day deadlines in Rules 4004 and 4007 run from the first date scheduled for the meeting of creditors. He suggests that these 60-day periods start from the date

on which the meeting is actually held. Creditors often use the meeting of creditors to weigh whether or not they want to file a complaint under these rules. "Often what appear to be suspicious circumstances turn out to be easily explained or clarified by the debtor" at the meeting, persuading the creditor not to pursue the matter further. The proposed amendment might lead to more complaints for exception to discharge being filed.

(2) Wade H. Logan, III, of South Carolina, commented that amendments to Rules 4004 and 4007 to require a motion for an extension of time to be *filed* before the time expires are "well reasoned," but that they present an excellent opportunity to set forth further guidance on the effect of the expiration of the time before the hearing on the extension motion.

(3) Association of the Bar of the District of Columbia, Litigation Committee, wrote that the amendments to Rules 4004 and 4007 are appropriate and that they "address confusion under the current rules, especially where the initial meeting is not held on the scheduled date."

(4) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rules 4004 and 4007.

(5) State Bar of California, Business Law Section, supports the proposed amendments to Rule 4007(c) and (d).

Gap Report on Rule 4004. No changes since publication.

Rule 4007. Determination of Dischargeability of a Debt

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(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, OR ~~AND~~ CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT ~~CASES~~ CASE; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of ~~any~~ a debt ~~pursuant to~~ under § 523(c) ~~of the Code~~ shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors ~~not~~ no less than 30 ~~days~~ days' notice of the time so fixed in the manner provided in Rule 2002. On motion of ~~any~~ a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

(d) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE ~~CASES~~; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing ~~a time for the filing of~~ the time to file a complaint to determine the dischargeability of any debt ~~pursuant to~~ under § 523(c) and shall give ~~not~~ no less than 30 ~~days~~ days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

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COMMITTEE NOTE

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt under

§ 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See, e.g., In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

The other amendments to this rule are stylistic.

Public Comment on Rule 4007. The proposed amendments to Rules 4004 and 4007 are similar. Five letters were received commenting on the proposed amendments to both of these rules. See "Public Comment on Rule 4004" above.

Gap Report on Rule 4007. No changes since publication, except for stylistic changes in the heading of Rule 4007(d).

Rule 6004. Use, Sale, or Lease of Property

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(g) STAY OF ORDER AUTHORIZING USE, SALE, OR LEASE OF PROPERTY. An order authorizing

the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363(b) of the Code before the order is implemented. It does not affect the time for filing a notice of appeal in accordance with Rule 8002.

Rule 6004(g) does not apply to orders regarding the use of cash collateral and does not affect the trustee's right to use, sell, or lease property without a court order to the extent permitted under § 363 of the Code.

The court may, in its discretion, order that Rule 6004(g) is not applicable so that the property may be used, sold, or leased immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6004(g) is for a fixed period less than 10 days.

Public Comment on Rule 6004.

(1) George C. Webster II, Esq., of California, wrote in support of this amendment. It will add a 10-day stay to Rules 6004 and 6006 that will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush...."

(2) William E. Shmidheiser, III, Esq., of Virginia, opposes the addition of the 10-day stay to Rules 6004 and 6006. It would represent a fundamental shift in the way business is conducted in bankruptcy cases, slowing down the already slow pace of business and probably killing many otherwise barely-viable deals.

(3) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), wrote that the bankruptcy judges in Oregon oppose the addition of the 10-day stay in Rules 6004 and 6006. This area is often time sensitive. Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order. Acknowledging that Rule 7062 is ambiguous with respect to its application to orders in contested matters, Judge Higdon suggests that this problem can be cured simply by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters.

(4) Wade H. Logan, Esq., of South Carolina, opposes the addition of the 10-day stay in Rules 6004 and 6006 to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(5) Litigation Committee, Bar Association of the District of Columbia, supports the 10-day stay added to Rules 6004 and 6006. These matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Since the court would have discretion to impose or modify the stay, parties should not be prejudiced under the amended rules.

(6) New Jersey Bar Association, Bankruptcy Law Section, suggests that the new 10-day stay in Rules 6004 and 6006 be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. Competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

(7) Prof. Anthony Michael Sabino of St. John's University College of Business Administration, New York, opposes the proposed amendments to Rules 6004 and 6006. These new 10-day stays will be a burden overly harmful to the bankruptcy system.

(8) Arthur L. Rolston, Esq., of California, suggests that the new 10-day stays that will be added to Rules 6004 and 6006 should apply to matters that are actually contested, but not to uncontested matters. If the matter is uncontested, the order should be effective immediately unless the court orders otherwise.

(9) State Bar of California, Federal Courts Committee, opposes all the amendments to Rules 6004 and 6006. There is no justification for shifting the post-order burden. "[A]ll the proposed amendments do is to transfer the burden of requesting post-ruling relief from the losing party to the prevailing party. The California Committee on Federal Courts is of the opinion that such a shift is not wanted, warranted, or desirable."

Gap Report on Rule 6004. No changes since publication.

Rule 6006. Assumption, Rejection ~~and~~ or Assignment of an Executory ~~Contracts and~~ Contract or Unexpired ~~Leases~~ Lease

* * * * *

(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (d) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the assignment of an executory contract or unexpired lease under § 365(f) of the Code before the assignment is consummated. The stay under subdivision (d) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6006(d) is not applicable so that the executory contract or unexpired lease may be assigned immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6006(d) is for a fixed period less than 10 days.

Public Comment on Rule 6006. Nine letters were received containing the same comments on Rules 6004 and 6006 (both rules are amended

to add 10-day stays to certain orders). See "Public Comment on Rule 6004" above. In addition, the State Bar of California, Business Law Section, asked why the current Rule 7062, which was amended in 1991 to make the Rule 7062 ten-day stay inapplicable to §365 orders, is being changed now to impose the ten-day stay on such orders. They also suggest that "entry of order" be defined (is the paper docket accurate in relation to the Pacer docket; is the "entered" stamp on the order always the date it is entered on the paper docket?).

Gap Report on Rule 6006. No changes since publication.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. ~~It is a proceeding~~ The following are adversary proceedings:

(1) a proceeding to recover money or property, ~~except~~ other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002~~,~~;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in

property, other than a proceeding under Rule 4003(d)~~,~~;

(3) a proceeding to obtain approval ~~pursuant to~~ under § 363(h) for the sale of both the interest of the estate and of a co-owner in property~~,~~;

(4) a proceeding to object to or revoke a discharge~~,~~;

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan~~,~~;

(6) a proceeding to determine the dischargeability of a debt~~,~~;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination ~~is provided in a chapter 9, 11, 12, or 13 plan,~~;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing~~,~~; or

(10) a proceeding to determine a claim or cause of action removed ~~pursuant to~~ under 28 U.S.C. § 1452.

COMMITTEE NOTE

This rule is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief that is provided for in a plan under circumstances in which substantive law permits the relief. Other amendments are stylistic.

Public Comment on Rule 7001.

(1) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rule 7001.

(2) Wade H. Logan, III, Esq., of South Carolina, wrote that the proposed amendment to Rule 7001(7) is "well advised."

(3) Francis M. Allegra, Deputy Associate Attorney General of the United States, wrote that the Department of Justice opposes the proposed amendment to Rule 7001 because it "jeopardizes unjustifiably the rights of those subject to injunctive or other equitable relief." The procedural safeguards under Civil Rule 65 would be lost. The targets will have their rights weighed in light of the rights of those affected by the plan; a tacit burden shifting can be expected requiring the targets to show effectively that their opposition to the injunctive relief is meritorious enough to overcome the totality of the interests dealt with by the plan. In addition, plans are frequently contracts of adhesion and injunctions included in lengthy plans may not receive proper scrutiny. The federal government would be an appealing target for a debtor seeking protection from a federal creditor or regulator, with a high risk of inadequate notice to affected agencies. Finally, there are barriers to appealing a confirmation order (such as an expensive supersedeas bond for a stay).

(4) Richard H. Walker, General Counsel, Securities and Exchange Commission, wrote that the staff of the SEC opposes the proposed amendments to Rule 7001 because it would impair procedural rights. Injunctions in plans do not carry safeguards present for injunctive relief in an adversary proceeding. "We have reviewed many plans incorporating injunctions that are not prominently displayed and whose effect is not adequately described in disclosure statements." Also, the plan process does not focus on the rights of any one creditor, but is class oriented, which, together with the absence of certain procedural protections, "would raise serious due process concerns." And including injunctions in a plan shifts the burden from the debtor to the target of the injunction to object to the plan, under a statutory scheme that does not accord the same weight to his

interests as the injunctive criteria." Also, appealing a confirmation order is onerous. He also wrote that the SEC has seen attempts to extinguish law enforcement claims against directors, officers and affiliates in plans. And the amendment would place the burden on the creditor to come into court and prove why they should not be enjoined.

(5) Prof. Michael Anthony Sabino of St. John's University College of Business Administration, New York, made several stylistic suggestions.

(6) Bar Association of the District of Columbia, Litigation Committee, wrote that this change would streamline the confirmation process and avoid time consuming ancillary litigation. Although imposition of injunctions without the requisite evidence propounded by the debtor would be highly prejudicial to the affected creditors, injunctive relief is included as plan terms on a routine basis. Therefore, the amendment would be sanctioning current practice in this regard.

Gap Report on Rule 7001. No changes since publication, except for stylistic changes.

Rule 7004. Process; Service of Summons, Complaint

* * * * *

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. ~~If service is made pursuant to Rule 4(e)-(j)~~ Service made under Rule 4(e), (g),

(h)(1), (i), or (j)(2) F.R.Civ.P. ~~it~~ shall be ~~made~~ by delivery of the summons and complaint within 10 days after the summons is issued ~~following issuance of the summons~~. If service is ~~made~~ by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued ~~following issuance of the summons~~. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended so that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

Public Comment on Rule 7004.

(1) State Bar of California, Business Law Section, does not oppose the amendment, which "merely seeks to make it clear that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country."

(2) State Bar of California, Federal Courts Committee, supports the proposed amendments to Rule 7004(e).

(3) Bar Association of the District of Columbia, Litigation Committee, supports this amendment as a "practical change."

Gap Report on Rule 7004. No changes since publication.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule because of the amendment to Rule 9014 that renders this rule

inapplicable in contested matters unless the court orders otherwise. *See also* the amendments to Rules 3020, 3021, 4001, 6004, and 6006 that delay the implementation of certain types of orders for a period of ten days unless the court otherwise directs.

Public Comment on Rule 7062.

(1) George C. Webster II, Esq., of California, wrote in support of the amendments to Rule 7062 and 9014, which will render Civil Rule 62(a) inapplicable in contested matters. The amendments will cure the uncertainty that exists under the current Rules regarding the application of Civil Rule 62(a) in bankruptcy.

(2) Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.), acknowledged that Rule 7062 is ambiguous with respect to its application to orders in contested matters, and agrees that the problem can be cured by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters. But the bankruptcy judges in Oregon oppose the addition of 10-day stays in Rules 3020, 4001(a)(3), 6004, or 6006.

(3) Bar Association of the District of Columbia, Litigation Committee, commented that the proposed amendments to Rules 7062 and 9014 "are appropriate because most orders entered in contested matters are either interlocutory, ministerial or simply too insignificant to the outcome of the case to require the ten day stay" and "many of these orders should be immediately effective to avoid additional costs to the estate which accrue during the ten day period...."

(4) State Bar of California, Federal Courts Committee, opposes the amendments to Rules 7062 and 9014 (as well as the 10-day stays added to Rules 3020, 4001(a), 6004, and 6006). While not unmindful

of the difficulties encountered in applying Rule 7062, "a better remedy would be to extend the scope of [Rule 7062] beyond 'enforcement.'" They believe that the proposed amendments would cause confusion. "No reason is given for changing current practice which, although not trouble free, is at least known and in most circumstances clear and workable."

(5) State Bar of California, Business Law Section, agrees with the proposed amendment to Rules 7062 and 9014 because "the provisions of Rule 62 are frequently not appropriate for orders granting or denying motions." The letter comments that the proposed amendments to Rules 7062 and 9014 "will clarify what has been a consistent source of confusion."

Gap Report on Rule 7062. No changes since publication.

Rule 9006. Time

*****

(b) ENLARGEMENT.

*****

(2) ENLARGEMENT NOT PERMITTED. The court may not enlarge the time for taking action under Rules 1007(d), ~~1017(b)(3),~~

2003(a) and (d), 7052, 9023, and 9024.

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COMMITTEE NOTE

Rule 9006(b)(2) is amended to conform to the abrogation of Rule 1017(b)(3).

Public Comment on Rule 9006. None.

Gap Report on Rule 9006. The proposed amendment to Rule 9006(b)(2) has been added as a technical change to conform to the abrogation of Rule 1017(b)(3). The proposed amendment to Rule 9006(c)(2), providing that the time under Rule 1019(6) to file a request for payment of an administrative expense after a case is converted to chapter 7 could not be reduced by the court, was deleted. The proposed amendments to Rule 1019(6) have been changed so that the court will fix the time for filing the request for payment. Since the court will fix the time limit, the court should have the power to reduce it. *See* Gap Report to Rule 1019(6).

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No

response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062,~~ 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter, and Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. In addition, amendments to Rules 3020, 4001, 6004, and 6006 automatically stay certain types of orders for a period of ten days, unless the court orders otherwise.

Public Comment on Rule 9014. Five letters were received commenting on the proposed amendments to Rules 7062 and 9014, which would render Civil Rule 62 inapplicable in contested matters. *See* "Public Comment on Rule 7062 above.

Gap Report on Rule 9014. No changes since publication.

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

To: Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: May 18, 1998

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met at the Duke University School of Law on March 16 and 17, 1998.

* * * * *

Technical conforming amendments are recommended in Civil Rule 6(b) and Form 2.

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II ACTION ITEMS

* * * * *

Rules Amendments Proposed for Adoption Without Publication
Civil Rule 6(b)

A conforming amendment of Rule 6(b) is required to reflect the 1997 abrogation of Rule 74(a), one of the former rules that regulated appeals under the abandoned procedure that allowed parties to consent to appeal to the district court from the final judgment of a magistrate judge. The change is simple and technical. The reference to Rule 74(a) should be stricken from the catalogue of time periods that cannot be extended by the district court:

* * * * *

Form 2

Form 2, paragraph (a), describes an allegation of diversity jurisdiction. It must be adjusted to conform to the statutory increase in the required amount in controversy. Rather than court the risk of continued revisions as the statutory amount may be changed in the future, the

Advisory Committee recommends adoption of a dynamic conformity to the statute;

* * * * *

This change also is a technical or conforming amendment that, under paragraph 4(d) of the Procedures for the Conduct of Business, need not be published for comment. The change, to be sure, is not as purely technical as an amendment to substitute $75,000 for $50,000. It does reflect a conclusion that the form need not, for the guidance of the singularly uninformed, attempt to state the amount required by the current diversity statute. Virtually all lawyers should become aware of statutory changes before it is possible to adjust the form. This conclusion, however, does not seem the sort of policy judgment that should require publication and delay of yet another year in adjusting the form to the current statute. The Advisory Committee recommends that the change be transmitted to the Judicial Conference at a suitable time.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Time

* * * * *

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b),

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

59(b), (d) and (e), and 60(b), ~~and 74(a),~~ except to the extent and under the conditions stated in them.

* * * * *

COMMITTEE NOTE

The reference to Rule 74(a) is stricken from the catalogue of time periods that cannot be extended by the district court. The change reflects the 1997 abrogation of Rule 74(a).

Form 2. Allegation of Jurisdiction

(a) Jurisdiction is founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interests and costs, the sum specified by 28 U.S.C. § 1332 ~~of fifty thousand dollars~~.

* * * * *

[1] [Footnotes and Explanatory Notes omitted]

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

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 1998**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 27 and 28, 1998 in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are included at Attachment B. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment).

* * * * *

- Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.).
- Rule 24(c). Alternate Jurors (Retention During Deliberations).

* * * * *

- Rule 54. Application and exception (Conforming Amendment).

As noted in the following discussion, the Advisory Committee proposes that these amendments be approved by the Committee and forwarded to the Judicial Conference.

* * * * *

II. Action Items — Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1997 meeting, the Standing Committee approved the publication of proposed amendments to nine rules for public comment from the bench and bar. In response, the Advisory Committee received written comments from 24 persons or organizations commenting on all or some of the Committee's proposed amendments to the rules. In addition, the Committee heard the testimony of four witnesses on the proposed amendments to Rules 11 and 32.2. The Committee has considered those comments and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court.[1] The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM — Rule 6. Grand Jury.

The Committee has proposed two amendments to Rule 6. The first, in Rule 6(d) would make provision for interpreters in grand jury deliberations; under the current rule, no persons other than the jurors themselves may be present. As originally drafted by the Advisory Committee, the provision for interpreters would have been extended only to interpreters for deaf persons serving on a grand jury. The Standing Committee, however, believed that the limitation as to the kind of interpreter permitted to be present during grand jury deliberations should be removed in order to provide an opportunity for the widest range of public comment on all the issues raised by the presence of an interpreter during those deliberations. Thus, the published amendment extended to any interpreter who may be necessary to assist a grand juror. While some of those commenting on this proposed amendment believed it would be appropriate to include all interpreters, several commentators correctly noted that the amendment as written would be inconsistent with 28 U.S.C. § 1865(b) which requires that all petit and grand jurors must speak English.

The second amendment would change Rule 6(f) regarding the return of an indictment. Under current practice the entire grand jury is required to return the indictment in open court. The proposed change would permit the grand jury foreperson to return the indictment in open court — on behalf of the grand jury. Of the eleven commentators, only two opposed this change on the general view that it distances the grand jury from the court.

Upon further consideration of the amendments to Rule 6(d), the Committee decided to limit the presence of interpreters to those assisting hearing or speech impaired grand jurors.

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[1] The Committee on Rules of Practice and Procedure declined to approve new Rule 32.2. In light of the committee's action, conforming amendments to Rules 7, 31, 32, and 38, which were grounded in the proposed new Rule 32.2, were also withdrawn from further consideration.

Recommendation — The Committee recommends that the amendments to Rule 6, as modified following publication, be approved and forwarded to the Judicial Conference.

* * * * *

3. ACTION ITEM — Rule 11. Pleas.

The proposed amendments to Rule 11 reflect the Committee's discussion over the last year concerning the interplay between the sentencing guidelines and plea agreements and the ability of a defendant to waive any attacks on his or her sentence. Specifically, Rule 11(a) has been changed slightly to conform the definition of organizational defendants. Rule 11(c) would be amended to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence. A majority of the commentators, and one witness who testified before the Committee, opposed the change. Their general opposition rests on the argument that the Rule should not in any way reflect the Committee's support of such waivers until the Supreme Court has ruled on the question of whether such waivers are valid. The Committee believed that it was appropriate to recognize what is apparently already taking place in a number of jurisdictions and formally require trial judges in those jurisdictions to question the defendant about whether his or her waiver was made knowingly, voluntarily, and intelligently. The Committee did add a disclaimer to the Committee Note, as suggested by at least one commentator.

The proposed change in Rule 11(e)(1) is intended to distinguish clearly between (e)(1)(B) plea agreements — which are not binding on the court — and (e)(1)(C) agreements — which are binding. Other language has been added to those subdivisions to make it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. The proposed language includes suggested changes by the Subcommittee on Style. The majority of the commentators supported this clarification.

Recommendation — The Committee recommends that the amendments to Rule 11 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM — Rule 24(c). Alternate Jurors.

The proposed amendment to Rule 24(c) would permit the trial court to retain alternate jurors — who during the trial have not been selected as substitutes for regular jurors — during the deliberations in case any other regular juror becomes incapacitated and can no longer take part. Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule. Most of those commenting on the proposed amendment, supported it. The NADCL and the ABA opposed the change; the former believes that there is no provision for the court to make any substitutions of jurors after deliberations begin. The ABA opposes the amendment because it believes that it will create an unnecessary risk that jurors will decide the case on something less than a thorough evaluation of

the evidence. On the other hand, the Magistrate Judges Association supports the change. After considering the comments, the Committee decided to forward the rule with no changes to the published version.

Recommendation — The Committee recommends that the amendment to Rule 24(c) be approved and forwarded to the Judicial Conference.

* * * * *

9. ACTION ITEM — Rule 54. Application and Exception.

The proposed amendment to Rule 54 is a minor change reflecting the fact that the Canal Zone court no longer exists. The Committee received only two comments on the amendment; both supported the change.

Recommendation — The Committee recommends that the amendment to Rule 54 be approved as published and forwarded to the Judicial Conference.

B. Text of Proposed Amendments, Summary of Comments and GAP Reports.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 6. The Grand Jury

* * * * *

(d) WHO MAY BE PRESENT.

(1) *While Grand Jury is in Session.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session~~,~~ .

(2) *During Deliberations and Voting.* ~~but no~~ No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.

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

(f) FINDING AND RETURN OF INDICTMENT.

A grand jury may indict ~~An indictment may be found~~ only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not vote to indict ~~concur in finding an indictment~~, the foreperson shall so report to a federal magistrate judge in writing as soon as possible ~~forthwith~~.

* * * * *

COMMITTEE NOTE

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist persons who are speech or hearing impaired and are serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting

interpreters to assist hearing and speech impaired jurors in the process seems a reasonable accommodation. *See also United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member).

The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, "they have disappeared, at least in part." 226 U.S. at 9. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions the grand jury sits in a building completely separated from the courtrooms. In those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.

Summary of Comments on Rule 6.

Judge Hayden W. Head, Jr. (CR-001)
U.S. District Judge
Southern District of Texas
Corpus Christi, Texas
September 19, 1998

Judge Head believes that the proposed amendment which would allow for "interpreters" is overly broad and thus contravenes Title 28 U.S.C.A. § 1865(b) which requires that all petit and grand jurors be required to speak English. Even if amendment is only for hearing impaired, he does not support it because he is against the introduction of another person into the inner sanctum of the grand jury proceedings. He further objects because he does not support the rule's proposed distinction between jurors and grand jurors.

John Gregg McMaster, Esq. (CR-002)
Attorney at Law
Tompkins and McMaster
Columbia, South Carolina
September 19, 1998

Mr. McMaster finds the proposed rule change "preposterous." He says that it would be a "travesty of justice" to allow someone "to be indicted by a person who does not understand or speak the language of the country or of the indictment." He reasons that is an immigrant's obligation to learn the language of his new country.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes to Rule 6.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge
Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen agrees with his colleague Judge Head about the proposed changes to Rule 6(d). He believes that this proposal is incomprehensible because jurors are required to speak and understand English in order to serve as jurors. He concedes that policy consideration support the narrow exception for deaf jurors.

Judge Cornelia G. Kennedy (CR-008)
Circuit Judge
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan
October 21, 1997

Judge Kennedy believes the proposed change to Rule 6(f) which would allow the grand jury foreperson alone to return the indictment will save some time and avoid some inconvenience, but that it will also distance the grand jury from the court. She believes that having the whole grand jury present the indictment to the court allows members to express concerns and ask questions. She says that it is important for the grand jury to know that it is an "adjunct of the court... not merely votes required by the Assistant United States Attorney." Judge Kennedy also states that grand jury rooms should be in the court house. When they are not, she notes, it is even more

important for the members of the grand jury to go before the court and be reminded of their function.

Judge Donald C. Ashmanskas (CR-010)
United States Magistrate Judge
United States District Court for the District of Oregon
Portland, Oregon
October 29, 1997

Magistrate Ashmanskas suggests specific amendments to Rule 6(f). He suggests that the name "presiding grand juror" be substituted for the proposed rule's moniker, "foreperson," and "deputy presiding grand juror" instead of "deputy foreperson." He also suggests that the indictments be permitted to be filed with district clerk, rather than before a magistrate or judge in open court. As an alternative, he suggests that the indictment be returned to a magistrate or district court judge. In a post script, he notes that he would favor a reduction in the size of the grand jury. He notes that in Oregon the grand jury is composed of seven people and five must concur for an indictment to be returned.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa wholeheartedly supports the proposed changes to Rule 6(f) because the practical result will be that grand jurors will be able to leave the court house at a reasonable hour.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL believes that the proposal to Rule 6(a) which would allow interpreters into grand jury proceedings should not be adopted at this time because it would not be consistent with 28 U.S.C. § 1865 (b) (2,3,4). The NACDL opposes the proposed amendment to Rule 6(f) which would allow the grand jury foreperson to return the indictment alone. They believe that having all of the grand jurors present when an indictment is returned reminds the grand jurors that they are an extension of the court and independent from the prosecutor and makes the jurors take the process more seriously. The NACDL concludes by asserting that the "salutary purposes served by Rule 6(f) outweigh whatever minor inconveniences and administrative problems may be encountered in achieving them."

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the proposed amendments to Rule 6. It opines that if an interpreter will assist a grand juror, that person's presence should be permitted. And it believes that permitting the foreperson or deputy foreperson to return the indictment may avoid further impingement on the grand jurors time.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the amendments to Rule 6. It recommends that a statement be added to the Committee Note to remind interpreters of the need for confidentiality.

GAP Report — Rule 6.

The Committee modified Rule 6(d) to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

Rule 11. Pleas

(a) ALTERNATIVES.

(1) *In General.* A defendant may plead ~~not~~ guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant ~~corporation~~ organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

* * * * *

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the

defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

* * * * *

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the attorney for the defendant — or

the defendant when acting pro se — may agree ~~engage in discussions with a view toward reaching an agreement~~ that, upon the defendant's entering ~~of~~ a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: ~~do any of the following:~~

(A) move to dismiss ~~for dismissal of~~ other charges; or

(B) recommend, ~~make a recommendation,~~ or agree not to oppose the defendant's request, for a particular sentence, or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such ~~with the understanding that such~~ recommendation or

request is ~~shall~~ not ~~be~~ binding on ~~upon~~ the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any ~~such~~ discussions between the parties concerning any such plea agreement.

* * * * *

COMMITTEE NOTE

Subdivision (a). The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. Second, under an (e)(1)(C) agreement, the government and defense

have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it. As is the situation under the current Rule, the court retains absolute discretion whether to accept a plea agreement.

Summary of Comments on Rule 11.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

Judge Paul D. Borman (CR-004)
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
September 24, 1997

Judge Borman submitted a request to testify in testifying about proposed amendments to Rule 11. He does not express an opinion on the proposed amendments.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans summarily states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge
Southern District of Texas

Laredo, Texas
October 7, 1998

Judge Kazen states that the proposed changes to Rule 11 appear to be helpful. He notes that the Committee has still not addressed the problem of Rule 11(e)(4) and the problem of rejected plea agreements and the defendant's opportunity to withdraw a plea.

Judge Malcolm F. Marsh (CR-009)
United States District Judge
United States District Court for the District of Oregon
Portland, Oregon
October 21, 1997

Judge Marsh is opposed to the proposed amendment to Rule 11(e)(1)(C). He is concerned with allowing parties to agree to a specific sentencing range. He fears that this practice will allow parties to agree to offense characteristics regardless of the actual facts of the offense as found in the Pre-Sentencing Report. He notes that the primary danger is allowing parties to bind the court to certain facts, thus taking away more of the court's discretionary authority and shifting it to the prosecutor's office.

Thomas W. Hillier, II (CR-012)
Chair, Legislative Subcommittee
Federal Public Defender
Western District of Washington
Seattle, Washington
December 5, 1997

Mr. Thomas Hillier, Chair, Legislative Subcommittee of the Federal Public Defender, opposes the proposed amendments Rule 11(c) concerning a defendant's waiver of rights to appeal. He first commends the general purpose of ensuring knowing, voluntary appeal waivers. But, he "strongly disfavors" the proposal. He notes in his initial remarks that if the Committee does go forward with the

proposed amendments, the Federal Public Defenders urge cautionary language in the notes that emphasizes the problems associated with appeal waivers. Mr. Hillier cites *United States v. Melancon*, 972 F.2d 566, 569-580 (5th Cir. 1992) for its arguments against appeal waivers. He attaches an article which identifies other judges who believe that appeal waivers should not be used. Mr. Hillier believes that the proposed amendment is premature and states that the Committee should not go forward with any proposal on this issue until the courts have had an opportunity to review all of the problems that appeal waivers present. He notes that the Supreme Court will eventually decide the issue.

Judge Paul L. Friedman (CR-016)
United States District Judge
United States District Court for the District Court of Columbia
Washington, D.C.
January 5, 1998

Judge Friedman is opposed to the proposed changes to Rule 11. He opposes the amendment because in his view there can be no valid waiver of such appellate rights and that the proposed amendment would suggest that such waivers are lawful. He encloses his opinion in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and a copy of Judge Greene's opinion in *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997), to support his position.

Mr. Kenneth Laborde (CR-017)
Chief Probation Officer
Eastern District of Texas
Beaumont, Texas
January 26, 1998

Mr. Laborde is opposed to the proposed changes to Rule 11(e)(1)(C). His primary concern is that a defendant's sentence may

be determined by prosecutors and defense counsel before the probation officer has an opportunity to conduct a pre-sentence investigation and apply the sentencing guidelines. He is also concerned that parties "may be tempted to circumvent the guidelines" in order to avoid trial. He emphasizes that the proposed changes to the Rule would deprive the court of probation officers' expertise in this area. Finally, he writes that the intended result of fewer appeals would occur, but that the quality of justice will suffer, and this is too great a cost.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa supports the changes to Rule 11(c) because he anticipates that "many problems and questionable petitions" will be avoided.

Richard A. Rossman (CR-019)
Chairperson, Standing Committee on United States Courts of the State Bar of Michigan
Detroit, Michigan
February 9, 1998

On behalf of the Standing Committee on United States Courts of the State Bar of Michigan, Mr. Rossman, the chair, indicates that his committee is "unanimous in its opposition to the proposed amendment to Rule 11(c)(6)." First, the committee believes that waiver provisions have no place in plea agreements and secondly, there is no need to highlight any particular provision in the agreement. Finally, a colloquy itself might raise confusion or inadequate explanations regarding the provision. It has no objection to the other amendments proposed for Rule 11.

Mr. Robert Ritchie (CR-020)
Chairman, Federal Criminal Procedures Committee,
American College of Trial Lawyers
Knoxville, Tennessee
February 11, 1998

Mr. Ritchie writes on behalf of the American College of Trial Lawyers and is opposed to the proposed changes of Rule 11(c)(6) because the changes would institutionalize the practice of requiring criminal defendants to waive rights of appeal and collateral attack of illegal sentences. He notes that "Rule 11(e)(1)(c) already allows agreed-to sentences, which is an appropriate procedure through which to ensure that a sentencing appeal is unnecessary." He states that the proposed practice violates the Due Process Clause because the waiver would not be knowing, voluntary and intelligent when a sentence has not yet been imposed. In support of his rationale he cites *United States v. Johnson*, written by District Court Judge Green (*see, supra*, Judge Friedman) and *United States v. Melancon*, 972 F.2d 566, 570-580 (5th Cir. 1992).

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL strongly oppose the proposed amendment to Rule 11(c)(6) on both procedural and substantive grounds. The NACDL recognizes the purpose of the amendment is to ensure that defendants who are waiving their appellate rights are doing so knowingly. But it believes that this proposed change would signal the

Judicial Conference's approval of appeal waivers. The NACDL states that appeal waivers are "so inherently coercive and unfair that they should not be tolerated in our system of justice." The NACDL believes that the amendment is premature because it puts the Committee in the position of making law. This is true in large part, the NACDL notes, because the courts of this country have reached consensus on whether or not appeal waivers are constitutionally permissible. The NACDL also believes that the amendment is premature because the courts do not agree on what an appeal waiver means. The NACDL notes that even courts who accept this practice disagree on what may be waived. The NACDL expresses its support of the opinion of District Court Judge Friedman and Green in United *States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997). The NACDL states that appeal waivers violate the constitution, violate public policy and invite, and encourage illegal sentences where both parties to an agreement know that their practices will not be subject to review.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.
February 17, 1998

The ABA supports the proposed change to rule 11(c)(6) that would make a defendant aware of the waiver of any appellate rights. The ABA urges the Committee to consider ABA Standard for Criminal Justice 14.1.4(c) that encourages the court to make the defendant aware of possible collateral consequences of pleading guilty. However, the ABA opposes the proposal to change the second sentence of Rule 11(e)(1)(C) because it mandates the court

acceptance of a plea binds the court to specific sentencing ranges. The ABA generally supports the third sentence of (e)(1)(C) that would prohibit court participation in any discussions between the parties concerning plea agreements. However, it notes that ABA Standard 14-3.3 would permit the parties upon agreement to seek the judge's opinion about the acceptability of certain plea agreements.

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the amendments to Rule 11. Specifically, it believes that requiring judges to determine the defendant's understanding of a waiver provision will ensure that the defendant knows what rights he or she is waiving. The Committee also believes that the amendments to Rule 11(e) reflect the current practice of agreeing to guideline ranges or factors.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the proposed amendments to Rule 11. They view the amendments as neither significant nor controversial. Instead, they note, the proposed changes "represent incremental improvements of the rule that clarify its meaning, make it work more effectively with other statutes or regulations, and bring it into conformity with evolving practice."

Summary of Testimony — Rule 11

Judge Paul D. Borman
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
Testified — April 27, 1998

Testifying before the Committee, Judge Borman expressed strong disagreement with the proposed amendment to Rule 11(c)(6). He believed that requiring the defendant to waive the right to appeal a sentence is not permitted and violates the very spirit of the Sentencing Guidelines. He was particularly concerned that the amendment would signal the Advisory Committee's approval of such waivers, which have not been ruled upon by the Supreme Court.

GAP Report — Rule 11.

The Committee made no changes to the published draft amendments to Rule 11. But it did add language to the Committee Note which reflects the view that the amendment is not intended to signal its approval of the underlying practice of including waiver provisions in pretrial agreements.

Rule 24. Trial Jurors

* * * * *

(c) ALTERNATE JURORS.

(1) *In General.* The court may empanel no ~~direct that not~~ more than 6 jurors, in addition to the

regular jury, ~~be called and impanelled~~ to sit as alternate jurors. An alternate juror, ~~Alternate jurors~~ in the order ~~in which they are~~ called, shall replace a juror ~~jurors~~ who~~, prior to the time the jury retires to consider its verdict,~~ becomes or is found ~~become or are found~~ to be unable or disqualified to perform juror ~~their~~ duties. Alternate jurors shall (i) be drawn in the same manner, ~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to the same examination and challenges, and ~~shall~~ (iv) take the same oath as regular jurors. An alternate juror has ~~and shall have~~ the same functions, powers, facilities and privileges as a regular juror. ~~the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~

(2) Peremptory Challenges. In addition to challenges otherwise provided by law, each ~~Each~~ side

is entitled to 1 additional peremptory challenge ~~in addition to those otherwise allowed by law~~ if 1 or 2 alternate jurors are empaneled ~~to be impanelled~~, 2 additional peremptory challenges if 3 or 4 alternate jurors are ~~to be~~ empaneled ~~impanelled~~, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled ~~to be impanelled~~. The additional peremptory challenges may be used to remove ~~against~~ an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove ~~against~~ an alternate juror.

(3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they

replace a regular juror during deliberations. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

COMMITTEE NOTE

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors — who have not been selected to replace other jurors — when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), citing *United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Rule 23(b) provides that in some circumstances a verdict may be returned by eleven jurors. In addition, there may be cases where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate and to use Rule 23(b) to proceed with eleven jurors or to substitute a juror or jurors with alternate jurors who have not been discharged.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the

alternate jurors. That may be done, for example, by separating the alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. *See, e.g., United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are used, the jurors must be instructed that they must begin their deliberations anew.

Finally, subsection (c) has been reorganized and restyled.

Summary of Comments on Rule 24(c).

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Prentice H. Marshall (CR-011)
Ponce Inlet, Florida
November 14, 1997

Mr. Marshall is very much in favor of the proposed amendment to Rule 24(c) which would allow district judges to retain alternate jurors during deliberations so that they may be substituted for juror who becomes incapacitated during deliberations. He is not opposed to any of the proposed changes.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL urges that the proposed amendment not be adopted because at the present time there is no provision which would allow an alternate juror to replace a regular juror after deliberations have commenced. It notes that if the Committee's intent is to enable alternates to replace jurors during deliberations, the Committee should propose an amendment which says so forthrightly.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.

The ABA opposes the proposed change to Rule 24(c) that allows for the retention of alternate jurors once jury deliberations

begin. Quoting ABA Standard for Criminal Justice 15-2.9 it notes that allowing this practice increases risks of the jury returning a verdict based on "a less than thorough evaluation of the evidence."

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the proposed amendments to Rule 24. It agrees that providing the trial court with the option of retaining the alternate jurors may be an appropriate alternative, especially in long and complicated cases.

GAP Report — Rule 24(c).

The final sentence of Rule 24(c) was moved from the committee note to the rule to emphasize that if an alternate replaces a juror during deliberations, the court shall instruct the jury to begin its deliberations anew.

Rule 54. Application and Exception

(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976

(90 Stat. 263); and in the District Court of the Virgin Islands; ~~and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone;~~ in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

* * * * *

COMMITTEE NOTE

The amendment to Rule 54(a) is a technical amendment removing the reference to the court in the Canal Zone, which no longer exists.

Summary of Comments on Rule 54

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the proposed amendments to Rule 54.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Federal Magistrate Judges supports the technical changes to the amendment to Rule 54.

GAP Report — Rule 54.

The Committee made no changes to the published draft.

PROPOSED RULE AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on certain controversial rule amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Criminal Procedure

I. Rule 11 (Waiver of Appeal Rights)

A. Brief Description

The proposed amendment of Rule 11 would require the court to determine whether the defendant understands any provision that waives the right to appeal or to collaterally attack the sentence in a plea agreement.

B. Arguments in Favor

The proposed amendment ensures that a complete record exists regarding a defendant's waiver of appeal rights that shows that the defendant voluntarily and knowingly agreed to the waiver provision.

An increasing number of judges are accepting these plea agreement waivers, a practice which has been upheld by several courts of appeals. The proposed amendments acknowledge this practice and provide some guidance to sentencing judges on accepting a waiver.

C. Objections

The proposed amendment would signal tacit "official" approval of these waiver provisions and may encourage judges to accept them.

D. Rules Committees Consideration

A witness at the public hearing and several commentators expressed concern that the proposed rule amendments would implicitly approve the practice of including a waiver of appeal rights as part of a plea agreement. They argued that although the courts of appeals have determined that the practice may not be prohibited by law, it should be restricted or eliminated as a matter of fairness and

policy. The advisory committee acknowledged the concerns, but also recognized the growing practice of using these waiver provisions and the string of appellate decisions uniformly upholding them. The rules committees believed that the amendment would be helpful to a sentencing judge who decides to accept such a plea. But in response to the expressed concerns, the rules committees emphasized that the "Committee takes no position on the underlying validity of such waivers" in the Committee Note.

Federal Rules of Bankruptcy Procedure

I. Rules 3020, 3021, 4001, 6004, and 6006 (10-day stay)

A. Brief Description

The proposed amendments to these rules would automatically stay for ten days court orders confirming a chapter 9 or chapter 11 plan, authorizing the use, sale, or lease of property (other than cash collateral), granting relief from the automatic stay under § 362 of the Bankruptcy Code, or authorizing the assignment of an executory contract or unexpired lease, unless the court orders otherwise.

B. Arguments in Favor

The proposed amendments would provide a party with a reasonable opportunity to appeal a court's orders before the appeal is mooted by the performance of acts or completion of transactions authorized by the order. But the court would have the discretion to provide in its order or to otherwise direct that the 10-day stay is inapplicable when circumstances indicate that performance of the acts or completion of the transactions authorized should not be delayed. Alternatively, the court could direct that the stay of its order shall be for a fixed period less than 10 days.

C. Objections

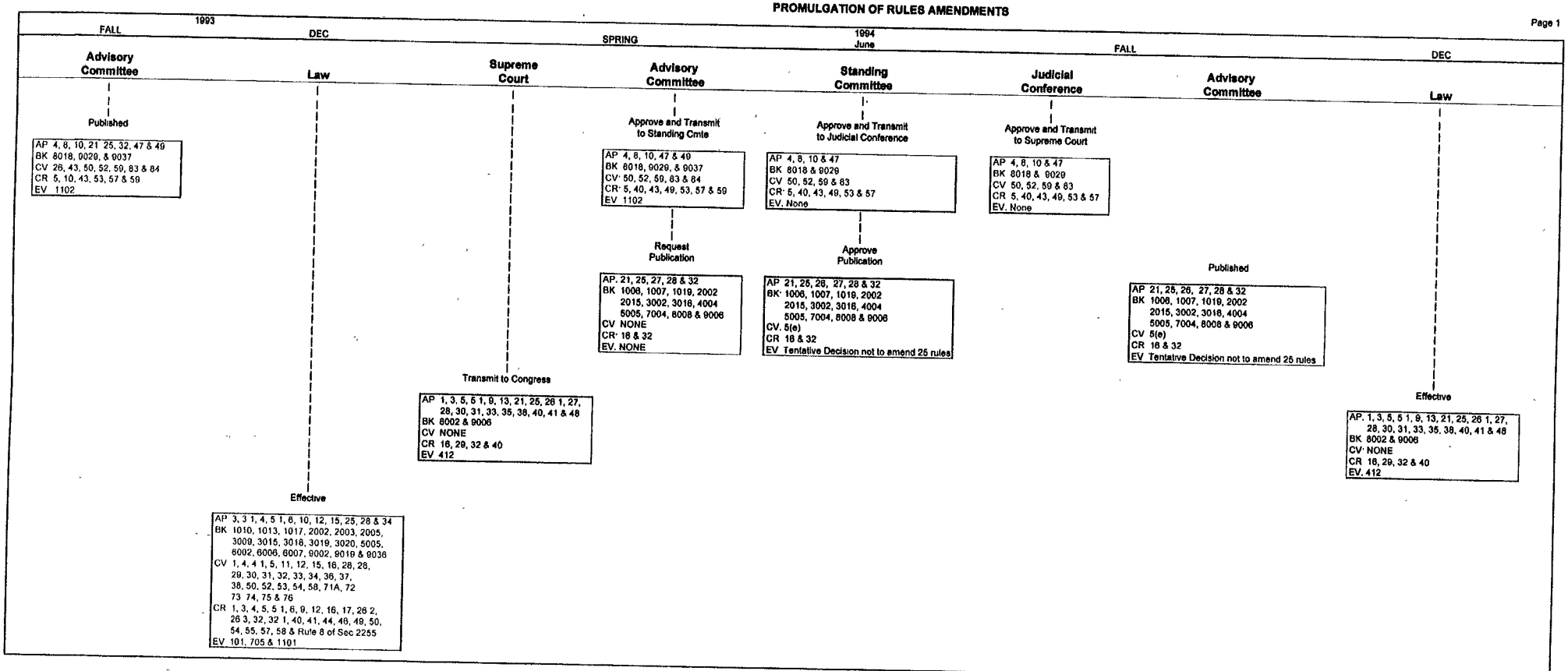
Several members of the Standing Committee voted against the proposed amendments after a member expressed concern that the 10-day stays might be abused to thwart a plan or other commercial transaction approved by the court. Commercial transactions, such as the sale of property, in some complex cases are the products of careful negotiations and any delay in consummating these particular transactions may prove fatal to the plan.

D. Rules Committees Consideration

- The Standing Committee approved the proposed amendments by an 8-4 vote, concluding as did the advisory committee, that the limited number of occasions when a 10-day stay might be abused does not outweigh the advantages in providing a party with a reasonable opportunity to appeal a court order before an appeal is effectively mooted by performance of the acts and completion of the transactions authorized by the order. Absent the 10-day stay, the rules committees were concerned that a party would be faced with a fait accompli with no real opportunity to appeal under these circumstances.

- In addition, the court's broad discretion (without the need for notice or hearing) to direct that the 10-day stay shall be inapplicable or reduced is a safeguard that adequately addresses the concern regarding instances of potential abuse.

PROMULGATION OF RULES AMENDMENTS



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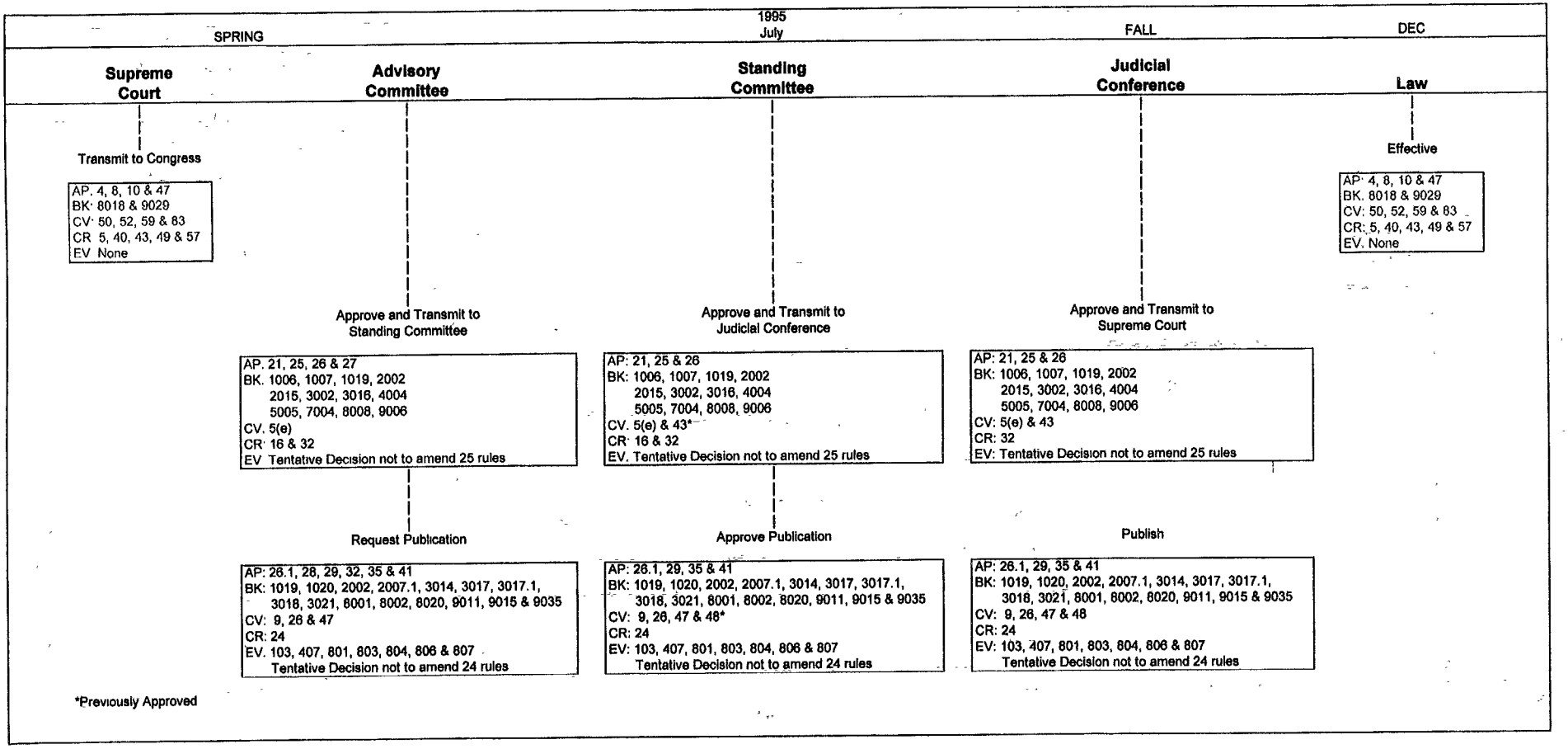

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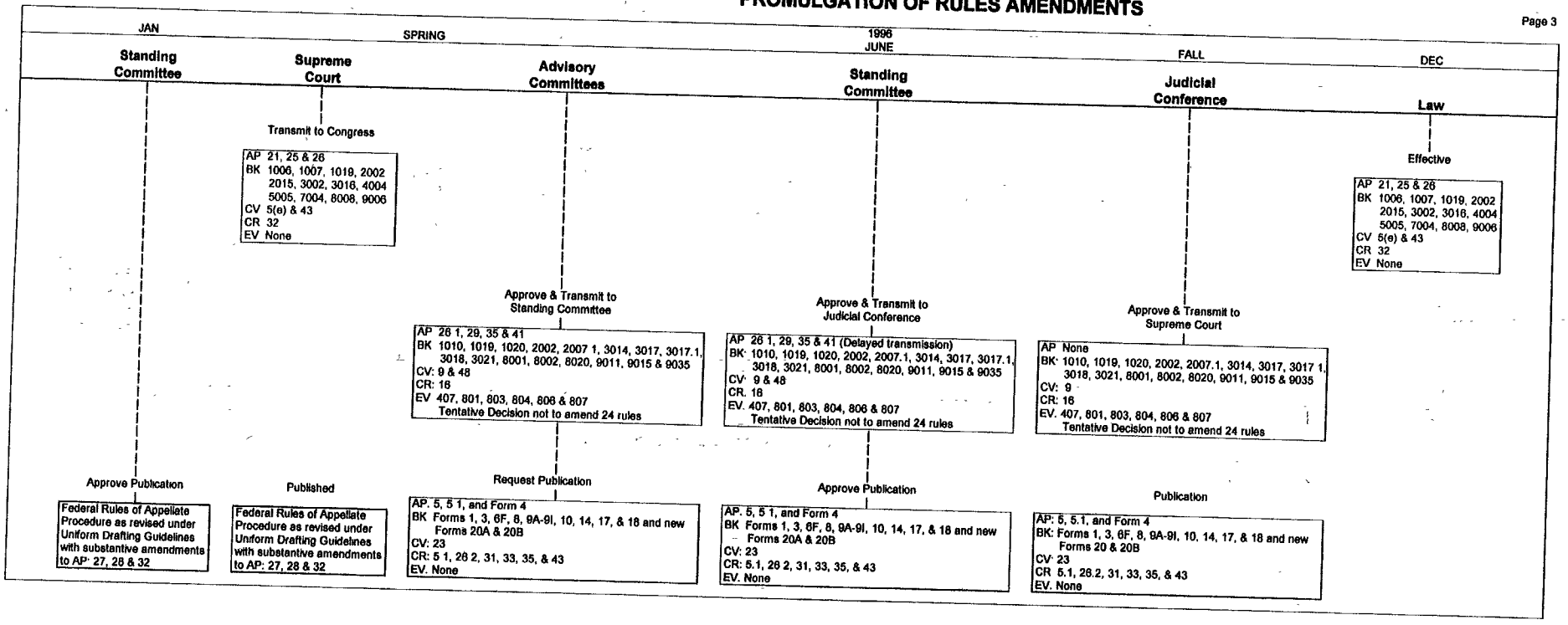

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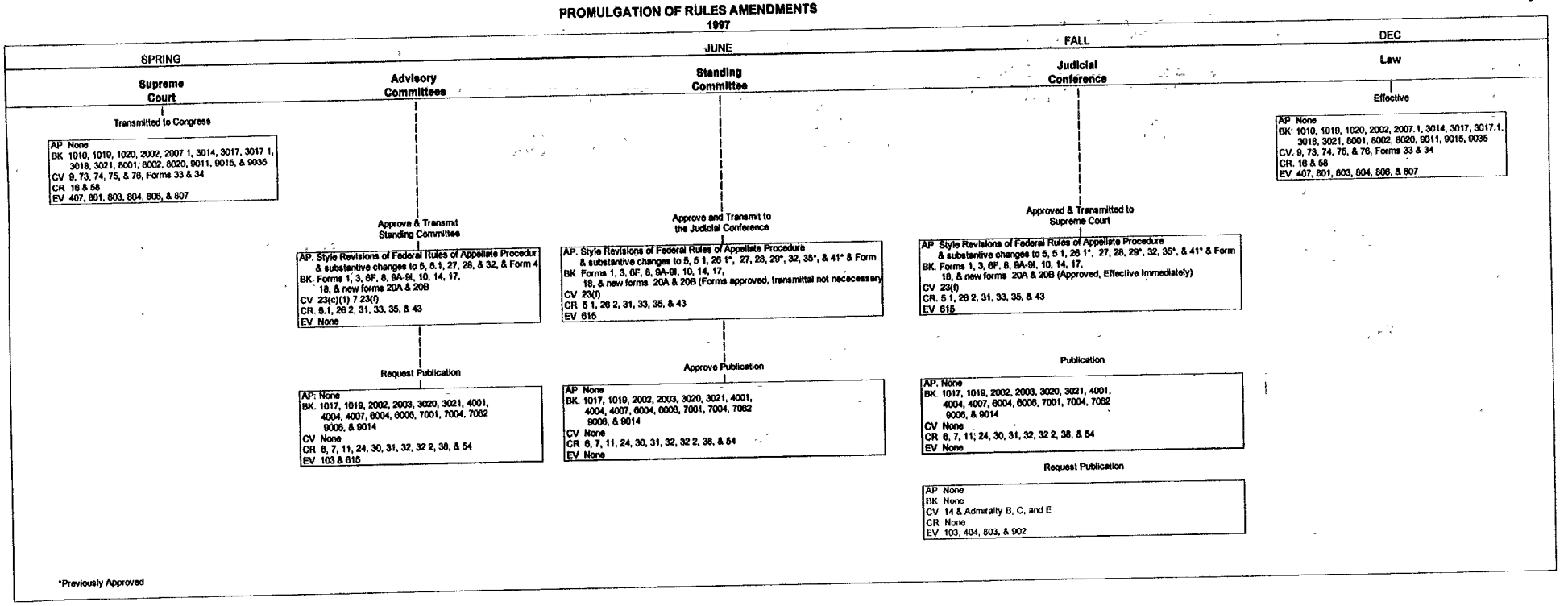

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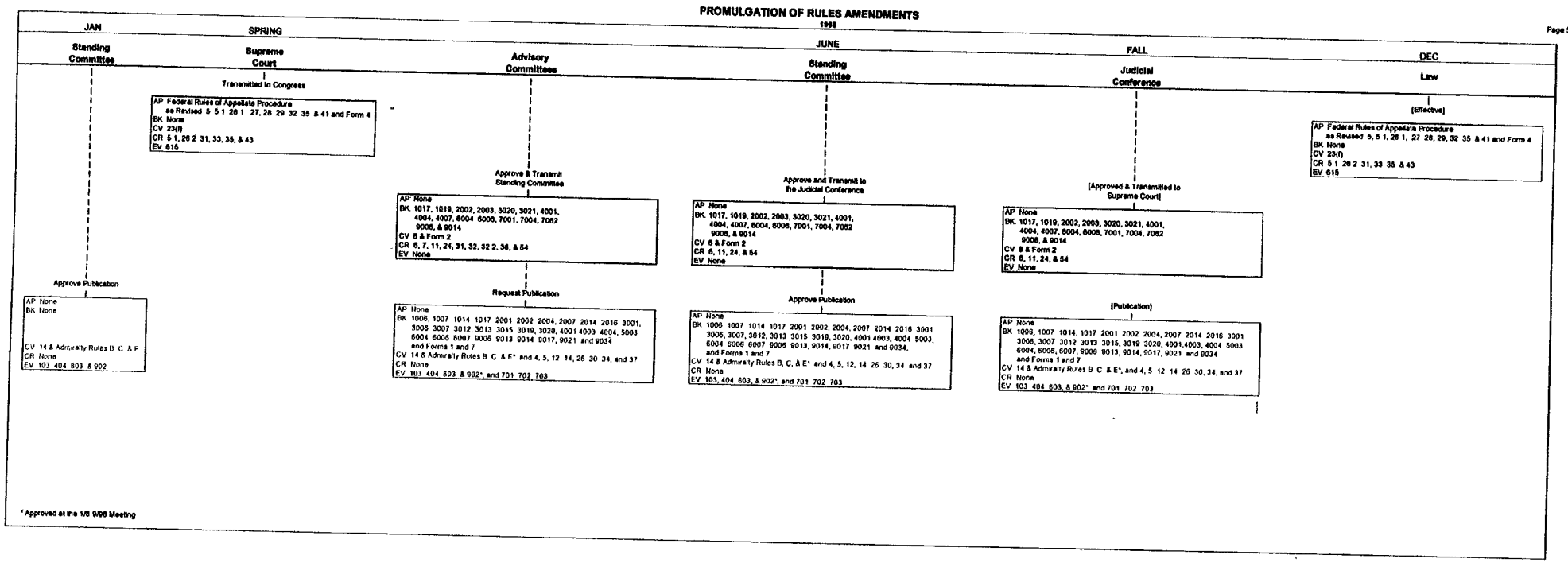
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1998
JAN
SPRING
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DEC
Standing Committee
Supreme Court
Advisory Committees
Standing Committee
Judicial Conference
Law
Transmitted to Congress
(Effective)
AP Federal Rules of Appellate Procedure as Revised 5, 5.1, 28.1, 27, 28, 29, 32, 35, & 41 and Form 4
BK None
CV 23(f)
CR 5.1, 26.2, 31, 33, 35, & 43
EV 615
Approve & Transmit Standing Committee
Approve and Transmit to the Judicial Conference
[Approved & Transmitted to Supreme Court]
AP None
BK 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062 9006, & 9014
CV 6 & Form 2
CR 6, 7, 11, 24, 31, 32, 32.2, 38, & 54
EV None
Approve Publication
Request Publication
Approve Publication
(Publication)
AP None
BK 1006, 1007, 1014, 1017, 2001, 2002, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001,4003, 4004, 5003, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034, and Forms 1 and 7
CV 14 & Admiralty Rules B, C, & E*, and 4, 5, 12, 14, 26, 30, 34, and 37
CR None
EV 103, 404, 603, & 902*, and 701, 702, 703
* Approved at the 1/8 9/98 Meeting