

1965

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RULES OF THE

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UNITED STATES COURTS



SOUTHERN AND EASTERN DISTRICTS
NEW YORK

and

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



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**RULES OF THE
UNITED STATES COURTS
SOUTHERN AND EASTERN DISTRICTS, NEW YORK**

**Bankruptcy Rules — General Rules — Calendar Rules
Civil Rules — Criminal Rules — Admiralty Rules
and**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Bankruptcy Rules Annotated by

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Member of the N.Y. Bar

Court of Appeals Second Circuit Rules Annotated by

A. DANIEL FUSARO

Clerk of the Court



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Library of Congress Catalog Card No. 65-16452

Manufactured in the United States of America

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Bankruptcy Rules

of

United States District Courts

For the Southern and Eastern Districts of New York

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RULE 1—Petitions and Schedules

(a) In addition to complying with the *Bankruptcy Act*, General Orders and prescribed Forms, all petitions and schedules and all lists of creditors, shall, in describing the residence or place of business of a bankrupt, debtor or creditor, state the usual post office address, including the street and number thereof.

NOTE: Identical to former Rule 1 with the exception of the words italicized.

(b) In voluntary proceedings, all assumed, trade and any other names or designations by or under which the bankrupt has been known or has conducted any business within six years next preceding the filing of the petition in bankruptcy shall be set forth in the caption of the petition and in all notices sent creditors. In involuntary proceedings, such facts shall likewise be set forth in the caption by the petitioning creditors to the best of their knowledge, information and belief.

NOTE: Subdivision (b) has been amended by addition of the italicized words. Assumed and trade names appearing in the caption of the petition and in all notices to creditors will serve to alert creditors and interested parties who would not otherwise be aware of their interest in the matter. Where bankrupt has not been known by any other assumed, trade or any other name or designation, it should be so stated in the petition. If he had been so known, the petition should give particulars, including names, dates and places, in order to support their inclusion in the caption. Note that the Rule applies equally to voluntary and involuntary petitions.

RULE 2—Reference of Petitions and Proceedings After Reference

SOUTHERN DISTRICT

(a) Except where the judge handling the ex parte business of the court at the time directs otherwise, the clerk

shall, immediately upon the filing of a petition initiating a case under Chapters I through VII and Chapter XIII of the Bankruptcy Act, refer the case to a referee.

(b) Except where the judge handling the *ex parte* business of the court at the time directs otherwise, the Chief Judge, immediately upon the filing of a petition initiating a case under Chapter XI of the Bankruptcy Act, shall refer the case to a referee.

NOTE: NEW, and applicable only to Southern District. Prior to the 1959 amendment to §22 of the Act, only the District Judge was authorized to make the reference. By that amendment, the Clerk of the Court was directed to make the reference unless otherwise ordered by the Judge, thereby relieving the latter of the routine formality of signing orders of reference. Implementing §22a of the Act, Rule 2(a) provides for automatic reference by the Clerk in ordinary bankruptcy and Chapter XIII proceedings, while Rule 2(b) provides for reference of Chapter XI cases by the Chief Judge. In either case, the *ex parte* judge may direct otherwise.

Pursuant to Rule 2, involuntary as well as voluntary cases are automatically referred by the Clerk. See Rule 6 for procedure where an answer to an involuntary petition raises issues triable by jury.

Procedure for reference in the Eastern District remains unchanged.

SOUTHERN AND EASTERN DISTRICTS

(c) Except as otherwise provided in the Bankruptcy Act or these rules all proceedings after reference shall be had before the referee to whom the case was referred.

NOTE: New and applicable to both Southern and Eastern Districts. The subdivision makes clear that after reference all proceedings must be had before the Referee. This would include trial of issues where an answer has been interposed to an involuntary petition and no jury trial required. See also Rule 19.

RULE 3—Lists of Creditors and Statement of Assets

Whenever, pursuant to law, further time is *granted* for the filing of schedules, the required list of creditors and

their addresses shall be filed in triplicate and shall, unless otherwise ordered by the court for cause shown, be accompanied by a statement in triplicate setting forth a brief description *of the assets of the bankrupt and the location of the physical assets*. The clerk shall forthwith deliver one copy of such list and statement to the referee and another to the receiver, if one is appointed.

NOTE: Substantially the same as former Rule 2. The word "granted" is substituted for the word "sought". The italicized phrases indicate that while a description of all assets is still required, the location of only the "physical" assets need be set forth.

RULE 4—Service of Subpoena and Adjudication

(a) In involuntary proceedings, unless a notice of appearance on behalf of the alleged bankrupt is filed with the petition, the clerk shall forthwith issue a subpoena and cause the subpoena and copy of the petition to be delivered to the marshal or to a person specially appointed for that purpose for service upon the alleged bankrupt.

In voluntary proceedings in behalf of a partnership filed by less than all of the general partners, unless a notice of appearance on behalf of the partner or partners who did not join in such petition is filed with such petition, the clerk shall forthwith issue a subpoena and cause the subpoena and a copy of the petition to be delivered to the marshal or to a person specially appointed for that purpose for service on the non-joining partner or partners.

(b) The marshal or person specially appointed for that purpose shall forthwith serve the subpoena and petition in conformity with Rule of Civil Procedure 4.

NOTE: Substantially the same as former Rule 3(a) and (b). The only changes are the clarifying words italicized.

SOUTHERN DISTRICT

(c) If service is not made within the time allowed by law and an order for service by publication has not been obtained, *the referee to whom the case has been referred shall forthwith give notice in writing to the attorney for the petitioning creditors to show cause before him on a date fixed by him why service of the subpoena has not been made or an order of publication obtained.*

NOTE: Adapted from former Rule 3(c), this subdivision is applicable only to the Southern District, and is consonant with the automatic reference procedure [See Rule 2]. The Referee is now required to perform those duties which formerly devolved upon the Clerk of the Court.

EASTERN DISTRICT

(c) If service is not made within the time allowed by law and an order for service by publication has not been obtained, *the referee to whom the case has been referred shall forthwith give notice in writing to the attorney for the petitioning creditors to show cause before him on a date fixed by him why service of the subpoena has not been made or an order of publication obtained. If there has been no reference the clerk shall give said notice and the hearing shall be held before the court on the next bankruptcy motion day.*

NOTE: Applicable to the Eastern District only, the first sentence is identical with new Rule 4(c) adopted by the Southern District. The final sentence constitutes new matter and is consonant with the retention of the reference procedure prevailing under the former Rules.

[SOUTHERN AND EASTERN DISTRICTS]

(d) No application for the appointment of a receiver in an involuntary proceeding or in a proceeding instituted by or in behalf of a partnership by less than all of the general partners shall be submitted to the court until after

the subpoena shall have been delivered to the marshal, or other person specially appointed by the court, for service, or a notice of appearance on behalf of the bankrupt or the respondent partners, as the case may be, shall have been filed with the clerk; and the clerk shall in every case advise the court when submitting such application whether this provision has been complied with.

NOTE: Identical to former Rule 3(d). Although the heading of this subdivision does not appear in the rule as promulgated, it is intended that it apply to both the Southern and Eastern Districts.

SOUTHERN DISTRICT

(e) Upon adjudication, the *referee* shall forthwith mail a certified copy thereof to the attorney for the petitioning creditors or petitioning partners, as the case may be, who shall immediately serve it with notice of entry upon the bankrupt or respondent partners or their attorneys of record. *Where the bankrupt has not appeared by an attorney, service of a certified copy of the order of adjudication may be made by mailing the same to the bankrupt's last known address.*

NOTE: Adapted from former Rule 3(e), this subdivision is applicable only to the Southern District. The word "referee" has been substituted for "clerk", thus requiring the former to perform a duty which formerly devolved upon the Clerk. The last sentence is entirely new and is self-explanatory.

EASTERN DISTRICT

(e) Upon adjudication, *the referee or if there has been no reference*, the clerk shall forthwith mail a certified copy thereof to the attorney for the petitioning creditors or petitioning partners, as the case may be, who shall immediately serve it with notice of entry upon the bankrupt or respondent partners or their attorneys of record. *Where the bankrupt has not appeared by an attorney, service of a*

certified copy of the order of adjudication may be made by mailing the same to the bankrupt's last known address.

NOTE: Adapted from former Rule 3(e), this subdivision is applicable only to the Eastern District. The matter italicized is new, but retention of the word "clerk" is consonant with the optional reference procedure followed in the Eastern District.

RULE 5—Extension of Time to Answer

The time to answer or move with respect to a petition shall be extended only upon order of the court made on stipulation or on petition showing adequate cause.

NOTE: Identical to former Rule 4.

RULE 6—Trial of Issues

Where an answer to an involuntary petition raises issues triable by jury and timely demand for a jury trial is duly made, the referee to whom the case has been referred shall notify the clerk who shall forthwith place the matter at the head of the appropriate Ready Day Calendar.

If non-jury issues are unresolved when the jury issues are tried, they shall be later tried by the referee unless the judge otherwise directs.

NOTE: NEW, completely revising former Rule 5. The procedure outlined by this Rule accords with the automatic reference provisions of §22 of the Act and new Rule 2. After reference, issues raised by answer to an involuntary petition are determined by the Referee except where jury trial is required. Where jury and non-jury issues are presented, the former are disposed of first.

RULE 7—Stay of Adjudication

No order staying adjudication shall be entered except on notice to the receiver.

NOTE: Identical to former Rule 6.

RULE 8—Receivers**(a) *Appointment.***

Every application for the appointment of a receiver shall be made to the ex parte judge on a verified petition setting forth the necessity therefor and the value of the assets.

NOTE: Identical to former Rule 7(a) except for the addition of the word "every". The use of this word apparently was designed to remove any doubt that the power of appointment rests exclusively in the Judges.

(b) *Possession—Inventory—List of Creditors.*

Upon qualification, the receiver shall take personal and immediate possession of the property, books and records of the bankrupt. Within ten days after qualification he shall make and file in the office of the clerk or, if the proceeding has been referred, with the referee, an inventory of the property, books, and records; and unless the bankrupt *or petitioning creditors* shall have already done so, the receiver shall file in triplicate with the clerk a list of *known* creditors with their *last known* addresses.

As soon as possible after qualification, the receiver shall determine whether the assets shall be sold or the business continued and shall, at the earliest possible date, make and bring on for prompt determination an appropriate application in respect to such matters.

NOTE: Adapted substantially from former Rule 7(b). Italicized words added.

(c) *Continuance of Business.*

The order appointing the receiver may authorize him to continue the business for a period of not more than fifteen days, during which time he shall inquire into the propriety of its further continuance, and if he *decides* that the business should be further continued he shall so petition the court setting forth his recommendations and the recommendations,

if any, made by substantial creditor interests. The court may authorize a further continuance of the business for *limited periods*. The continuance of the business for the *initial* period of *not more than* fifteen days shall not entitle the receiver to the *commissions provided for by Section 48a(3) of the Bankruptcy Act* except upon special direction of the court.

NOTE: Adapted substantially from former Rule 7(c). Clarifying words added or substituted are italicized. The words "limited periods" have been substituted for "a specified period" to conform the rule to the language of the Bankruptcy Act, §2a(5). The phraseology with respect to the extent of commissions allowable effects no substantive change in the previous rule.

(d) *Deposit and Disbursement of Funds.*

All funds received shall be deposited in designated depositories. Payments and withdrawals shall be made only by checks consecutively numbered. Such checks shall be signed by the receiver and countersigned by the referee, and shall be substantially in the following form:

"No.	Date
NAME OF BANK	
Pay to the Order of \$.....	
..... Dollars	
In payment of	
Estate of	
.....	
(Alleged) Bankrupt	
.....	
Receiver	
Countersigned:	
.....	
Referee in Bankruptcy"	

The designated depository used by the receiver for the deposit of estate funds shall send all bank statements and cancelled checks and other communications with respect to such account to the receiver personally and not to any agent or attorney for such receiver. No receiver shall have the power to designate an agent or attorney to receive such bank statements, cancelled checks or other communications.

NOTE: Adapted from former Rule 7(d). The new matter, italicized, is designed to place squarely upon the receiver direct accountability for all funds of the estate entrusted to his care.

In view of the automatic reference, there is omitted the former procedure for countersignature of receiver's checks prior to reference.

(e) *Consultation with Creditors.*

Where practicable, the receiver shall consult with creditors and their committees regarding the administration and disposition of bankrupt estates.

NOTE: Identical to former Rule 7(e).

(f) *Reports and Accounts.*

Within ten days after qualification of the trustee, the receiver shall, unless otherwise ordered, turn over to the trustee all property, funds and books of the estate, and within *thirty* days after the qualification of the trustee, the receiver shall file with the referee in duplicate his report and accounting and petition for allowance. Such report shall contain the following information in the following order:

(1) Date of the receiver's qualification and the amount of his bond.

(2) Statement of the services performed by the receiver.

(3) Total receipts and total disbursements of the receiver and the balance turned over by him to the trustee.

(4) Total disbursements made by him in continuing the business of the bankrupt.

(5) The compensation requested by the receiver for his services and the amount of any previous allowance.

(6) A statement of the amounts of compensation asked for by his attorneys and accountants together with such comments or recommendations as he may deem appropriate.

(7) A statement that all disbursements made by the receiver were reasonable in amount and properly made.

Attached to the report shall be the following: Affidavit required by Section 62 of the Bankruptcy Act, vouchers for all disbursements, together with bank statement showing account closed, and the following schedules:

Schedule A. Cash items received by the receiver in detail, giving the dates of receipt and on account of what received and the total of such receipts.

Schedule B. The disbursements of the receiver in detail, giving the date of each disbursement, the amount thereof, the purpose thereof and the total of such disbursements.

Schedule C. An adequate statement as to the assets which came into the receiver's possession and the disposition thereof.

Schedule D. A list of the receiver's unpaid obligations.

NOTE: Identical to former Rule 7(f), except that receiver's report and accounting must be filed within thirty days after qualification instead of twenty days.

RULE 9—Trustees**(a) *Inventory.***

Within ten days after qualification, the trustee, if he be a person other than the receiver, shall file with the referee an inventory of all property, books and records coming into his possession.

NOTE: Identical to former Rule 8(a).

(b) *Deposit and Disbursement of Funds.*

All funds received shall be deposited in designated depositories. Payments and withdrawals shall be made only by checks consecutively numbered. Such checks shall be signed by the trustee and countersigned by the referee and shall be substantially in the following form:

“No.	Date
NAME OF BANK	
Pay to the Order of	
	\$.....
..... Dollars	
In payment of	
	Estate of
	
	Bankrupt
	
	Trustee
Countersigned:	
.....	
Referee in Bankruptcy”	

The designated depository used by the trustee for the deposit of estate funds shall send all bank statements and

cancelled checks and other communications with respect to such account to the trustee personally and not to any agent or attorney for such trustee. No trustee shall have the power to designate an agent or attorney to receive such bank statements, cancelled checks or other communications.

NOTE: Adapted from former Rule 8(b). The new matter, italicized, is designed to place squarely upon the trustee, direct accountability for all funds of the estate entrusted to his care.

(c) *Reports and Accounts.*

Within one month after qualification the trustee shall file a report with the referee, and shall *every three months thereafter, unless otherwise ordered by the court*, file such reports as may be necessary to keep the court and creditors advised of the progress of the administration of the estate. Every such report shall state what, if any, dividends can be paid and the reasons why a final report cannot then be filed.

The trustee's final report shall be filed in duplicate and shall contain the following information in the following order:

(1) Date of the trustee's qualification and the amount of his bond.

(2) Statement of the services performed by the trustee.

(3) Total receipts and total disbursements of the trustee.

(4) Total disbursements made by him in continuing the business of the bankrupt.

(5) A statement that all the assets have been reduced to cash and that the estate is ready to be closed.

(6) A statement referring in reasonable detail to the items of property mentioned in the bankrupt's schedules,

including accounts receivable and choses in action, and accounting for the same.

(7) A statement that the trustee has examined into the amount paid, prior to the filing of the petition, to any attorney for the bankrupt for services rendered or to be rendered in connection with the bankruptcy, setting forth the amount of such payment, and whether he deems the fee reasonable; and if he deems the fee unreasonable, what proceedings have been taken thereon.

(8) A statement of the amounts of compensation asked for by his attorneys and accountants, together with such comments or recommendations as he may deem appropriate.

(9) A statement that all disbursements made by the trustee were reasonable in amount and properly made.

(10) A statement that the claims on file with the referee have been examined and should be allowed for the amounts therein claimed or for such amounts as have been fixed by order.

(11) The compensation requested by the trustee for his services and the amount of any previous allowance.

(12) *A list of unpaid claims incurred in any prior proceeding superseded by the bankruptcy and filed with the trustee or the court containing the names of the holders, their addresses and amounts, and a statement whether such claims are valid and, if not, that objections thereto have been or are being filed and noticed for hearing.*

Attached to the report shall be the following: Affidavit required by Section 62 of the *Bankruptcy Act*, vouchers for all disbursements, together with bank statement and the following schedules:

Schedule A. Cash items received by the trustee in detail, giving the dates of receipt and on account of what received and the total of such receipts.

Schedule B. The disbursements of the trustee in detail, giving the date of each disbursement, the amount thereof, the purpose thereof and the total of such disbursements.

Schedule C. An adequate statement as to the assets which came into the trustee's possession and the disposition thereof.

NOTE: Adapted from former Rule 8(c). Interim reports are required to be filed every three months instead of "from time to time" as required by the former Rule. Bankruptcy Act, §47a(12) requires bimonthly reports "unless otherwise ordered by the courts". The power to order otherwise has been exercised by promulgation of this Rule.

Although the rule does not specifically so require, it appears quite clear that an interim report would be incomplete without annexing thereto the most recent bank statement.

Subdivision (12), italicized, is entirely new. This rule is designed to insure that all unpaid administration claims in prior proceedings, including aborted Chapter cases, and assignments for the benefit of creditors, etc., participate in distribution, if any.

(d) *Unclaimed Dividends and Unadministered Assets.*

Sixty days after declaration of the final dividend the trustee shall stop payment of all checks then unpaid and deposit by certified check the amount of such unpaid checks with the clerk, and shall file with the clerk a list of the persons entitled to the unpaid checks and the amounts thereof.

If after the declaration of a final dividend or other termination of the proceeding, a trustee shall have paid to him any moneys belonging to the estate, he shall notify at least two of the creditors of the estate and forthwith pay the same to the clerk of the court, who shall thereupon deposit

the amount received by him in the registry of the court, subject to its further order.

NOTE: Identical to former Rule 8(d).

(e) Storage of Bankrupt's Books, etc.

The trustee may, if necessary, place in storage, at the expense of the bankrupt estate, the bankrupt's books, records and papers for a period of eighteen (18) months from the date of the trustee's appointment. Application for leave to store for any additional period at the expense of the estate shall be made by the trustee upon his petition showing the necessity therefor.

NOTE: NEW. This rule is designed to effect economy in administration. After books and records have served their purpose, application should be made for authorization to dispose of them.

RULE 10—Appointment of Attorneys

All petitions to retain an attorney for a receiver, trustee or debtor in possession shall comply with General Order 44. The showing of necessity shall be factual.

The attorney for petitioning creditors shall not be retained as attorney for the receiver, trustee or debtor in possession unless his affidavit shall show that he did not file the petition or become the attorney for the petitioning creditors at the instance of or pursuant to any arrangement with the bankrupt or anyone acting in his behalf. ✓

The receiver, trustee or debtor in possession may retain as special counsel for litigation or other matters then pending an attorney who at the time of the filing of the petition *initiating the proceeding under the Bankruptcy Act* was acting for the bankrupt. The receiver, trustee or debtor in possession may also retain as special counsel an attorney in

another jurisdiction. No special counsel shall be so retained except on order of the court.

NOTE: Adapted substantially from former Rule 9. *Italicized matter substituted for "petition in bankruptcy".*

General Order 44, referred to in this Rule, requires a verified petition setting forth (1) name of counsel to be employed, (2) reasons for his selection, (3) professional services to be rendered, (4) necessity for employing counsel, and (5) to the best of petitioner's knowledge, all of the attorney's connections with the bankrupt or debtor, the creditors, or any other party in interest, and their respective attorneys.

General Order 44 must be strictly observed, else the attorney will be denied compensation. See *Matter of Stratton* (2d Cir. 1931), 51 F.(2d) 984, cert. den. 284 U. S. 682; *Matter of Rogers-Pyatt Shellac Co.* (2d Cir. 1931), 51 F.(2d) 988.

RULE 11—Employees of Receiver and Trustee

No receiver or trustee shall employ, at the expense of the estate, a caretaker or watchman for more than five days or, unless authorized to carry on the business, a person for any other purpose for any period, except on order of the court expressly authorizing such employment and fixing the amount of compensation or the rate or measure thereof. The application for such order must be made upon the petition of the receiver or trustee setting forth the name of the person whom he wishes to employ, the reason for his selection and the necessity for the employment. The receiver or trustee shall not employ, at the expense of the estate, persons merely for the purpose of guarding the property when there are other adequate methods of protecting it at less expense.

Each such person employed by the receiver or trustee shall submit before payment an affidavit setting forth the dates on which he acted as such employee, and also the hours between which he was actually present and performing his duties as such; such affidavit shall accompany the check when presented for countersignature.

A petition to employ an accountant shall comply with General Order 45 and Rule 12.

NOTE: Identical to former Rule 10.

RULE 12—Accountants

No receiver, trustee or debtor in possession shall employ an accountant except upon order of the court. Such order shall be granted only upon petition of the receiver, trustee or debtor in possession setting forth facts indicating the necessity for the employment of an accountant and the reason for his selection. The affidavit of the person proposed as accountant shall accompany the petition and shall set forth:

(a) His name, business address, whether or not he is a certified public accountant, and to the best of his knowledge his relationship to or business association with any attorney, creditor, bankrupt, or debtor or other party to the proceedings;

(b) Whether he has already rendered any service as an accountant to the bankrupt, receiver, trustee, debtor or debtor in possession, the extent thereof, and the status of his compensation therefor;

(c) The nature and extent of the services that he proposes to render, the estimated cost thereof, the basis of such estimate and the extent to which he is familiar with the books or accounts of the bankrupt or debtor.

Any order authorizing the employment of an accountant shall fix the amount of the compensation or the rate or measure thereof in accordance with General Order 45.

NOTE: Identical to former Rule 11. Failure to obtain an order authorizing retention of an accountant may result in disallowance of compensation. *Matter of Honig, Myers & Co. Inc.* (D.C.N.Y.) 22 F. Supp. 287 (dealing with violation of local rule). Likewise, where the order fails to fix the amount of the compensation or

the rate or measure thereof, there is the danger of total disallowance thereof, *Matter of New York Investors, Inc.* (E.D. N.Y.), 48 F. Supp. 900, aff'd 138 F.(2d) 881.

RULE 13—Newspapers and Official Advertising

Notices and orders which the court may direct to be published shall be inserted in the newspapers designated by the judges pursuant to Section 28 of the Bankruptcy Act. Lists of the newspapers so designated shall be on file in the offices of the clerks of the district courts for the respective districts and in the offices of the referees in bankruptcy for such districts.

NOTE: Adapted from former Rule 12 which specified the designated newspapers. Under the revised rule, lists of designated newspapers will be on file in the Clerks' and the Referees' offices. Provision in former Rule 12 for additional publication, eliminated from this rule, may now be found in Rule 14(c).

RULE 14—Appraisals—Auctioneer—Sales

(a) *Appraisals.*

Appraisals shall be filed before the sale with the referee, or if the matter has not been referred, with the clerk of the court.

Upon the filing of the appraisal it shall be impounded by the court and its contents shall be held confidential until after the conclusion of the bidding. Unless the court otherwise directs, access thereto may be had only by the judge and the referee, and by the receiver, trustee and their respective attorneys but none of them shall disclose the contents of the appraisal or any part thereof to any person not herein described until after the conclusion of the bidding.

NOTE: Adapted from former Rule 13(a). The first paragraph is identical to the former rule. The second paragraph recasts the former rule and adds the italicized sentence. No substantive change is effected.

As in the case of accountants, failure to obtain an order of appointment or failure to comply with General Order 45 requiring the compensation of appraisers to be fixed in such order, will result in disallowance of compensation. *In the Matter of Benjamin Kaufman, Inc.* (D.C.N.Y.), 21 F.(2d) 799.

(b) *Auctioneer.*

APPLICABLE TO SOUTHERN DISTRICT

The Underwriters' Salvage Company of New York is designated as the official auctioneer for sales within the counties of New York, Bronx and Westchester, and shall be subject to removal by the court at any time. Such auctioneer shall give, *at its own expense*, a surety bond *to the United States of America* in the sum of Twenty-five Thousand (\$25,000.) Dollars, conditioned upon (1) the faithful and prompt accounting for all moneys and property which may come into its possession as such auctioneer, (2) compliance with all rules, orders and decrees of this court, and (3) the faithful performance of its duties *in all respects*. Such auctioneer shall provide an adequate warehouse and shall receive and store in such warehouse and, if requested by the receiver or trustee, shall insure movable property of bankrupt estates, without charge for storage of property, other than for books and papers, if sold at auction by it within thirty days after the time of receipt, and, if not so sold, such auctioneer shall be allowed a reasonable charge for the storage of property for the period in excess of thirty days.

In *counties* other than those where the official auctioneer is designated to act, an auctioneer shall be specially designated in each case by the court; and, unless limited in the order of his designation, shall be allowed the commissions hereinafter specified. The auctioneer, whether official or otherwise, shall be reimbursed for expenditures in trucking goods when so directed by the receiver or trustee and shall be allowed reasonable disbursements for necessary labor, cataloguing, printing, insurance and all other actual and necessary disbursements.

*See amendment
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Any auctioneer appointed by the court shall not act as such, nor conduct a sale unless he (it) shall give in each estate, at his (its) own expense, a surety bond to the United States of America, in such sum as may be fixed by the court, upon the same conditions as set forth for the official auctioneer. In lieu of a bond in each case, an auctioneer may be permitted to file, at his (its) own expense, a standing surety bond covering all cases in which he (it) may act. Such bond shall be in the sum of Twenty-five Thousand (\$25,000.) Dollars, shall run to the United States of America, and shall be conditioned as provided for the bond of the official auctioneer.

All bonds shall be approved by the court and filed with the clerk of the court; and may be proceeded upon in the name of the United States as provided in Section 50h of the Bankruptcy Act.

The *auctioneer* shall be allowed the following commissions upon the proceeds of each sale conducted by such auctioneer:

“ $7\frac{1}{2}\%$ on the first \$10,000. or any part thereof; 5% on the next \$15,000. or any part thereof; 3% on any amount over \$25,000.”

In sales of real property the compensation of the auctioneer shall be fixed by the court at rates not in excess of the rates fixed for the sale of personalty.

The books and records of a bankrupt estate to be stored with the official auctioneer shall be packed in cases weighing not more than one hundred (100) pounds each. It shall be entitled to charge sixty-five cents (65¢) per month for the first six months and thereafter at the rate of forty cents (40¢) per month for the storage of each such case. It shall, in cases where there are any assets, receive payment in advance for the storage of books and records for six months' periods.

Every auctioneer acting hereunder shall at all times keep proper records of all transactions and shall set forth in the reports of sales:

- (1) The time and place of sale;
- (2) The gross amount of the sale, and when property is sold in lots, the items and the amount received for each lot, as well as the bulk bid;
- (3) An itemized statement of the expenditures, disbursements and commissions allowable under this rule, together with appropriate vouchers.
- (4) Whenever articles are sold free and clear of liens, the lien to attach to the proceeds, they shall be itemized *and** stated separately.

Payment of proceeds of sale shall be made by the auctioneer with all possible promptness and not later than one week after the completion of the delivery of property sold. In event of unavoidable delay in completing deliveries, payments on account shall be made by the auctioneer to the receiver or trustee within one week after receipt of said payments by the auctioneer.

NOTE: Adapted from former Rule 13(b). Changes in the first two paragraphs, italicized, are not substantive. The third paragraph is entirely new and relates to the bond requirement of any auctioneers other than the official auctioneer.

The fourth paragraph provides for approval of the bonds of other than the official auctioneers. This paragraph also extends the summary enforcement provisions of §50b of the Act to action on auctioneers' bonds.

The remaining changes, italicized, are not substantive.

Note that the provisions for storage of books and records is applicable only to the Southern District of New York and no like provision is found in the rules which relate to the Eastern District.

* "And" substituted for "or".

APPLICABLE TO EASTERN DISTRICT

There shall be no official auctioneer, but the auctioneer shall be designated in every case in the order authorizing the sale. *Any auctioneer appointed by the court shall not act as such, nor conduct a sale unless he (it) shall give in each estate, at his (its) own expense, a surety bond to the United States of America, to be approved by the court, in such sum as may be fixed by the court, conditioned upon (1) the faithful and prompt accounting for all moneys and property which may come into his (its) possession as such auctioneer, (2) compliance with all rules, orders and decrees of this court, and (3) the faithful performance of his (its) duties in all respects. In lieu of a bond in each case, an auctioneer may be permitted to file, at his (its) own expense, a standing surety bond covering all cases in which he (it) may act. Such bond shall be in the sum of Twenty-five Thousand (\$25,000.) Dollars, shall run to the United States of America, and shall be conditioned for each estate to be handled thereunder, in the same terms as bonds in separate estates. All bonds when approved by the court, shall be filed with the clerk of the court; and may be proceeded upon in the name of the United States as provided in Section 50h of the Bankruptcy Act.*

Every auctioneer acting hereunder shall at all times keep proper records of all transactions conducted by him and shall set forth in his reports of sales

- (1) The time and place of sale;
- (2) The gross amount of the sale, and when property is sold in lots, the items and the amount received for each lot, as well as the bulk bid;
- (3) An itemized statement of the expenditures, disbursements and commissions allowable under this rule, together with appropriate vouchers;

(4) Whenever articles are sold free and clear of liens, the lien to attach to the proceeds, they shall be itemized *and** stated separately.

Payment of proceeds of sales shall be made by the auctioneer with all possible promptness and not later than one week after the completion of the delivery of property sold. In event of unavoidable delay in completing deliveries, payments on account shall be made by the auctioneer to the receiver or trustee within one week after receipt of said payments by the auctioneer.

The auctioneer shall be allowed a reasonable charge for the storage of goods if not sold by him, and his reasonable disbursements for necessary labor, cataloguing, printing, insurance and all other actual disbursements, which must be itemized. He shall also be allowed the following commissions upon the proceeds of sales made by him:

6% on the first \$5,000;
3% on all over \$5,000.

In sales of real property the compensation of the auctioneer shall be fixed by the court at rates not in excess of the rates fixed for the sale of personalty.

NOTE: Adapted from former rule 13(b). The Eastern District has no official auctioneer. The new matter in the first paragraph, italicized, is substantially the same as the bond requirement in the Southern District for non-official auctioneers.

* "And" substituted for "or".

SOUTHERN AND EASTERN DISTRICTS

(c) *Sales.*

No auctioneer or officer, director, stockholder, agent or employee of an auctioneer shall be directly or indirectly interested in the purchase of any of the assets or property of the estate of which he (it) is auctioneer.

No receiver or trustee shall sell property of a bankrupt estate on a percentage basis, i.e., on terms providing for the payment of a fixed percentage to creditors and expenses of administration.

Unless otherwise ordered by reason of special circumstances, sales shall be by public auction. Unless the court, for cause shown, dispenses with or modifies these requirements or directs a shorter period of advertising, sales shall be advertised at least ten days before the sale and on the day of sale, except that in those counties in which no morning daily newspaper is designated, sales shall be advertised at least ten days before the sale and again on such additional day before the sale as will be closest to the day of sale. *The receiver or trustee may cause further advertising to be given. Except as in this rule provided or unless otherwise specially ordered, all advertising shall be in the newspapers designated by the court.**

The property to be sold shall be on public exhibition for such reasonable period prior to the sale as the receiver or trustee may determine. The auctioneer shall, before receiving bids, announce the terms of sale. The property shall be offered for sale first in bulk and then in lots; or in such other manner as the court may direct. The auctioneer shall announce that no sales will be final without special order of the court unless the sale realizes seventy-five per cent or more of the appraised value. Any property which, because of reclamation proceedings or for other reasons, is not included in the sale, shall be set apart and conspicuously marked "not included in sale", and such fact shall be announced by the auctioneer before the sale.

NOTE: Adapted from former Rule 13(c). The first paragraph is new. This extends to auctioneers the prohibition of 18 U.S.C. §154 which makes it an offense for a referee, receiver, custodian, trustee, marshal or other officer of the court to directly or indirectly purchase property of the estate.

The provision in the third paragraph authorizing the receiver or trustee to cause further advertising has been adapted from former Rule 12, omitting the necessity for prior court approval. This would seem to mean that receivers and trustees may exercise their own judgment with respect to further advertising. If a considerable expenditure is contemplated, prudence would dictate prior court approval.

Other changes, italicized, are not substantive.

* The words "by the court" are substituted for "by these rules".

(d) *Disposition of books, records and property.*

The receiver or trustee may, upon approval by the court, abandon any property of the bankrupt if burdensome or of no net realizable value.

At the final meeting of creditors, the referee may order the *sale or abandonment* of the books and records of the bankrupt estate or provide for the payment of an appropriate amount for storage charges should the retention of the books be ordered.

NOTE: Identical to Rule 13(d) except that matter italicized is substituted for "distribution, sale or other disposition".

RULE 15—Solicitation of Proxies and Voting

(a) *Disapproval of Election of Trustee or Creditors' Committee.*

The appointment of any trustee in bankruptcy or of the official creditors' committee selected at any meeting of creditors as provided in the Bankruptcy Act whose election or appointment shall have been procured by votes cast under powers of attorney or proxies in the interest of the bankrupt, or in any interest other than that of general creditors, shall be forthwith disapproved. *For such cause and upon notice* the trustee shall be removed and the appointment of such committee set aside. Such powers of attorney or proxies

shall not thereafter be voted for any purpose by the holders thereof.

NOTE: Substantially adapted from former Rule 14(a). The matter italicized is new and makes clear that while a trustee's election may be forthwith disapproved at the time of the election for the grounds stated, once appointed, he may be removed for such cause only upon notice, and inferentially, after hearing. See Bankr. Act §2a(17) empowering the court upon complaints of creditors or upon its own motion, to remove for cause receivers or trustees upon hearing after notice.

(b) Voting More Than One Claim by Proxy.

No person, firm or corporation, other than a creditor, committee of creditors, or an attorney at law, shall be permitted to vote more than one claim under power of attorney or proxy at any meeting of creditors, unless the referee at the time of voting, and not prior thereto, grants an order authorizing such voting. Such order may be granted on an affidavit or verified petition annexed to said order which shall set forth the following:

Applicant's name, business and address, whether the claims applicant desires to vote have been solicited, and if so, by whom and at whose suggestion, the purpose of such solicitation, the compensation or consideration, if any, which affiant expects to receive, directly or indirectly, therefrom, and that such solicitation is not in the interest of the bankrupt, or in an interest other than that of general creditors.

If it shall thereafter appear to the satisfaction of the referee that powers of attorney or proxies have been solicited by the applicant in the interest of the bankrupt or in an interest other than that of general creditors, the referee may vacate such order, in which event, he shall give notice in such manner as he may direct of the said vacatur to all persons who have theretofore granted powers of attorney or proxies to the applicant.

NOTE: Identical to former Rule 14(b).

(c) *Qualification for Voting By*

1. *A Creditor.*

A creditor desiring to vote claims, other than his own, under power of attorney or proxy at any meeting of creditors shall, prior to such voting, file an affidavit with the referee stating (1) his name, address, nature of business and amount of his own claim, (2) the names and amounts of the claims he desires to vote, (3) the name of the person from whom he received the claims and the nature of his connection with said person, (4) whether the claims have been solicited, and if so, by whom and at whose instance or suggestion, and the purpose of such solicitation, (5) whether he expects to receive any compensation or consideration, directly or indirectly, and if so, from whom, and the amount or nature thereof, and (6) that said claims were not solicited nor will they be voted in the interest of the bankrupt or in an interest other than that of general creditors.

NOTE: Identical to former Rule 14(c) 1.

2. *A Committee of Creditors.*

Any member or members of a committee of creditors desiring to vote claims held by such committee shall, prior to such voting, file an affidavit *of any member of the committee* with the referee stating (1) names of officers and members of such committee and the amounts of their respective claims, (2) whether they or their firms are general creditors, (3) when, where and at whose instance the committee was organized, (4) whether any members or officers thereof expect compensation, directly or indirectly, and if so, from whom, and (5) that said claims were not solicited nor will they be voted in the interest of the bankrupt or in an interest other than that of general creditors.

NOTE: Adapted from former Rule 14(c) 2, new matter italicized. This makes clear that any member of the committee may vote claims

held by such committee upon filing an affidavit, as required by this rule, made by he who votes the claim or by any other member of the committee. Previously, it was thought by some that only he who made the affidavit could vote.

3. *An Attorney at Law.*

An attorney desiring to vote more than one claim under power of attorney or proxy at any meeting of creditors shall, prior to such voting, file an affidavit with the referee stating (1) his name and office address, (2) the names and amounts of the claims he desires to vote, (3) whether any of the creditors whose claims he desires to vote are his regular clients, and if so, their names and the approximate length of time each has been such regular client, (4) the name of the person from whom he received the claims of creditors who are not his regular clients, and the nature of his connection with such person, (5) whether the claims of creditors other than his regular clients have been solicited, and if so, by whom, and (6) that said claims were not solicited nor will they be voted in the interest of the bankrupt or in an interest other than that of general creditors.

NOTE: Identical to former Rule 14c(3). Note that an attorney may vote a single claim without filing the affidavit under this rule. However, although representing a regular client, an attorney at law must, before being entitled to vote, present a written power of attorney. See *Matter of Capital Trading Co. Inc.* (D.C.N.Y.), 229 Fed. 806, where the court said that the creditor may vote for a trustee by agent, attorney or proxy when such agent, attorney or proxy presents and files power or letter of attorney authorizing him so to do. But where the creditor is himself present, his acquiescence sufficiently establishes the authority of his attorney to act. *Matter of Solomon* (2d Cir.), 37 F.(2d) 18. On matters other than voting, however, it would seem that an attorney at law may represent his client without written power of attorney.

(d) *Inquiry by Referee as to Solicitation of Proxies.*

The referee, at his own instance, or at the request of any party in interest in the proceeding, may make, or permit inquiry to be made, as to the solicitation of claims voted, or

to be voted. If, upon such inquiry, it appears that any claim, power of attorney or proxy has been solicited with the intent or purpose of voting such claim at any meeting or hearing in the interest of the bankrupt, or in an interest other than that of general creditors, or, if it appears that any claim, power of attorney or proxy has been solicited, and such claim is being voted at any meeting of creditors by an attorney at law, the referee shall not allow the voting of such claim under such power of attorney or proxy. If, in the opinion of the referee, the election of the trustee, or the determination of the matter to be submitted, is affected by such disallowance, the referee may adjourn the meeting and notify the creditor who executed such power of attorney or proxy of the adjourned date of meeting, to afford him an opportunity to attend and vote or to execute a new power of attorney or proxy designating some other person.

NOTE: Identical to former Rule 14(d). Solicitation of claims is not in itself unlawful. See *In re Mayflower Hat Co. Inc.* (2d Cir.), 65 F.(2d) 330, in which the court said: "Unless it is done in the interest of the bankrupt or of some one other than a general creditor to enable him to control the election, it is proper to solicit claims." It is improper, however, for an attorney to solicit business for himself and therefore solicitation of claims by an attorney is considered improper. Cf. *In re J.L.N. Distributors, Inc.* (2d Cir. 1964), 330 F.(2d) 815 in which the court, commenting upon this very rule said, "While the rule is designed to proscribe a lawyer's independent solicitation of claims for his own benefit, creditors should not be denied the right to retain attorneys to aid them in the sometimes complex task of assembling the claims of other creditors and presenting these claims before the referee in bankruptcy". While attorneys may represent their clients as members of creditors' committees, this may not be done merely as "a mask for the lawyer's solicitation of business for himself".—*id.*

RULE 16—Allowances

(a) Compensation Applications.

All applications for allowances, including the reports and accounts of custodians, receivers, ancillary receivers,

trustees, accountants, attorneys, assignees and appraisers shall be filed with the referee in the case.

Applications must state the sums requested. No sums shall be allowed greater than those requested. No disbursements shall be allowed for any except extraordinary type-writing charges. All applicants for allowances shall annex to their applications an affidavit which shall state in addition to the matters required by Sec. 62 of the Bankruptcy Act: (1) that no division of compensation will be made by the applicant except as set forth in said affidavit; (2) whether or not any agreement prohibited by the U.S.C. Title 18 Sec. 155 has been made.

Except as to appraisers as hereinafter mentioned, applications for allowances shall be heard on notice sent by mail to the creditors, the applicants, the trustee and his attorney. The notice of hearing shall state the amount requested, and the amount of compensation, if any, and to whom, theretofore allowed in the case. Where an appraiser requests \$100 or less as compensation, the referee may pass on such application without notice to creditors, *and fix the value of such services and order the same as fixed to be paid.*

NOTE: Adapted from former Rule 15(a). The effect of the new matter, italicized, is to empower the referee to pass upon, without notice to creditors, and to fix and direct payment of compensation for an appraiser where the amount requested is \$100, instead of \$50 as formerly.

(b) *Recommendations or Orders on Allowances.*

(i.) *Recommendations*—SOUTHERN DISTRICT.

In cases of which he is in charge, the referee shall examine all accounts of receivers and trustees and shall make recommendations to the court as to discharge of receivers. The referee shall also make recommendations to the court as to compensation and the amount thereof, in accordance with

these rules and the Bankruptcy Act, to receivers, trustees, accountants, appraisers, assignees, attorneys for assignees, attorneys for debtors, attorneys for the petitioning creditors, attorneys for bankrupts, attorneys for receivers and attorneys for trustees. Where an appraiser requests \$100* or less as compensation, the referee shall fix the value of such services and order the same as fixed to be paid.

NOTE: This rule is identical to language found in former Rule 15(a). Previously, applying to both districts, this rule is now applicable only to the Southern District.

* "\$100" substituted for "\$50".

(ii.) *Orders*—EASTERN DISTRICT.

In cases of which he is in charge, the referee shall examine all accounts of receivers and trustees and shall approve or disapprove such accounts and, if proper, discharge the receivers and trustees. The referee shall also fix compensation and the amount thereof, in accordance with these rules and the Bankruptcy Act, to all persons entitled to compensation.

No payment shall be made pursuant to the referee's order fixing compensation until ten days after the entry thereof. If a petition for review is filed within such ten day period the payment shall be withheld until the final determination of the petition for review by the district judge or other final disposition thereof.

NOTE: Entirely new. The referees in the Eastern District now fix compensation instead of recommending compensation to the District Court. Note that there is an automatic stay of 10 days after entry of the order fixing compensation to permit a review pursuant to §39c of the Act.

(c) *Contents of Orders or Recommendations.*

In the order or recommendation fixing compensation the referee shall recite:

1. What the gross assets of the estate were.
2. What the net assets on hand are.
3. What amount will remain after payment of the allowances *as fixed* and any other deduction.
4. What previous dividends have been declared and paid, and if so, of what per cent and of what *aggregate* amount.
5. The sum necessary to pay a dividend of 1%.
6. An itemized statement of all prior allowances both as to amounts and the persons to whom such allowances were made.
7. Whether the services referred to *therein* have been the subject of compensation in whole or in part to any other person.
8. And in the case of a receiver whether the services rendered were more than those of a mere custodian.
9. *Such other findings as may be appropriate in the circumstances.*

NOTE: Adapted from former Rule 15(a) with language changes to conform to the different procedures as to compensation [See notes to Rules 16(b)(i) and 16(b)(ii)]. Other changes, *italized*, are merely clarification. Subdivision "9" of this rule is entirely new.

(d) *Attorney for Receiver or Trustee.*

Applications for compensation for services as attorney for the receiver or trustee shall comply with Section 62 of the *Bankruptcy Act*, and shall state in addition the following:

1. The date when the attorney was retained, together with a copy of the order authorizing such retention, except when made by the referee.

2. That all the services for which compensation is requested were performed for and on behalf of the receiver or trustee, as the case may be, and not on behalf of any committee, creditor or other person.

3. In concise form the facts regarding such services, showing their nature and extent, the results obtained, the size of the estate and any other matters which will enable the court to determine the reasonable value of such services.

4. The amount of compensation applied for, the amount of any compensation theretofore received in the case, and the amount requested as reimbursement for expenses, which shall be itemized.

NOTE: Identical to former Rule 15(b) with the exception of the added word, *italicized*.

(e) *Attorney for Petitioning Creditors or Partners.*

Applications for compensation for services as attorney for the petitioning creditors in an involuntary proceeding or as attorney for petitioning partners in a voluntary proceeding (where less than all join) shall comply with Section 62 of the *Bankruptcy Act* and shall state in addition the following:

1. That all the services for which compensation is requested were rendered for and on behalf of the petitioning creditors, or petitioning partners, as the case may be.

2. The amount of compensation requested for said services, and the amount requested as reimbursement for expenses, which shall be itemized.

3. That a certified copy of the adjudication has been served upon the bankrupt, or the respondent partners,

or their attorneys of record, within five days after adjudication, or the reasons why such service was not made.

NOTE: Identical to former Rule 15(c), with the exception of the added word, italicized.

(f) *Attorney for Bankrupt.*

Applications for compensation for services as attorney for the bankrupt shall comply with Section 62 of the *Bankruptcy Act*, and, in addition, shall state the following:

1. That all services for which compensation is requested, performed before the petition in bankruptcy was filed, were in connection with the said bankruptcy proceeding and were not services in any other matter; that all services performed after the filing of the petition were in connection with the performance by the bankrupt of the duties prescribed for him by the *Bankruptcy Act* or were rendered pursuant to an order of the court.

2. The amount of compensation requested for such services and the amount of compensation received therefor from the bankrupt or any other person and the amount requested as reimbursement for expenses which shall be itemized.

NOTE: Identical to former Rule 15(d), with the exception of the added word, italicized.

✓ (g) *Any application for attorney's fees hereunder shall state the hours spent by attorney or attorneys for which compensation is sought.*

NOTE: NEW. Since the element of time is one of the several factors considered in determining compensation for an attorney, this rule requires a statement of hours spent. This suggests the necessity for maintaining accurate time records.

RULE 17—Discharges**(a) *Individual and Copartnership Bankrupts.***

After the filing fees are paid in full, and in cases where the bankrupt is an individual or a copartnership and has not waived the right to a discharge, the referee shall fix by order the last day for the filing of objections to the bankrupt's discharge, which shall be not less than thirty days after the first date set for the first meeting of creditors, and give notice thereof to all parties in interest, as provided in Section 58b of the Bankruptcy Act.

The time for filing objections to the bankrupt's discharge may be extended in accordance with Section 14b of the Bankruptcy Act.

The objections to the bankrupt's discharge shall be in writing, shall specify the grounds of opposition, shall be served upon the bankrupt or his attorney *on or before the date of filing* and shall be filed *with proof of service* with the referee.

Within five days after the last day fixed for the filing of the objections the bankrupt may make any motion with respect thereto on at least five days' notice to the objecting party of a hearing thereon before the referee on the earliest date on which such referee shall hold hearings. The referee may permit the filing of amended objections in the event that the motion is sustained.

A party who files objections may be required by the referee to deposit with the stenographer such sum as the referee may determine is necessary to pay the expense of the stenographer in reporting the minutes. In that event the referee shall give notice to the attorney for the objecting party of the amount of the deposit required and that unless such deposit is made within ten days thereafter the objections may be dismissed. If such deposit is not made within

said period of ten days or such further time as the referee may permit, the referee may dismiss the objections and grant the discharge.

Notice of hearing on the objections filed to the bankrupt's discharge shall be given by the referee within fifteen days after the last day fixed for the filing of such objections, but where a motion by the bankrupt is pending as to such objections, such notice shall be given within such time as the referee may fix in the order disposing of such motion.

If after the commencement of the hearing on the objections there is unreasonable delay in carrying on and completing such hearing, the court may dismiss the application for discharge or the objections, as the case may be.

In the event of any withdrawal of objections to a discharge or the failure to prosecute the objections, no discharge shall be granted unless the bankrupt and his attorney shall each make and file with the court an affidavit that no consideration has been promised or given, directly or indirectly, for any such withdrawal or failure to prosecute.

NOTE: Adapted from former Rule 16(a). New matter, italicized, has been added to conform to Bankr. Act §14b. Thus, §14b of the Act and this rule require that the last day fixed for filing objections must be not less than 30 days after the first date set for the first meeting of creditors, and §58b of the Act requires at least 30 days notice to creditors thereof.

The second paragraph is new and again conforms to the provisions of §14b which provides that "upon the expiration of the time fixed in such order or any extension of such time granted by the court, the court shall discharge the bankrupt * * *." Apparently, this extension may be granted after the time fixed has expired. *In re Fithiam* (D.C.Md.), 156 F. Supp. 877. The time may be extended without entry of a formal order. *In re Legon* (S.D.N.Y.), 85 F. Supp. 946, and, acceptance of specifications, notification to bankrupt of their filing and holding the hearing thereon has been treated as evidence of the granting of such extension although no formal order of extension appeared in the record. *In re Massa* (2d Cir.), 133 F.(2d) 191.

The third paragraph has been rewritten first, to eliminate the former requirement that objections be verified, and second to require service upon bankrupt or his attorney *before* filing.

(b) *Corporate Bankrupts.*

Within six months after adjudication, corporations seeking discharge shall file their applications with the clerk and a duplicate original thereof with the referee in charge of the proceeding. Thereupon the procedure set out in subdivision (a) of this rule shall be followed. *Failure to make such application within such period shall bar such application thereafter.*

NOTE: Adapted from former Rule 16(b), this rule has been completely redrafted to conform the procedure on discharge of a corporation to the procedure for individual and co-partnership bankrupts. The italicized matter conforms the rule to §14a of the Act which provides that a corporation must file application for discharge within six months after adjudication, and to the numerous cases which hold that this period cannot be extended *nunc pro tunc*. See *In re Moore* (D.C.N.Y.), 36 F.(2d) 429; *In re Taunton* (D.C.N.Y.), 216 Fed. 987.

RULE 18—Compensation of Referees' Court Stenographers

Compensation to stenographers employed to report proceedings before Referees in Bankruptcy is fixed at *thirty* cents per folio for an original transcript and *twenty* cents per folio for a copy.

For attending and making shorthand notes in each proceeding the stenographer may charge a minimum of one dollar and fifty cents (\$1.50) for the first ten minutes of such service or any portion thereof and one dollar (\$1.00) for each succeeding ten minutes or portion thereof. In no event, however, shall the charge in any one proceeding for one half day's attendance exceed seven dollars and fifty cents (\$7.50), or for a full day's attendance fifteen dollars (\$15.00), except that there shall be an additional charge of two dollars and fifty cents (\$2.50) per hour in excess of five in any day. In the event that a transcript is furnished the attendance charge shall be absorbed in the charge for the

transcript if the transcript charges are greater than the attendance fees set forth above.

NOTE: Adapted from former Rule 17. This rule is now applicable in its entirety to both Southern and Eastern Districts. "Thirty" cents substituted for "twenty five" cents and "twenty" cents substituted for "fifteen" cents.

RULE 19—Proceedings Before Referees

After a general reference, all applications whether ex parte or on notice, shall be made to the referee unless otherwise provided by law or by these rules. If an application is made to the judge after a general reference, the judge shall refuse to hear the application, unless the referee is absent and no other referee is available.

In the event of the absence of a referee from his office and court any other referee who may be available shall temporarily act in his place.

NOTE: Substantially the same as former Rule 18. This rule complements Rule 2(c) which provides that after reference "all proceedings" shall be had before the Referee except as otherwise provided in the Act or in these rules, and makes it plain that after reference *all* applications [with the exceptions noted] must be made to the Referee in charge of the case.

RULE 20—First Meeting of Creditors

The referee shall promptly call the first meeting of creditors to be held at the earliest practicable date. Where a list of creditors with their addresses is filed with the referee, the latter shall, without waiting for the filing of schedules, call such first meeting of creditors.

With the notice of the first meeting of creditors, the referee shall include a notice reading substantially as follows:

"FILING OF CLAIM

Your attention is directed to the provisions of the Bankruptcy Act that claims may not be allowed against the bankrupt estate if not filed within six months after the first date set for the first meeting of creditors. Proof of claim must be filed whether or not the debt due the creditor is included in the schedules of the bankrupt.

It is essential to proper administration of bankrupt estates that creditors avoid giving their proxies to unknown persons who may solicit them. Proxies will not be recognized by the referee if it appears that they were solicited in the interests of the bankrupt or of any one other than general creditors."

The notice of the first meeting of creditors may be combined with the notice of the day fixed as the last day for the filing of objections to the bankrupt's discharge.

NOTE: Identical to former Rule 19 except for the addition of the last paragraph. This conforms to the 1957 amendment to §14b, which in effect permits the notice of the first meeting to be combined with the notice of the last day fixed for filing objections to discharge.

**RULE 21—Referees' Decisions—Orders Thereon—
Petitions for Review**

(a) *Decisions.*

Referees shall make and file decisions within two months after final submission and shall forthwith give notice of such filing to the parties or their attorneys.

(b) *Orders Thereon.*

Unless the referee otherwise directs, an order in a contested matter shall be settled on notice.

(c) *Petitions for Review.*

To enable referees to comply with Section 39a(8) of the *Bankruptcy Act*, the party who files with the referee a petition to review a referee's order, shall, within ten days thereafter, or within such further time as the referee may for cause shown allow, furnish the referee with (1) a transcript of the evidence or a summary thereof agreed on by the parties; (2) all exhibits, and (3) the expense, if any, of transporting the same to the clerk.

(d) *Extension of Time.*

An order granting an extension of the time within which to file a petition for review shall be served promptly on all adverse parties.

(e) *Calendar on Review.*

The referee's certificate on a petition for review shall be placed on the bankruptcy motion calendar of the court and the referee shall give at least fourteen days' notice thereof to the parties in interest or their attorneys and shall direct attention to General Rule 9(c).

NOTE: Identical to former Rule 20 except for the addition of paragraph "(e)". The Referee is required to give at least 14 days' notice to parties and their attorneys of the date the petition for review will appear on the bankruptcy motion calendar and to direct attention to General Rule 9(c). The latter requires all supporting papers and accompanying memoranda of law to be filed with the Clerk of the motion part [Clerk of the Court—Eastern District] at least three days before the return day. Papers and memoranda in opposition must be filed with the Clerk before noon of the preceding day. Papers not so filed will not be received by the court except upon special permission for good cause shown.

RULE 22—Distribution of Dividends

Except as otherwise directed by the court, upon the declaration of any dividend or confirmation of an arrange-

ment, checks shall be forwarded to the several creditors, or to their duly authorized attorneys-at-law, with a notice reading substantially as follows:

“Enclosed please find check for dividend of%. This check should be deposited promptly, as it will be necessary, after the declaration of final dividends, to stop payment of all checks in accordance with the rules and practice of this court.”

NOTE: Identical with former Rule 21.

RULE X-1—Applicability of General Bankruptcy Rules

The General Bankruptcy Rules, so far as applicable and not inconsistent with the provisions of these rules, shall apply to proceedings under Chapter X.

NOTE: Identical to former Rule X-1. It would seem that the following General Bankruptcy Rules would clearly apply in Chapter X proceedings: Rules 1, 5, 12, 13 and 21 [where there has been a reference of matters not specifically reserved to the judge].

RULE X-2—Number of Copies of Papers to be Filed

(a) Petition.

The original and five copies of each petition pursuant to Article IV of Chapter X of the Act shall be filed with the clerk.

(b) Orders and Other Papers.

1. The original and four copies of each of the following papers shall be filed with the clerk: (a) orders approving or dismissing petitions; (b) orders appointing trustees or continuing debtors in possession; (c) orders determining the time within which the claims of creditors may be filed and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims

and stock; (d) orders approving any plan or plans, together with copies of such plans; (e) orders approving alterations or modifications in plans, together with copies of such alterations or modifications; (f) orders confirming plans, together with copies of such plans; (g) applications for allowances for compensation and expenses; (h) orders making or refusing to make such allowances; (i) orders adjudging debtors to be solvent or insolvent; (j) orders adjudging debtors as bankrupts or dismissing proceedings.

2. Except as otherwise provided in these rules the clerk or referee shall determine the number of copies of papers to be filed.

(c) Securities and Exchange Commission.

Whenever, by law, copies of papers are required to be transmitted to the Securities and Exchange Commission, two copies thereof shall be so transmitted.

NOTE: Identical to former Rule X-2.

RULE X-3—Time Within Which Application for Approval of Debtor's Petition Must be Made

If application for approval of debtor's petition for reorganization is not made within ten days after the filing of such petition, an order shall be entered dismissing such petition unless the time for making such application is extended.

NOTE: Identical to former Rule X-3.

RULE X-4—Affidavit to be Filed Prior to Approval of Petition for Reorganization

Before a petition praying for reorganization shall be approved there shall be submitted an affidavit, together with five copies thereof, giving the following information:

(a) The nature and present status of each action or proceeding pending or threatened against the debtor or its property in which a judgment against the debtor or seizure of its property may be imminent.

(b) The amount of each issue of outstanding bonds, debentures or other evidences of indebtedness of the debtor whether or not secured by or issued under an indenture or other similar instrument, and the name and address of the trustee, if any, of each issue.

(c) The approximate total number of unsecured creditors of the debtor, other than holders of indebtedness mentioned in subdivision (b), and the name of each unsecured creditor who has a claim against the debtor in excess of 5% of the total of such claims.

(d) The name and address of each secured creditor of the debtor other than holders of securities specified in subdivision (b), the amount of the indebtedness to each, and a brief statement of the nature of the security held by each.

(e) A brief description of all property in the possession of the debtor, and of all property of the debtor in the custody of any public officer, receiver, trustee, assignee for the benefit of creditors, mortgagee, pledgee or assignee of rents; the name and address of each such person; the property held by each; and the courts in which such proceedings, if any, are pending.

(f) A brief statement of all pending proceedings or negotiations for the reorganization of the debtor and the names of the persons participating therein.

(g) If the fixed and liquidated indebtedness of the debtor is less than \$250,000.00, a statement giving the reasons or facts on the question whether a trustee should be appointed or whether the debtor should remain in possession.

(h) The names of all the officers and directors of the debtor and their present salaries.

If it is impracticable or impossible to furnish any of the foregoing information, the affidavit shall state the reason. Upon good cause shown, the judge may dispense with any of the foregoing requirements.

NOTE: Identical to former Rule X-4.

RULE X-5—Retention of Supervision by Judge

The judge who approves the petition shall retain supervision over all subsequent steps in the proceeding.

NOTE: Adapted from former Rule X-5. There has been omitted following the word "shall"—: "unless otherwise directed by him or by the chief judge".

RULE X-6—Answers

The original answer, with proof of service of a copy thereof upon the attorney for the petitioning creditors, indenture trustee or debtor, as the case may be, together with five copies thereof, shall be filed with the clerk.

NOTE: Identical to former Rule X-6.

RULE X-7—Trial of Issues; Reference

If an answer denies any material allegation of a petition, the clerk shall place the cause upon the next succeeding bankruptcy motion calendar as a contested issue. Upon the call of the calendar, the issue shall be referred to the judge who approved the petition or before whom application for approval of the petition or an issue raised by another answer is pending. Thereupon the judge shall either: (a) determine the issues summarily; or (b) refer the issues to a referee in

bankruptcy or other person as special master in accordance with Section 117 of the Act and Rule 53(b) of the Rules of Civil Procedure for consideration and report.

Note:—*See Rule 53(b) of Federal Rules of Civil Procedure and criticism of appointment of special masters in Newman & Bisco v. Realty Associates, 173 F. 2d 609, 610; Prudence Bonds Corp. v. Prudence Realization Corp., 174 F. 2d 288, 289.*

NOTE: Identical to former Rule X-7. The note above, italicized, is contained in this rule as promulgated. See also *In re American Bantam Car Co.* (3rd Cir. 1952), 193 F.(2d) 616, holding it to be an abuse of judicial discretion and beyond the power of the courts to appoint another person as special master where a referee is available in the district.

RULE X-8—Appointment and Qualification of Trustees— Attorneys for Trustees

(a) Immediately upon the appointment of a trustee the clerk shall notify him by mail of his appointment. Within five days after his appointment, or within such further time, not to exceed five days, as the judge may permit, the trustee shall qualify by filing his bond with the clerk with an affidavit showing that he has the qualifications required by Sections 156 and 158 of the Act.

NOTE: Identical to former Rule X-8. Where the indebtedness (liquidated and not contingent) is \$250,000 or over, the judge must appoint one or more trustees; where less than \$250,000 the judge may appoint such trustee(s) or continue the debtor in possession. The trustee must be competent to perform his duties. See Bankr. Act §158 which specifies instances in which a person is not deemed disinterested.

(b) No attorney shall be appointed to represent a trustee unless an affidavit showing that he has the qualifications required by Sections 157 and 158 of the Act has been submitted with the application for his appointment.

NOTE: Identical to former Rule X-8(b). See Bankr. Act §158 for instances in which an attorney is not deemed disinterested.

RULE X-9—Interventions

(a) Every petition for leave to intervene pursuant to the provisions of Section 207 of the Act shall state whether the application is to intervene generally or as to specific matters, the interest which the petitioner seeks to protect, the facts showing the necessity for intervention to protect such interest, and the specific matters or issues as to which the petitioner desires to intervene. If the intervention is sought by any person or committee required to file a statement under Section 211 of the Act, a copy of such statement shall be annexed to the petition for leave to intervene. Notice of the application shall be given to the debtor in possession or trustee, to all persons who shall theretofore have been granted leave to intervene generally in the proceeding, to the Securities and Exchange Commission and to such other persons as the judge may direct. Prior to the approval of the petition, such notice shall also be given to the debtor and to the petitioning creditors.

(b) If the interest which the petitioner seeks to protect is already represented in the proceeding, the petition shall state the name of the prior representative and the reasons why the interest which the petitioner seeks to protect is not adequately protected by such prior representative.

(c) If intervention is granted, the order shall state that the intervention is general or that the intervention is granted as to the specific matters or issues enumerated in such order. The granting of leave to intervene shall not of itself entitle the intervenor, or his attorney, to an allowance for services.

NOTE: Identical to former Rule X-9.

RULE X-10—Confirmation of Reports of Special Masters

Hearings upon a special master's report on the approval or confirmation of a plan of reorganization, dismissal of the

proceedings, adjudication of the debtor to be a bankrupt, or allowance of fees and expenses, shall be held at such time and place and upon such notice as the judge shall direct. Upon all other matters, the report of the special master shall be filed in the office of the clerk and upon the same day notice thereof shall be delivered or mailed by the special master to the attorneys who appeared before him at the hearing and to the parties who appeared at the hearing without attorneys. The report shall be brought on for confirmation on the day named in the notice, which shall be a day upon which the bankruptcy motion calendar is called and shall not be less than five days after the filing of the report and delivery or mailing of the notice. The clerk shall place the case on the calendar on the day specified in the notice.

NOTE: Identical to former Rule X-10. Under this rule, hearings on special masters' reports relating to approval or confirmation of a plan, dismissal or adjudication or allowance of fees are held at such time and place and upon such notice as the judge in charge of the case directs. Hearings on all other reports are placed on the bankruptcy motion calendar and referred by the judge there presiding to the judge in charge of the case.

The rule obviously does not relate to uncontested matters and routine *ex parte* applications, and it would seem that the special master's report in such cases should go directly to the judge in charge of the case, thus avoiding unnecessary delay in purely administrative matters.

RULE X-11—Reports of Operation of Business

Unless otherwise ordered, the trustee or debtor in possession shall file with the clerk, not less than three days prior to the hearing provided for in Section 161 of the Act, a report and summary of the operations of the business of the debtor and the present condition thereof.

Unless otherwise ordered, every trustee or debtor in possession, if authorized to operate the business, shall file with the clerk, not later than the 15th of each month, a report and summary of the operations of the business during the

preceding month. Unless the judge otherwise directs, the report shall include a classified statement of receipts and disbursements, balance on hand at the beginning and at the end of the month, indebtedness incurred, credit extended, contractual and other obligations assumed, and such other matters as may be specified by the judge.

NOTE: Identical to former Rule X-11. This rule complements Bankr. Act §189 which requires a trustee or debtor in possession to file reports of the operation of the business "at such intervals as the court may designate." See also Bankr. Act §190 relating to reports.

RULE X-12—Operation of Vessels and Protection of Maritime Liens

(a) In all proceedings in which the debtor is the owner, or owner *pro hac vice*, or charterer, or is an agreed purchaser in possession, of one or more vessels upon which maritime liens are asserted, the judge shall, unless in his discretion he shall otherwise direct, upon application made at any time by the trustee, or by the debtor in possession, or by any one asserting such maritime lien, make such provision as he shall deem wise for the protection by insurance or otherwise of the holders of such maritime lien existing or claimed to exist at the time of the filing of the petition or arising thereafter, during such time as any such vessel or vessels may remain in the ownership of or be operated by the trustee, or by the debtor in possession.

(b) Any maritime lienor, notwithstanding any restraining order that may be issued in such proceeding, unless issued after hearing upon notice to him, shall be at liberty to file a libel in admiralty *in rem* against a vessel for the determination of his lien and the amount thereof, but without the right to issue process of attachment, or right of seizure, or of sale, or interference with the possession of the

trustee or debtor in possession, except upon further order of the judge. Upon the filing of such libel the trustee or debtor in possession shall file claim to such a vessel without being required to file any stipulation for costs or value, and shall confess or defend the libel as may seem proper. In the latter event the issues raised by the pleadings shall be tried as a preferential cause on the admiralty side of court.

Note:—*The purpose of the rule is to protect an existing maritime lienor against the possibility of loss of the vessel or incurrence of priority charges while it is in the operation of a debtor in reorganization. Limitation of such protection to a situation where the debtor is the actual owner or owner pro hac vice, is inadequate. An owner pro hac vice is a bareboat or demise charterer, and but one of the class of persons who are presumptively clothed with power to pledge the credit of the vessel under Title 46 U.S.C. Sections 972, 973. Section 173 designates the persons having presumptive authority to pledge the credit of the vessel as “* * * such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; * * *”. Hence, the rule should include all persons of such class and now includes “* * * the owner, the owner pro hac vice, the time charterer or an agreed purchaser in possession of one or more vessels * * *”.*

As to the jurisdiction of the reorganization court see Foust v. Munson S. S. Lines, 299 U. S. 77, 57 S. Ct. 90.

NOTE: Identical to former Rule X-12. The note above, italicized, is contained in the rule as promulgated.

RULE X-13—Agents of Receivers or Trustees for the Disbursement of Funds or the Execution of Instruments

The judge may authorize a receiver or trustee to designate one or more agents to sign, endorse and deliver checks and other negotiable instruments, orders for the pay-

ment of money or the delivery of property, documents of title, and other instruments and documents.

NOTE: Identical to former Rule X-13.

RULE X-14—Proofs of Claim and of Interest—Allowance—Objections

(a) *Forms.* Proofs of claim, except those founded upon securities, shall be in the form prescribed by subsections (a) and (b) of Section 57 of the Act, except that the proof need not be under oath if the claims or interests have been scheduled by the debtor in possession or listed by the trustee pursuant to Section 163 or Section 164 of the Act and if the claims or interests have not been disputed.

Every proof of claim or interest founded upon securities, other than a proof of claim by an indenture trustee, shall be signed by the holder of the claim or interest, and shall contain the following information: a description of the securities; the principal amounts of the securities, or the number of the shares; the coupons attached to the securities, if any; and the serial certificate, bond, and other identifying numbers of the securities. The proof of claim or interest shall be verified unless (1) the claim or interest has been scheduled by the debtor or listed by the trustee, and has not been disputed; or (2) proof of claim has been filed by the indenture trustee.

(b) *Filing.* The judge may authorize the filing of proofs of claim or of interest with the debtor in possession or trustee, or a referee, special master or agent appointed by him. The security on which a proof of claim or interest is founded need not be forwarded or filed with the proof of claim or interest.

(c) *Proofs of claim by indenture trustees.* Every proof of claim filed by an indenture trustee pursuant to Section 198 of the Act shall be verified and have annexed thereto

a copy of the instrument under which he is trustee. The proof of claim shall state the amount of securities then outstanding under the trust indenture and the amount of cash and securities, if any, held for the account of the trust. The amount of the claim filed by the indenture trustee shall be deemed to be reduced: (1) by such part of the claim as is represented by securities owned by the debtor; and (2) by such part of the claim as is represented by securities on which proofs of claim or of interest have been filed by holders thereof and allowed.

(d) *Allowance of claims and interests.* Every claim or interest for which a proof of claim or of interest has been filed shall be deemed to be allowed until written objection is filed as provided herein.

(e) *Objections to claims and interests.* The debtor in possession, trustee, or any party in interest may, at any time prior to confirmation of the plan, file objections to any claim or interest scheduled by the debtor in possession or listed by the trustee or for which a proof of claim or interest has been filed. The judge may, however, fix an earlier date for the filing of objections, and may, for cause shown, permit an objection to be filed after confirmation of the plan. Objections shall be filed with the person designated by the judge as the person with whom proofs of claim or interest are to be filed. Such person shall mail notice of the objections to the claimant.

The claimant, or objectant, or debtor in possession or trustee may at any time apply to the judge or referee for a summary hearing on a filed objection. The determination of the judge or referee shall be entered upon the registration records of the debtor's securities if the claim or interest is founded on a security.

NOTE: Identical to former Rule X-14. Section 57n of the Bankr. Act—the six months rule for filing claims—is specifically made inapplicable to Chapter X proceedings (Bankr. Act §102).

RULE X-15—Conflicting Claims Founded on the Same Securities

If two or more persons file conflicting proofs of claim or of interest founded on the same securities and bearing different dates and if there is no conflict with the security registration records of the debtor as referred to in the following paragraph, the person designated by the judge as the person with whom proofs of claim or interest are to be filed shall give notice by mail to the claimant whose proof of claim or interest bears the earlier date, advising him that such other proof of claim or interest on the same security has been filed, and that objections thereto must be made within ten days; and, if no objection be filed within such ten days or within any further time allowed, the person whose proof of claim bears the later date shall be presumed to be the owner of such claim or interest for the purpose of giving or withholding acceptance of a plan. If such conflicting proofs of claim or of interest bear the same date, each claimant shall be deemed to have objected to the claim of the other, and the provisions of Rule X-14 shall apply.

If a person file a proof of claim or of interest founded upon securities which is in conflict with the security registration records of the debtor, the person designated by the judge as the person with whom proofs of claim or interest are to be filed shall give notice by mail to such claimant, advising him of the conflict and that objections to the accuracy of the security registration records must be made within ten days; and, if no objection be filed within such ten days or within any further time allowed, the person whose name appears on the security registration records shall be presumed, for the purpose of giving or withholding acceptance of a plan, to be the owner of such claim or interest.

If objection be made pursuant to this rule, the matter shall be heard and determined as the court may direct.

NOTE: Identical to former Rule X-15.

RULE X-16—Assignments of Claims Other Than Claims Founded on Securities

Upon the filing of satisfactory proof of an assignment of a claim, other than a claim founded on a security, proof of which has been filed, the person designated by the judge as the person with whom proofs of claim or interest are to be filed, shall give notice by mail to the original claimant advising him that such proof of assignment has been filed and that objections thereto must be made within ten days; and, if no objection be filed within ten days or within any further time allowed, the assignee shall be deemed subrogated to the original claimant for all purposes. If objection be made, the matter shall be heard and determined as the court may direct.

NOTE: Identical to former Rule X-16.

RULE X-17—Security Records and Transfer of Securities—Notices

(a) *Records and Transfers.* Whether a trustee is appointed or the debtor is continued in possession, the debtor shall continue, unless otherwise directed by the court, to transfer and exchange its stock certificates, bonds and other securities, and upon satisfactory proof of loss, theft, destruction or mutilation to issue new stock certificates, bonds, and other securities, in the usual manner and in accordance with applicable law and the terms of the agreements, indentures, instruments, or other authority under which the securities were issued or listed, and it shall continue to record such transactions in its security records.

The schedules of the debtor in possession filed pursuant to Section 163, or the trustee's list of stockholders and of creditors holding claims founded on securities filed pursuant to Section 164 of the Act, shall conform to such records, and all subsequent transfers and changes noted on such records shall be deemed to be amendments of the schedules or lists so filed.

A sale, assignment or transfer, of a security shall be deemed to effect a sale, assignment or transfer of the claim or interest covered by any filed proof of claim or interest founded on such security.

(b) *Notices.* Communications to holders of claims or interests founded upon registered securities shall be addressed to them at their addresses in the registration records of the debtor's securities. Upon written request by a registered holder, his address on such records shall be changed.

NOTE: Identical to former Rule X-17.

RULE X-18—Hearing of Plans

Notice of a hearing under Section 169 or Section 170 of the Act shall be given by mail and shall be accompanied by a copy of the plan filed by the debtor in possession or examiner, if any, or the trustee. If the hearing is on a report by the trustee that a plan cannot be effected, a copy of the report shall accompany the notice.

NOTE: Identical to former Rule X-18.

Bankruptcy Act §§169, 170 require that the judge fix a time for a hearing on the plan(s) which is filed. Section 171 designates who is to receive notice of the hearing and this rule requires such notice to be by mail and accompanied by a copy of the plan.

RULE X-19—Applications for Compensation and Allowance

Every application for compensation or allowance shall be verified and shall include (a) a detailed statement of the

services rendered and expenses incurred; (b) the amounts, separately stated, for which an allowance is sought as compensation and as reimbursement; (c) a copy of the statement, if any, filed pursuant to Section 211 of the Act; (d) a detailed statement bringing the facts in the statement filed pursuant to Section 211, if any, up to date; (e) a detailed statement of the facts required to be stated under Section 249 of the Act; (f) a statement by the applicant that he has not entered into any agreement, written or oral, express or implied, with the debtor, receiver, trustee, or any other party in interest, or any attorney of any of such persons, for the purpose of fixing the amount of any of the fees or other compensation to be allowed out of or paid from the assets of the debtor; and (g) such other facts as may be necessary to reveal fully the applicant's connection with the proceeding and with the debtor, receiver or trustee and the parties in interest.

Unless otherwise ordered, notice of hearing on such applications, shall state the names of the applicants, the several capacities in which they have acted, and the amounts, separately stated, sought by each for compensation and for reimbursement.

NOTE: Identical to former Rule X-19. The provisions of the Act relating to compensation found in §§246, 250, do not prescribe the contents of the application. However, §249 requires an affidavit showing claims or stock of the debtor in which a beneficial interest, direct or indirect, has been acquired or transferred by applicant after the proceeding commenced. Such acquisition or disposition without prior or subsequent approval of the judge, will bar compensation to any committee, attorney or other party acting in a representative or fiduciary capacity. In this connection see *Wolf v. Weinstein*, 372 U.S. 633 (1963).

Section 211 of the Act requires every person or committee representing more than 12 creditors or stockholders, and every indenture trustee to file a statement under oath reciting all the facts and circumstances of the employment, claims or stock owned by the member of the committee, etc., and other details. This rule requires applicants for compensation to bring the §211 statement up to date.

RULE X-20—Date for Determining Validity of Acceptances

The judge shall fix a date as of which the ownership of claims and interests shall be determined for the purpose of deciding who may accept or withhold acceptance of any specified plan, and on or before which acceptances must be filed. Proofs of claim or interest founded upon securities may be filed at any time on or before such date.

NOTE: Identical to former Rule X-20. When the Judge approves a plan, he is required to fix a time within which creditors and stockholders affected thereby may accept it. Bankr. Act §174. This rule is designed to ascertain in advance who may or who may not accept or reject the approved plan. Note that in Chapter X proceedings approval of the plan by the Judge is required before its submission to creditors and stockholders.

RULE X-21—Consummation of Plan: Reports and Final Decree

(a) *Reports.* If the debtor has remained in possession, the debtor and such other corporation, if any, as may under the plan succeed to the business and assets of the debtor, shall, within thirty days after the date of the order confirming the plan or within such other period as the judge shall direct, report to him the action taken and the progress made in the consummation of the plan. If a trustee was appointed, such reports shall be made by the trustee and the debtor or such other corporation, if any, as may under the plan succeed to the business and assets of the debtor. Further reports shall be made from time to time as the judge may direct, until the plan has been consummated.

(b) *Final Decree.* After the consummation of the plan, the trustee or the debtor shall make application for a final decree. Such application shall set forth: (a) the extent to which the plan has been consummated; (b) the names and addresses, so far as may be known, of the holders of claims or interests which have not been surrendered or released in

accordance with the provisions of the plan, and a statement of the nature and amounts of such claims or interests; (c) if the application is made by a trustee, a detailed statement of the services rendered by him and disbursements made or incurred for which no allowance has theretofore been made, including in such statement all the information required by Rule X-19 so far as applicable; and (d) such other facts as may be necessary to enable the judge to pass upon the provisions to be included in the final decree.

In addition to the provisions required by Section 228 of the Act, the judge may, in the final decree: (a) allow to the trustee, if any, compensation for services rendered and reimbursement for expenses incurred; (b) fix a time within which claims and interests must be released or surrendered, as provided in Section 204 of the Act, in order to participate in the distribution under the plan; and (c) designate the debtor or other corporation which, under Section 205 of the Act, shall become entitled to the securities and cash remaining unclaimed at the expiration of the time fixed as provided in Section 204.

NOTE: Identical to former Rule X-21.

Paragraph (a) supplements Rule X-11 and provides for progress reports by the trustee and the debtor after confirmation and until the plan has been consummated.

Bankr. Act §228 provides for entry of a final decree after consummation. Paragraph (b) of this rule supplements §228 by requiring the trustee or debtor to make application for such decree and sets forth the content of such application. Section 228 also prescribes the content of the decree and this rule sets forth additional provisions which the judge may include therein. Where there is a trustee, he may have rendered services or incurred expenses after confirmation for which he has not been paid. This rule provides for such payment in the final decree.

RULE X-22—Procedures Subsequent to Adjudication of Debtor as Bankrupt

(a) *Order.* The order adjudicating the debtor a bankrupt and directing that bankruptcy be proceeded with shall: (1)

direct the trustee in the reorganization proceeding to continue to administer the estate until the election of a trustee under Section 44 of the Act, or appoint a receiver to replace the debtor in possession; and (2) refer the case to one of the referees. The clerk shall mail or deliver a certified copy of the order to the referee.

(b) *Accounting of trustee or debtor in possession.* Within twenty days after qualification of the trustee elected pursuant to Section 44, the trustee in the reorganization proceeding or the debtor in possession, shall file with the referee, in duplicate, a report and accounting, which shall contain, so far as applicable, the information required from a receiver on an accounting in bankruptcy.

NOTE: Identical to former Rule X-22. Note that under this rule if there is a trustee, the judge "shall" direct him to continue to act until the bankruptcy trustee is elected. If the debtor was in possession, the judge "shall" appoint a receiver to serve until the bankruptcy trustee is elected. The Bankruptcy Act makes no provision for the interim between adjudication and election of a bankruptcy trustee, and this rule is intended to fill the gap.

RULE XI-1—Applicability of General Bankruptcy Rules

✓ The General Bankruptcy Rules, so far as applicable and not inconsistent with the provisions of these rules, shall apply to proceedings under Chapter XI.

NOTE: Identical to former Rule XI-1.

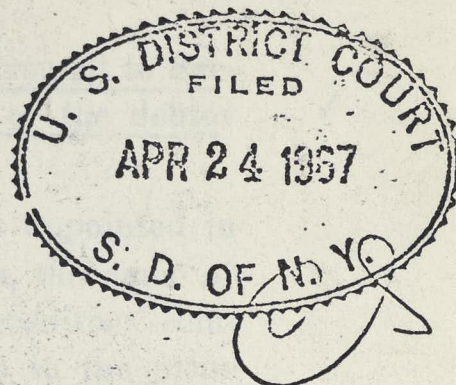
It would seem that the following General Bankruptcy Rules would clearly apply in Chapter XI proceedings: 1, 2(b), 3, 7, 8(a), 8(d), 8(e), 10, 12, 13, 15, 18, 19, 21 and 22.

RULE XI-2—Petition and Affidavits to Be Filed

11 (a) The petition and five copies shall be filed with the clerk.

NOTE: Adapted from former Rule XI-7(a) which required four copies.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
IN THE MATTER :

-of- :

The Amendment of the Bankruptcy Rules of:
the United States District Court for
the Southern District of New York. :

M 10-468

----- X
This court upon its own motion does hereby

ORDER that the following amendment to Rule XI-2(b)

of the Bankruptcy Rules of this court is adopted and approved
effective at the beginning of business on May 1, 1967.

A new subparagraph is added to Rule XI-2(b) reading
as follows:

(5) a statement of the number
and class of shares of stock, debentures
or other securities of the debtor and of
any subsidiary of the debtor which are
publicly held; the number of holders
thereof, listing separately those held
by its officers and directors and the
amounts thereof.

dated: New York, N.Y.
April 18, 1967

(b) Every petition for arrangement filed pursuant to Section 321 shall be accompanied by an affidavit of the debtor setting forth:

(1) Whether a receiver or trustee was appointed in the prior bankruptcy proceeding, and if so, the name of such receiver or trustee; whether or not a creditors' committee was appointed under Section 44(b) in the prior bankruptcy proceeding, and if so, the names and addresses of the members of such committee;

(2) the names and addresses of the ten largest creditors, excluding (a) those creditors who would not be entitled to vote at creditors' meetings under Section 56(b); (b) such creditors as were employed by the debtor at the time of the filing of the petition; (c) creditors who are relatives of the debtor, or, if the debtor is a corporation, creditors who are stockholders or officers or members of the board of directors or trustees or other similar controlling bodies of such debtor corporation; and (d) creditors who have participated directly or indirectly in the act of bankruptcy as charged in the petition;

(3) the nature and present status of each action or proceeding pending or threatened against the debtor or his property, where a judgment against the debtor or the seizure of his property may be imminent; and

(4) a statement of all property of the debtor in the possession or custody of any public officer, receiver, trustee, assignee for the benefit of creditors, mortgagee, pledgee, or assignee of rents, giving the names and addresses of such persons and the court in which such proceedings, if any, are pending.

NOTE: Identical to former Rule XI-2(a). This rule requires debtor to file a list of his ten largest creditors so that such persons may receive notice of the indemnity hearing provided for in Rule XI-4, *infra*.

(c) If the petition is filed under Section 322 the affidavit shall set forth the matters required by subsection (b)(2)(3) and (4) of this rule and shall also state whether the debtor is occupying any premises under a lease, and if he is, a statement as to the length of the term, the rent reserved, the amount owing for rent, and what negotiations for a modification of the lease have been had, if any, with whom and the present status thereof.

NOTE: Identical to former Rule XI-2(b).

(d) If the debtor desires to continue the operation of the business, the affidavit shall also state:

(1) the estimated amount of the weekly payroll to employees (exclusive of the officers, stockholders and directors, if a corporation) for a period of thirty days following the filing of the Chapter XI petition;

(2) the amount now being paid and proposed to be paid for services for a period of thirty days following the filing of the Chapter XI petition

(a) if a corporation, to officers, stockholders or directors;

(b) if an individual or a partnership, to the individual or the members of the partnership;

(3) the estimated additional operating expenses for the period of thirty days following the filing of the Chapter XI petition;

(4) the estimated gain or loss in the operation of the debtor's business for a period of thirty days following the filing of the Chapter XI petition; and

(5) such additional information as may fully inform the court relative to the desirability of the debtor continuing business.

Upon a proper showing that it is impracticable or impossible to furnish any of the foregoing information, the court may dispense with any of the foregoing requirements, except that, in any event the affidavit shall contain the information required by subdivision (b)(2) of this rule.

NOTE: Identical to former Rule XI-2(c).

RULE XI-3—Compensation to Debtor

No compensation shall be paid to the debtor, if an individual, or to the members of a copartnership, if a copartnership, or to an officer, stockholder or director of a corporation, if a corporation, from the time of the filing of the petition until confirmation of the arrangement unless a prior order of the court shall have been obtained approving the employment and fixing the compensation.

NOTE: Identical to former Rule XI-3.

RULE XI-4—Hearing on Indemnity; Papers to Be Furnished

The court, after the filing of a petition under Section 322, shall cause a hearing to be held as soon as practicable, upon five days' notice by mail to the debtor, the debtor's attorney, those creditors whose names are listed in the affidavit filed by the debtor pursuant to the provisions of Rule XI-2, and to such other parties in interest as the court may direct, for the purpose of determining whether or not the debtor shall be required to file a bond or undertaking or deposit cash indemnity, or whether any other terms or conditions shall be imposed in accordance with Sections 326, 342 and 343 of the Bankruptcy Act.

Copies of Arrangement and Summaries. To enable the court to comply with the provisions of Chapter XI of the Bankruptcy Act, the debtor shall, promptly when required,

furnish to the court sufficient copies of (1) the proposed arrangement; (2) summary of the liabilities; and (3) summary of the appraisal, if made, or summary of the assets.

NOTE: Adapted from former Rules XI-4 and XI-7(c). Bankruptcy Act §326 provides that the court may fix indemnity "upon hearing and after notice to the debtor and to such other persons as the court may direct * * *". By this rule, the court directs notice to the debtor, his attorney and to the ten largest creditors whose names and addresses are required to be set forth in the affidavit filed under Rule XI-2(b)(2).

The second paragraph merely recasts the language of former Rule XI-7(c) without substantive change. Obedience to this rule enables the court to comply with Bankr. Act §335.

RULE XI-5—Operation of Debtor's Business

Unless otherwise ordered, every receiver, trustee or debtor in possession authorized to operate the business, shall file with the referee, and if the proceeding has not been referred, with the clerk, in duplicate (1) a verified weekly statement of cash receipts and disbursements setting forth the names of the persons to whom payments have been made, the amounts of the payments, the consideration, and where payments are to employees, the amounts of the deductions for withholding and social security taxes and whether or not such deductions have been deposited in a special account; (2) a verified monthly report not later than the 15th of each month which shall set forth a summary of the operations of the business during the preceding month and a verified statement of (a) receipts from all sources, classified, and balance on hand at the beginning and at the end of the month, (b) disbursements for all purposes, classified, (c) the amount of indebtedness incurred and remaining unpaid and contractual and other obligations assumed, and, (d) detailed inventory on hand at the beginning of the month and detailed inventory on hand at the end of the month.

NOTE: Identical to former Rule XI-5. Note that the requirements for weekly statements and detailed monthly inventories, often onerous, may be dispensed with only upon order of the court.

RULE XI-6—Operations of Vessels and Protection of Maritime Liens

(a) In all proceedings in which the debtor is the owner, or owner *pro hac vice*, or charterer, or is an agreed purchaser in possession, of one or more vessels upon which maritime liens are asserted, the court shall, unless in its discretion it shall otherwise direct, upon application made at any time by the trustee, or by the debtor in possession, or by any one asserting such maritime lien, make such provision as it shall deem wise for the protection by insurance or otherwise of the holders of such maritime lien existing or claimed to exist at the time of the filing of the petition or arising thereafter, during such time as any such vessel or vessels may remain in the ownership of or be operated by the trustee, or by the debtor in possession.

(b) Any maritime lienor, notwithstanding any restraining order that may be issued in such proceeding, unless issued after hearing upon notice to him, shall be at liberty to file a libel in admiralty *in rem* against a vessel for the determination of his lien and the amount thereof, but without the right to issue process of attachment, or right of seizure, or of sale, or interference with the possession of the trustee or debtor in possession, except upon further order of the court. Upon the filing of such libel the trustee or debtor in possession shall file claim to such vessel without being required to file any stipulation for costs or value, and shall confess or defend the libel as may seem proper. In the latter event the issues raised by the pleadings shall be tried as a preferred cause on the admiralty side of the court.

NOTE: Identical to former Rule XI-6.

RULE XI-7—Number of Copies of Papers to Be Filed

The original and two copies of orders appointing receivers shall be filed with the clerk and one copy thereof shall be

transmitted to the referee when the proceeding is referred. The original and one copy of each of the following shall be filed with the clerk, or, if such proceeding has been referred, with the referee: (1) orders continuing debtors in possession; (2) orders confirming arrangements, together with copies of such arrangements; (3) orders approving alterations or modifications in arrangements, together with copies of such alterations or modifications; (4) all applications for allowances for compensation and expenses, and the orders making or refusing to make such allowances; and (5) all orders dismissing proceedings, or directing that bankruptcy be proceeded with, discharging debtors, closing estates, and setting aside confirmations.

NOTE: Adapted from former Rule XI-7(b). Former Rule XI-7(a) has been transposed to Rule XI-2(a), and former Rule XI-7(c) is now found in Rule XI-4.

RULE XI-8—Objections to Confirmation of Arrangement

No opposition to the confirmation of an arrangement shall be heard unless at or prior to the time set for hearing, written objections, specifying the grounds of opposition, shall have been served on the debtor or his attorney and filed *with proof of service thereof*. The court shall hear the parties summarily, and shall then and there decide the procedure necessary to secure justice to the parties, order the prompt trial of the objections or take any other proceedings which the court deems appropriate under the circumstances.

A party who files objections may be required by the referee to deposit with the stenographer, within a fixed time, such sum as the referee may determine is necessary to pay the expense of the stenographer in reporting the minutes. If such deposit is not made within the period as fixed or such further time as the referee may permit, the referee may in his discretion dismiss the objections and proceed accordingly.

If after the commencement of the hearing on the objections there is unreasonable delay in carrying on and completing such hearing, the court may dismiss the application for confirmation, or the objections, as the case may be.

In the event of the withdrawal of objections to an arrangement or the failure to prosecute the objections, no arrangement shall be confirmed unless the debtor and his attorney shall make and file with the court an affidavit that no consideration has been promised or given, directly or indirectly, for any such withdrawal or failure to prosecute.

NOTE: Substantially adapted from former Rule XI-8. Specifications of objection to confirmation need no longer be verified. The new matter, italicized, requires specifications to be served on the debtor or his attorney *before* filing.

RULE XI-9—Distribution in Arrangement Proceedings

The disbursing agent, *within* sixty days after completion of distribution, shall submit to the referee a bank statement together with cancelled checks, a statement of unclaimed checks upon which “stop payment” orders shall have been issued and deposit in the registry of the court the moneys represented by such unclaimed checks and all other securities and property not yet distributed by him.

NOTE: Adapted from former Rule XI-9. Under the revised language of this rule, the disbursing agent must take the steps set forth therein within sixty days after completion of *distribution*.

RULE XI-10—Certificate to Be Filed by Referee

Prior to the expiration of 90 days after the order of reference in a Chapter XI proceeding the referee shall file in the office of the clerk of the court a certificate setting forth the pertinent facts relating to the arrangement proceeding, if then pending before him, and his recommendations in the matter. Based upon such certificate, and upon notice

to the debtor and the creditors' committee, any party in interest may apply to the judge sitting in bankruptcy for such relief as may be proper.

NOTE: Identical to former Rule XI-10.

RULE XII-1—Applicability of General Bankruptcy and Chapter XI Rules

The General Bankruptcy Rules and the Rules relating to Arrangement Proceedings Under Chapter XI shall apply to proceedings under Chapter XII. In addition to the copies of papers required by Rules *XI-2, XI-4 and XI-7*, the original and one copy of the following shall be filed with the clerk, or, if such proceeding has been referred, with the referee: (a) orders appointing trustees; (b) orders determining the time within which claims of creditors may be filed or allowed and the division of creditors into classes.

NOTE: Adapted from former Rule XII-1, new matter italicized.

RULE XIII-1—Applicability of General Bankruptcy and Chapter XI Rules

The General Bankruptcy Rules and the Rules Relating to Arrangement Proceedings Under Chapter XI shall apply to proceedings under Chapter XIII. In addition to the copies of papers required by Rules *XI-2, XI-4 and XI-7*, the original and one copy of the following shall be filed with the clerk, or, if such proceeding has been referred, with the referee: (a) orders confirming plans, together with copies of plans; (b) orders increasing or reducing the amount of the installment payments under plans and orders extending or adjourning the time of such payments.

NOTE: Adapted from former Rule XIII-1. New matter italicized.

*General Rules are printed
in Vol. 188. Fed. Supp.*

General Rules

of

United States District Courts

For the Southern and Eastern Districts of New York

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GENERAL RULES FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

RULE 1—Judge and Clerk

(a) The word “judge,” wherever occurring in any rule of this court, shall mean any judge or justice authorized by law to serve in this court;

(b) The words “chief judge,” wherever so occurring, shall apply also to a judge temporarily performing the duties of chief judge under 28 U. S. C. Sec. 136(e);

(c) The word “clerk,” wherever so occurring, shall include a deputy clerk designated by the clerk to perform services of the general class provided for in the rule.

RULE 2—Terms of Court; Long and Complicated Cases

(a) A regular term of court shall commence on the first Monday of each month.

The judges shall periodically adopt schedules of assignment of judges and division of the work of the court and the judges shall preside in the several parts and perform the work thus assigned. The chief judge shall file with the clerk such schedules as adopted.

*amended
9/29/67*
(b) The ~~(Southern)~~ chief judge ~~[(Eastern) with the approval of his associate judges]~~, upon his own motion or the motion of any party, may assign a long and complicated case to a judge for all purposes including the following: (1) to hear all motions and preliminary applications; (2) to conduct the pre-trial conference; and (3) to preside at the trial of the action.

The motion of a party for such assignment shall be supported by an affidavit setting forth the nature of the action,

the issues involved, the approximate number of witnesses and exhibits and any other facts indicating that the cause will be long and complicated, with an estimate of the duration of the trial.

RULE 3—Admission to the Bar

(Returnable Thursdays only.)

(a) A member in good standing of the bar of the State of New York, who has been such for at least one year, or a member in good standing of the bar of a United States district court in New Jersey, Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rules extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court on compliance with the following provisions:

*CONN
OK.
(NOTES)*

Each applicant for admission shall file with the clerk of this court, at least ten days prior to hearing thereon (unless, for good cause shown, the judge shall shorten the time), a verified written petition for admission stating: (1) his residence and office address; (2) the time when, and court where, admitted; (3) his legal training and experience; (4) whether he has ever been held in contempt of court, and if so the nature of the contempt and the final disposition thereof; (5) whether he has ever been censured, suspended or disbarred by any court and, if so, the facts and circumstances connected therewith; and (6) that he has read and is familiar with (a) the provisions of the Judicial Code (Title 28, U. S. C.) which pertain to the jurisdiction of, and practice in, the United States district courts, (b) the Rules of Civil Procedure for the district courts; (c) the Rules of Criminal Procedure for the district courts; (d) the Rules of the United States District Court for the Southern (Eastern) District of New York; and (e) that he has read the Canons of Ethics

*1 yr + 10 day
Rules reviewed
by Ryan J
see
W.J. Allingham
files 4/8/60
A.A.*

of the American Bar Association, and will faithfully adhere thereto.

The petition shall be accompanied by an affidavit of an attorney of this court who has known the applicant for at least one year, stating when the affiant was admitted to practice in this court, how long and under what circumstances he has known the applicant, and what he knows of the applicant's character and experience at the bar. Such petition shall be placed at the head of the calendar and, on the call thereof, the attorney whose affidavit accompanied the petition shall personally move the admission of the applicant. If the petition is granted, the applicant shall take the oath of office and sign the roll of attorneys.

(Eastern District only: Each applicant, upon admission to practice in the Eastern District shall pay to the clerk the statutory admission fee, and, in addition, shall pay a fee of Eight Dollars (\$8.00), which the clerk shall deposit to the credit of the Library Fund of the court.)

(b) A member in good standing of the bar of the United States District Court for the Southern (Eastern) District of New York may be admitted to the bar of this court without formal application (1) upon filing in this court a certificate of the Clerk of the United States District Court for the Southern (Eastern) District of New York, issued within 30 days, that he is a member in good standing of the bar of that court and (2) upon taking the oath of office, signing the roll of attorneys of this court and paying the fee required in this district.

(c) A member in good standing of the bar of any state, or of any United States district court, may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate. Only an attorney or proctor of this court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders.

RULE 4—Attorneys of Record and Parties Appearing *Pro Se*

(a) No member of the bar of this court not having an office within the Southern or Eastern District of New York shall appear as attorney or proctor of record in any cause without designating with his initial notice or pleading a member of the bar of either district having an office within the Southern or Eastern District of New York upon whom service of papers may be made.

(b) A party appearing *pro se* shall file with his initial notice or pleading either (1) a designation of an address within the Southern or Eastern District of New York at which service of papers may be made upon him, in which case service may be made upon him at that address in like manner as service may be made upon an attorney, or (2) a designation of the clerk of the court in which the action is brought as the person upon whom service may be made, and an address to which the clerk may mail any papers so served upon the clerk. The clerk within three (3) days of the receipt of papers so served shall mail them to the party at that address.

Any application for leave to serve any papers in less than five days before the return day, upon a party who has so designated the clerk, shall contain a statement of such designation.

RULE 5—Discipline of Attorneys

(a) The chief judge shall have charge of all matters relating to the discipline of members of the bar.

(b) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the bar of this court

(1) who has resigned from the bar of a court of any State, Territory, District, Commonwealth or Possession;

(2) who has been disbarred, suspended from practice or censured in any State, Territory, District, Commonwealth or Possession;

(3) who has been convicted of a crime involving moral turpitude in any State, Territory, District, Commonwealth or Possession; or

(4) who is guilty of conduct unbecoming a member of the bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or violation of the Canons of Ethics of the American Bar Association or of the New York State Bar Association.

(c) Cases within subdivisions (1), (2) and (3) of Paragraph (b) may be referred by the chief judge to the United States Attorney, who shall proceed against the respondent by a petition setting forth the charges against him and an order requiring him to show cause within thirty days after service thereof on him, personally or by mail, of the petition and order why he should not be disciplined. Upon the filing of such a petition the chief judge may, for good cause, temporarily suspend the respondent, pending the determination of the proceeding. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no timely answer is made by the respondent, the court shall take such action as justice may require.

(d) Cases within subdivision (4) of Paragraph (b) shall be presented to the chief judge, and, if he deems the charges

of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a bar association in the county where the member has his office or in his discretion to the United States Attorney. The recommendation shall be presented to the chief judge.

Thereupon, with the approval of the chief judge, the United States Attorney or counsel designated by the court shall proceed against the respondent by a petition setting forth the charges against him and an order requiring him to show cause within thirty days after service on him, personally or by mail, of the petition and order why he should not be disciplined. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no timely answer is made by the respondent, the court shall take such action as justice may require.

(e) The court, with the consent of the respondent, may order a disciplinary hearing to be private and direct the papers to be sealed and impounded.

(f) Whenever it appears that an attorney at law admitted to practice in the court of any State, Territory, District, Commonwealth or Possession is convicted of any crime, or is disbarred or suspended, in this court, the clerk shall transmit to the court of the State, Territory, District, Commonwealth or Possession where the attorney was admitted to practice a certified copy of the judgment of conviction or order of disbarment or suspension and a statement of his last known office and residence addresses.

(g) A visiting lawyer permitted to argue or try a particular cause in accordance with Rule 3(c) who is found guilty of professional misconduct may be precluded from again appearing at the bar of this court. Upon the entry of an order

of preclusion, the clerk shall transmit to the court of the State, Territory, District, Commonwealth or Possession where the attorney was admitted to practice, a certified copy thereof, and of the court's opinion.

RULE 6—Filing Papers: Supplying Marked Pleadings for Trial

(a) Unless a judge of this court shall otherwise direct, no paper shall be received for filing unless (1) it is plainly written, a typed ribbon copy or printed, without erasures or interlineations which materially deface it, (2) it bears the index number, if any, assigned to the action or proceeding and (3) it bears endorsed upon the cover the name, office and post office address and telephone number of the attorney or proctor of record for the party filing the same.

(b) Counsel for plaintiff or libelant shall at least one day before a case is scheduled to actually go to trial (unless a shorter time is allowed by the judge) supply to the judge designated to preside at the trial a ribbon copy of marked pleadings which shall consist of the following:

(1) a copy of the complaint or libel and of any third party complaint or third party libel briefly indicating in the margin thereof, at each numbered paragraph or article thereof, the manner in which the defendant or respondent, or any third party defendant or respondent-impleaded who has filed an answer thereto, treats the allegations contained in said paragraph of the complaint or libel or third party complaint or third party libel;

(2) a complete and accurate copy of each answer filed by the defendant or respondent or any third party defendant or respondent-impleaded in the cause, similarly marked in case a reply has been filed;

(3) a complete and accurate copy of each reply filed in the cause.

(c) Interrogatories and answers thereto.

(1) Filing of interrogatories to parties and answers thereto.

(i) Interrogatories served pursuant to Rule 33 of the Federal Rules of Civil Procedure or Rule 31 of the Rules of Practice in Admiralty and Maritime Cases shall be filed by the propounder within two days after service thereof.

(ii) The party to whom such interrogatories are directed shall file his answers thereto within two days after service thereof.

(2) Filing of deposition of witness upon written interrogatories. The officer before whom the deposition of a witness by written interrogatories is taken pursuant to Rule 31 of the Federal Rules of Civil Procedure shall file or mail the deposition, together with a copy of the interrogatories and notice of taking, within two days after the deposition has been completed in accordance with Rule 31(b) of the Federal Rules of Civil Procedure.

RULE 7—Transfer of Cases to Another District

In a case ordered transferred from this district, the clerk, unless otherwise ordered, shall upon the expiration of five days mail to the court to which the case is transferred (1) certified copies of the court's opinion ordering the transfer, of its order thereon, and of the docket entries in the case, and (2) the originals of all other papers on file in the case.

RULE 8—Naturalization Days

The petitions of aliens to become citizens of the United States shall be heard on (Eastern) Tuesday and Thursdays,

[(Southern) Mondays] and on any other day fixed by the court.

RULE 9—Motions

(a) Except as otherwise provided by statute, rule or order of the court, notice of motion in all actions or proceedings shall be in the time and manner as provided in the Rules of Civil Procedure for the United States District Courts.

(b) Upon any motion the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion divided, under appropriate headings, into as many parts as there are points to be determined. The opposing party shall serve and file with the papers in opposition to the motion an answering memorandum, similarly divided, setting forth the points and authorities relied upon in opposition. Failure to comply may be deemed sufficient cause for the denial of the motion or the granting of the motion by default as the case may be.

(c) The notice of motion, supporting affidavits and memoranda, with proof of due service, shall be served in accordance with the following:

*for Thursday (only)
file by
Mon. 5 P.M.
see sub. o.*

(1) All motions and exceptions under Rule 26 through 37 inclusive of the Rules of Civil Procedure, and under Rules 27 and 30 (insofar as they apply to interrogatories), 31, 32, 32A, 32B and 32C of the Rules of Practice in Admiralty and Maritime Cases, shall be served at least five (5) days before the return day unless otherwise provided by statute or directed by the court. Where such service is made opposing affidavits and answering memoranda of law shall be served no later than noon of the day preceding the return day.

(2) In: All other motions except those in criminal proceedings, or for preferences, or in cases assigned to a judge for all purposes; all bankruptcy proceedings which are required to be conducted before a judge (other than jury trials); all exceptions other than as provided in subparagraph (1) hereof; and all writs of habeas corpus (other than in criminal proceedings or as 28 U. S. C. Sec. 2243 may otherwise require (including deportation and exclusion, the notice of motion, supporting affidavits and accompanying memoranda of law shall be served at least ten (10) days before the return day unless otherwise provided by statute or directed by the court. Where such service is made opposing affidavits and answering memoranda shall be served at least three (3) days before the return day.

(3) Upon any motion all affidavits, memoranda and other papers to be submitted in support of the motion must be filed with the clerk of the motion part (Southern), with the clerk of the court (Eastern) with proof of due service at least three (3) days before the return day. No note of issue is required. All papers and memoranda to be submitted in opposition to the motion must be filed with the said clerk with proof of due service before noon on the day preceding the return day. No papers, either in support of or in opposition to the motion, which have not been filed as heretofore provided will be accepted for filing or received by the court except upon special permission granted by the court for good cause shown.

(4) No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

(make sure tale member is endorsed on back of paper as per Gen. Rule 6)

For Tuesday (only) papers must be filed with motion clerk by 5:00 pm Thursday

order to show cause //

(d) Upon any motion based upon rules or statutes the notice of motion or order to show cause shall specify the rules or statutes upon which the motion is predicated. If such specification has not been made the motion may be stricken from the calendar.

(e) Upon any motion, objections or exceptions addressed to interrogatories, answers to interrogatories or requests for admissions, the moving party shall (1) file a copy thereof simultaneously with the filing of the moving papers in all instances in which the notice to take interrogatories or such interrogatories or answers have not been filed previously, and (2) specify and quote verbatim in the motion papers each interrogatory, answer or request to which the objection or exception is taken and immediately following each specification shall set forth the basis of the objection or exception.

(f) No motion of the type described in subparagraph (1) of subdivision (c) of this rule shall be heard unless counsel for the moving party files with the court at or prior to the argument an affidavit certifying that he has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such an agreement. If part of the issues raised by motion have been resolved by agreement the affidavit shall specify the issues so resolved and the issues remaining unresolved.

(g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

*Sum for
judgment*

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

*Filed with
Clerk*

(h) All motions and exceptions in a case assigned to a judge for all purposes pursuant to General Rule 2(b) shall be made returnable before the judge to whom the case is assigned and not in the motion part. The notice of motion, affidavits, memoranda and other papers submitted in support and the papers and memoranda submitted in opposition thereto shall be filed at the times prescribed in subparagraph (3) of subdivision (c) with the clerk of the court and not with the clerk of the motion part.

*adjourned
motions*

(i) There shall be a preliminary call of the General Motion Calendar by the clerk at 10:00 A. M. at which defaults, unopposed withdrawals and consents to the granting of motions may be noted. Any noticed motion may be adjourned, but not more than twice, by signed stipulation filed with the clerk of the motion part (Southern), with the clerk of the court (Eastern), not later than noon of the day preceding the return day of the motion. All motions not adjourned by such stipulation shall be heard on the return day or stricken from the calendar unless the judge assigned to the motion part, on good cause shown, shall otherwise direct.

(j) Motions marked off the calendar shall not be restored by consent or stipulation.

(k) The judge may direct the parties to submit, and may determine motions without oral hearing.

(l) No motion except for judgment or other final relief will be entertained in a case after it has reached the Permanent Calendar pursuant to the Calendar Rules unless the moving party has first obtained an order from the Part I Judge granting permission to make such motion. Application to the Part I Judge for such an order must be made on five

(5) days' notice to all parties who have appeared in the action upon a showing by affidavit that circumstances arising subsequent to the date when the case reached the Permanent Calendar require that the motion sought to be made is necessary in the interests of substantial justice. This subdivision does not apply to motions or applications which are required to be made to the Part I Judge under the Calendar Rules.

(m) A notice of motion for reargument shall be served within ten (10) days after the filing of the court's determination of the original motion and shall be made returnable within the same period of time as required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court.

Reargument

(n) APPLICABLE IN THE EASTERN DISTRICT ONLY

(1) All motions other than in criminal, or bankruptcy proceedings, or for preferences, or in cases assigned to a judge for all purposes, all exceptions, all writs of habeas corpus (other than in criminal proceedings, or as 28 U. S. C. Sec. 2243 may otherwise require), including deportation and exclusion shall be heard on Wednesdays in the motion part.

(2) Bankruptcy motions and proceedings which are required to be conducted before a judge (other than jury trials) shall be heard on Fridays in the motion part, UNLESS the judge assigned to the motion part otherwise directs.

(3) Criminal motions shall be heard in Trial Term Part IV, excepting that in the summer months they shall be heard in the criminal part.

(o) APPLICABLE IN THE SOUTHERN DISTRICT ONLY

9(o)(1). All motions described in subparagraph (1) of subdivision (c) shall be noticed for and heard on Thursdays in the motion part.

effective 6/24/68 m 10-468

Tuesday

(2) All other motions except those in criminal proceedings, or for preferences, or in cases assigned to a judge for all purposes; all bankruptcy proceedings which are required to be conducted before a judge (other than jury trials); all exceptions other than as provided in paragraph (c)(1); and all writs of habeas corpus (other than in criminal proceedings or as 28 U. S. C. Sec. 2243 may otherwise require) including deportation and exclusion shall be heard on Tuesdays in the motion part unless the judge assigned to the motion part otherwise directs.

(3) Any motion seeking combined or alternative relief which falls within the purview of both subparagraphs (1) and (2) of subdivision (c) of this rule shall be governed by the subdivision which is appropriate to the primary or predominant relief sought. If such a motion has been noticed under the inappropriate subparagraph the motion may be adjourned to a day for hearing motions under the appropriate subparagraph as the judge assigned to the motion part shall direct.

RULE 10—Preparation and Entry of Judgments, Decrees and Final Orders

Upon the verdict of a jury or the decision of a cause by an opinion, memorandum, findings or other direction of the court, a separate document which shall constitute the judgment, decree or final order shall be signed by the clerk and

entered. The judgment, decree or final order shall contain no recitals other than a recital of the verdict or any direction by the court upon which such judgment, decree or final order is entered. Unless the judge specifically directs otherwise, the clerk shall promptly prepare the judgment, decree or final order. He shall forthwith sign and enter it, except that where approval by the judge is required by F. R. Civ. P. 58, he shall first submit the judgment, decree or final order to the judge, who shall manifest such approval by adding his signature thereto or noting his approval on the margin. The notation in the appropriate docket of the judgment, decree or final order herein provided, whether prepared by the clerk or the attorney, shall constitute the entry of judgment.

NOTE: The confusion which preceded (and has followed) *United States v. F. & M. Schaefer Brewing Co.* (1958), 356 U. S. 227, with reference to the document or act from which the time to appeal runs, has made it desirable to provide specifically for a formal judgment, decree or final order in all cases. To avoid delay the judgment is to be prepared by the clerk unless the court directs settlement.

RULE 11—Orders

(a) A memorandum signed by the judge of the decision of a motion that does not finally determine all claims for relief shall constitute the order unless the memorandum directs the submission or settlement of an order in more extended form.

The notation in the appropriate docket of such memorandum, which does not direct the submission or settlement of an order in more extended form, shall constitute the entry of the order. The notation in the appropriate docket of an order in more extended form, as required to be submitted or settled by such memorandum, shall constitute the entry of the order.

(b) No *ex parte* order shall be granted, unless based upon an affidavit showing cause therefor, and stating whether a previous application for similar relief has been made.

(c) In the Eastern District, paragraph (a) shall not apply. Orders on all motions shall be submitted with notice of settlement.

RULE 12—Clerk to Sign Certain Orders

The clerk shall sign orders of the following classes without submission to a judge:

(a) Orders specially appointing persons 18 years old or over to serve a summons and complaint, or to serve an involuntary petition and subpoena in bankruptcy.

(b) Orders on consent for the substitution of attorneys.

(c) Orders of discontinuance or dismissal, with or without prejudice, on consent, except in bankruptcy proceedings and in causes to which Rule 23c or Rule 66 of the Rules of Civil Procedure applies.

(d) Orders on consent satisfying decrees, and orders on consent cancelling stipulations and bonds.

NOTE: Rule 11(c) and (d) of the General Rules, effective March 1, 1952, which provided for the clerk's signature to orders on consent extending the time within which to plead, move or except and to file the record on appeal and to docket the appeal have been omitted in these rules because of *Orange Theatre Corporation v. Rayherstz Amusement Corporation*, 130 F.(2d) 185 (3d Cir. 1942), *cert. denied*, 322 U. S. 740.

RULE 13—Form of Orders, Judgments and Decrees

The form of an order, judgment or decree shall be entitled substantially as follows:

UNITED STATES DISTRICT COURT
EASTERN (SOUTHERN) DISTRICT OF NEW YORK.

CAPTION

Docket No.

The date shall immediately precede the signature of the judge, clerk, referee or master and shall be substantially as follows: "Dated: Brooklyn, New York (New York, New York), July 1, 1958".

RULE 14—Submission of Orders, Judgments and Decrees

Proposed orders, judgments and decrees shall be presented to the clerk, and not presented directly to the judge. Unless the form of order, judgment or decree is consented to in writing, or unless the court otherwise directs, two-days' notice of settlement is required. One-day's notice is required of all counter-proposals. Unless adopted by the court, such proposed orders, judgments or decrees shall not form any part of the record of the action.

RULE 15—Entering Satisfaction of Judgments or Decrees

Satisfaction of a money judgment recovered or registered in this district shall be entered by the clerk, as follows:

(a) Upon the payment into court of the amount thereof, plus interest, and the payment of the clerk's and marshal's fees, if any;

(b) Upon the filing of a satisfaction-piece executed and acknowledged by (1) the judgment-creditor; or (2) his legal representatives or assigns, with evidence of their authority;

✓ or (3) his attorney or proctor, if within two years of the entry of the judgment or decree.

✓ (c) If the judgment-creditor is the United States, upon the filing of a satisfaction-piece executed by the United States Attorney.

✓ (d) In admiralty, pursuant to an order of satisfaction; but such an order will not be made on the consent of the proctors only, unless such consent is given within two years from the entry of the decree to be satisfied.

✓ (e) Upon the registration of a certified copy of a satisfaction entered in another district.

RULE 16—Receivers

✓ Applications for the appointment of receivers shall be made only to the *ex parte* judge. If he is unavailable, the application shall be made to such other judge as the chief judge designates.

NOTE: See Bankruptcy Rules 7 and XI-4-c. (The reference is to certain requirements of notice in the Bankruptcy Rules.)

RULE 17—Oath of Master, Commissioner, Etc.

Every person appointed master, special master, commissioner, special commissioner, assessor or appraiser shall before entering upon his duties take and subscribe an oath, which, except as otherwise prescribed by statute or rule, shall be to the effect that he will faithfully and impartially discharge his duties conformably to the order of appointment to the best of his ability and understanding. Such oath may be taken before any federal or state officer authorized by federal law to administer oaths, and shall be filed in the office of the clerk.

RULE 18—Commission to Take Testimony

(a) Except as otherwise provided by law, in all actions or proceedings where the taking of depositions of witnesses or of parties is authorized, the procedure for obtaining and using the same shall be that provided in the Rules of Civil Procedure for the United States District Courts. The party seeking the deposition shall furnish the officer to whom the commission is issued with a copy of Rules of Civil Procedure 26(b), (c), 28(c), 30(c), (d), (e) and (f) and 43(b).

(b) Upon receipt of a deposition the clerk, unless otherwise ordered, shall open and file it forthwith and give notice thereof by mail to the attorneys for the parties.

RULE 19—Deposition for Use Abroad

A person desiring to take the deposition of a witness who resides or may be found within the district for use in a judicial proceeding pending in a foreign country may apply *ex parte* to the court for an order designating a commissioner before whom such deposition may be taken. If a person has been appointed to take such deposition by the court in which the action is pending, the court shall designate that person commissioner unless there be good cause for withholding such designation. If no such appointment has been made, the court, if requested, shall designate as commissioner a person authorized to administer oaths by the laws of the United States or of the State of New York.

The entry of such an order constitutes a sufficient authorization for the issuance by the clerk of subpoenas for the persons named or described therein. The Rules of Civil Procedure for the United States District Courts, so far as applicable, including the provision for punishment for contempt for

disobedience of a subpoena, shall govern the taking of such deposition.

RULE 20—Exhibits

Except in proceedings before a master or commissioner, and unless the court otherwise directs, exhibits shall not be filed with the clerk, but shall be retained in the custody of the respective attorneys who produced them in court. In the case of an appeal or other review by an appellate court a party, upon the request of any other party, shall make the original exhibits available to him, or furnish copies, as may be necessary to enable him to designate or prepare the record on appeal.

RULE 21—Actions By or on Behalf of Infants or Incompetents

An action by or on behalf of an infant or incompetent shall not be settled or compromised, or voluntarily discontinued, dismissed or terminated, without leave of the court embodied in an order, judgment or decree. The proceeding upon an application to settle or compromise such an action shall conform, as nearly as may be, to the New York State statutes and rules, but the court, for cause shown, may dispense with any New York State requirement.

The court shall authorize payment of a reasonable attorney's fee and proper disbursements from the amount recovered in such an action, whether realized by settlement, execution or otherwise and shall determine the said fee and disbursements, after due inquiry as to all charges against the fund.

The court shall order the balance of the proceeds of the recovery or settlement to be distributed as it deems may best protect the interest of the infant or incompetent.

**RULE 22—Settlements, Apportionments and Allowances in
Wrongful Death Actions**

In an action for wrongful death

(a) this court shall apportion the avails of the action only where required by statute;

(b) this court shall approve a settlement only in a case covered by subdivision (a);

(c) this court shall approve an attorney's fee only upon application in accordance with the provisions of Section 475 of the Judiciary Law of the State of New York.

**RULE 23—Review of Causes; Dismissal for Want of
Prosecution**

Causes which have been pending for more than (Southern) one year [(Eastern) six months] and are not on the trial calendar may be called for review upon not less than fifteen (15) days' notice given by the clerk by mail addressed to the attorneys or proctors of record. Notice of the call of such causes shall be published in the New York Law Journal, or otherwise as the court directs. The court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require.

RULE 24—Notice of Claim of Unconstitutionality

If, at any time prior to the trial of any action, suit or proceeding, to which neither the United States nor any agency, officer or employee thereof is a party, a party draws in question the constitutionality of an act of Congress affecting the public interest, such party (to enable the court to comply with 28 U. S. C. Sec. 2403) shall notify the chief

judge in writing of the existence of such question, giving the title of the cause, a reference to the questioned statute sufficient for its identification, and the respects in which it is claimed that the statute is unconstitutional.

RULE 25—Three-Judge Court

✓ Whenever upon an application for injunctive relief counsel is of opinion that the relief is such as may be granted only by a three-judge court, the petition shall so state, and the proposed order to show cause (whether or not containing a stay), or the notice of motion, shall include a request for a hearing before a three-judge court. Upon the convening of a three-judge court, in addition to the original papers on file, there shall be handed up three copies of the pleadings, three copies of the motion papers and three copies of all briefs.

RULE 26—Habeas Corpus

✓ (a) The petition in all habeas corpus proceedings shall set forth whether or not applications previously have been made for writs or for similar relief, stating to what court or judge they were made, the determination in each case, and any new facts upon the present application that were not previously shown.

(b) The original verified petition shall be filed with the clerk. In addition to the service on the respondent of the writ of habeas corpus or order to show cause why such a writ should not issue, in all cases of deportation and exclusion, and in all cases where an official or employee of the United States is respondent, a copy of the petition and writ or order to show cause shall be served on the United States Attorney on the day of the issuance of the writ or granting

of the order; if the office of the United States Attorney is closed, these papers shall be served before 10 A.M. on the following business day.

RULE 27—Petitions for Habeas Corpus in Exclusion and Deportation Cases

(a) A petition for habeas corpus in an exclusion or deportation case must be verified and, if the petitioner applies as next friend, must show either that the petitioner has been authorized by the alien to make the application, or that he is the parent, child, spouse, brother, or sister of the alien.

(b) Where an appeal from an order of a special inquiry officer is permitted by law, a writ will not be allowed to review that order unless the petition shows that the alien has taken such an appeal, and that the order of exclusion or deportation has become final.

(c) Petitioner must state in detail upon what grounds the final order of exclusion or deportation is invalid. The petition shall include a statement (1) that the petitioner or his attorney has learned the facts so stated from the records of the Immigration and Naturalization Service; or (2) that access to such records has been refused, in which event the petition shall state when and by whom application was made, and who refused the inspection; or (3) that the interval between the notice to the alien of the final order of exclusion or deportation and the time of the proposed enforcement of the order is too short to allow an examination of the records, in which event the petition shall state the time when the alien was informed of the final order of exclusion or deportation, the time of the proposed enforcement, and why the interval was not long enough to apply for examination of the records.

RULE 28—Service of the Writ in Exclusion and Deportation Cases

After delivery of an alien for deportation to the master of a ship or the commanding officer of an airplane, the writ shall be addressed to, and served upon, such master or commanding officer only. Notice to the respondent of the allowance or issuance of the writ will not be recognized as binding upon him without service. Service must be made by delivery of the original writ to the respondent while the alien is in his custody. Service may not be made upon a master after a ship has cast off her moorings.

In case the writ is served upon the master of a ship or upon the commanding officer of an airplane, he may deliver the alien at once to the officer from whom he received him, for custody until the return day. In such case the writ will be deemed returnable forthwith, and the custody of the officer so receiving the alien will be deemed that of the respondent, pending disposition of the writ.

RULE 29—Payment of Fees in Advance

The clerk shall not be required to render any service for which a fee is prescribed by statute or by the Judicial Conference of the United States unless the fee for the particular service is paid to him in advance.

RULE 30—Publication of Advertisements

All advertisements except notices of sale of real estate or of any interest in land shall, in civil and admiralty causes, be published in a newspaper published in the City of New York and which has a general circulation or a circulation calculated to give public notice of a legal publication. The court may direct the publication of such additional advertisement as it may deem advisable.

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Unless otherwise ordered, notices for the sale of real estate or of any interest in land shall be published in a newspaper of general circulation in the county in which the real estate or the land in question is located.

RULE 31—Sureties

(a) Whenever a bond, undertaking or stipulation is required, it shall be sufficient, except in bankruptcy or criminal cases, or as otherwise prescribed by law, if the instrument is executed by the surety or sureties only.

(b) Except as otherwise provided by law, every bond, undertaking or stipulation must (1) be secured by the deposit of cash or government bonds in the amount of the bond, undertaking or stipulation, or be secured by (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury, or (3) the undertaking or guaranty of two individual residents of the Southern or Eastern Districts of New York, each of whom owns real or personal property within such districts worth double the amount of the bond, undertaking or stipulation, over all his debts and liabilities, and over all obligations assumed by him on other bonds, undertakings, or stipulations, and exclusive of all legal exemptions.

(c) In the case of a bond, or undertaking, or stipulation executed by individual sureties, each surety shall attach his affidavit of justification, giving his full name, occupation, residence and business addresses, and showing that he is qualified as an individual surety under subdivision (b) of this rule.

(d) Members of the bar, administrative officers or employees of this court, the marshal, his deputies or assistants, shall not act as surety in any suit, action or proceeding pending in this court.

RULE 32—Approval of Bonds or Corporate Sureties

Except as otherwise provided by law, all bonds, undertakings and stipulations of corporate sureties holding certificates of authority from the Secretary of the Treasury, where the amount of such bonds or undertakings has been fixed by a judge or by court rule or statute, may be approved by the clerk.

RULE 33—Supersedeas

A supersedeas bond, where the judgment is for a sum of money only, shall be in the amount of the judgment plus 11% to cover interest and such damages for delay as may be awarded, plus \$250 to cover costs and, if eligible under Rule 32, may be approved by the clerk.

When the stay may be effected solely by the giving of the supersedeas bond, but the judgment or order is not solely for a sum of money, the court, on notice, shall fix the amount of the bond. In all other cases, it may, on notice, grant a stay on such terms as to security and otherwise as it may deem proper.

Upon approval a supersedeas bond shall be filed with the clerk, and a copy thereof, with notice of filing, promptly served on all parties affected thereby. If the appellee raises objections to the form of the bond or to the sufficiency of the surety, short notice of a hearing before the court on such objections shall be given.

RULE 34—Remand by an Appellate Court

Whenever an appellate court has remanded a cause or matter to the district court, and further proceedings not requiring the trial of an issue of fact are appropriate, an ap-

plication with reference thereto, whether made upon the motion calendar or otherwise, shall be referred for such further proceedings to the judge who heard the cause or matter below unless the appellate court otherwise directs.

Any other order or judgment of an appellate court, when filed in the office of the clerk of the district court, shall automatically become the order or judgment of the district court and be entered as such by the said clerk without further order, except if such order or judgment of the appellate court requires further proceedings in the district court other than a new trial, an order shall be entered making the order or judgment of the appellate court the order or judgment of the district court.

RULE 35—Notice of Changes in Rules

No amendment shall be made by the court to any local rule which is identical with a rule of the United States District Court for the Southern [Eastern] District of New York and no additional rules, other than Calendar Rules, shall be adopted without prior notice of the proposed amendment or additions by the chief judge of this court to the chief judge of the United States District Court for the Southern [Eastern] District.

Calendar Rules

of

United States District Court

For the Southern District of New York

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CALENDAR RULES FOR THE SOUTHERN DISTRICT OF NEW YORK

RULE 1. Causes Under Calendar Rules

These rules apply to civil and admiralty causes, but not (except where specific reference is made) to criminal causes.

RULE 2. Calendar Judges

In adopting the assignment of judges and division of work of this court, the judges shall provide for one or more judges to preside at the call of the calendars as provided in these rules. The calendars shall be called in a part designated as Part I and the judge presiding shall be known as the Part I Judge. All applications with relation to the calendars shall be presented to the Part I Judge except as provided in Calendar Rules 10 and 13.

NOTE: See also General Rule 2.

RULE 3. Deputy Clerk for Calendars

The clerk, with the approval of the court, shall appoint a deputy clerk for calendars, whose office shall be a subdivision of the clerk's office. He shall have charge of the preparation of calendars and assignment for pre-trial when directed by the chief judge, or trial when directed by the Part I Judge, of all causes covered by these rules. He shall keep the calendar status of each cause up-to-date and shall renumber the causes on the calendars from time to time. His records shall be open to the public during business hours.

RULE 4. Calendar Classification

Causes on the trial calendars shall be classified in accordance with the nature and object of the action and shall be designated by number and title as follows:

Calendar 1.—Jury Personal Injury and Death Actions.

On Calendar 1 shall be placed all personal injury or death actions which are to be tried by a jury.

Calendar 2.—Jury Other Than Personal Injury and Death Actions.

On Calendar 2 shall be placed all other actions, including issues in bankruptcy, to be tried by a jury.

Calendar 3.—Non-Jury Personal Injury and Death Actions.

On Calendar 3 shall be placed all personal injury or death actions which are to be tried without a jury, including such suits in admiralty.

Calendar 4.—Non-Jury Other Than Personal Injury and Death Actions.

On Calendar 4 shall be placed all other non-jury civil actions.

Calendar 5.—Admiralty Suits.

On Calendar 5 shall be placed all admiralty suits and proceedings other than for personal injury or death.

RULE 5. Placing Causes on the Calendars

(a) A party desiring to place a cause upon the trial calendar may file with the clerk, with proof of service thereof upon the attorneys of all parties who have appeared, a note of issue signed by an attorney of record stating:

- (1) The title of the case;
- (2) The docket number;

(3) Names, addresses and telephone numbers of the attorneys;

(4) The specific nature and object of the action;

(5) That issue has actually been joined on behalf of all parties to the action not in default;

(6) The date of the service and filing of the last pleading;

(7) Whether and by whom a jury has been demanded and the date of service and filing of the demand;

(8) That the parties have taken, or have had reasonable opportunity to take and complete, necessary depositions and other discovery proceedings;

(9) In personal injury cases, that there has been a physical examination or reasonable opportunity for such examination;

(10) That the cause is in all respects ready for trial;

(11) That the party filing the note of issue has unsuccessfully approached the other party as to the possibility of settlement, or the reason why he has not done so; and

(12) Whether or not there are other causes resting upon the same matter of right or defense and, if so, the docket numbers of the other causes. If there are such other causes, service of the note of issue shall be made upon the attorneys who have appeared therein.

(b) Ten days after the filing of the note of issue, the clerk shall notify the deputy clerk for calendars, who shall place the cause on the appropriate calendar in the order of filing, unless within that period the attorney for any other party has served and filed with the clerk his objections to placing the cause on the calendar, stating the reasons there-

for. The Part I Judge shall hear the objections and the deputy clerk for calendars shall notify the attorneys for each party of the time and place of the hearing.

(c) A motion or application to bring in a new or additional party to a cause that is on the trial calendar shall set forth the calendar position of the cause.

If the motion or application is granted, the moving party shall notify the deputy clerk for calendars in writing of the names, addresses and telephone numbers of the new or additional parties or their attorneys and any change in the title of the cause. The cause shall retain its place upon the calendar unless the court otherwise directs.

RULE 6. Calendar Divisions

The calendars provided for by Rule 4 shall be designated by divisions as follows:

(a) *Permanent Calendars.*

A cause added to the calendar by note of issue or by order or direction of the court shall be designated by its title and by a calendar number other than the court docket number, and shall be placed on the appropriate Permanent Calendar in the order of filing, or as directed by the court. The deputy clerk for calendars shall notify the attorneys of record of the calendar number and classification assigned to each cause.

(b) *Reserve Calendars.*

The deputy clerk for calendars shall, at least three days before the opening of the October Term and on each court day thereafter, publish by calendar number Reserve Calendars for each of the calendar classifications set forth in Rule 4. Unless otherwise directed by the Part 1 Judge, the

causes shall be taken in their numerical order from the Permanent Calendars. There shall be no call or answering of causes on the Reserve Calendars.

(c) *Part 1—Assignment and Pre-Trial Conference.*

Causes on the Reserve Calendars shall be scheduled for Assignment and Pre-Trial Conference Call before a judge presiding in Part 1. The Part 1 Judge shall call them and take such action as he finds in the interests of justice, including (1) holding a pre-trial or settlement conference, (2) fixing the time for holding a pre-trial or settlement conference, (3) marking a cause off the calendar, or (4) placing a cause on the Ready Day or Reserve Calendar. But no cause shall be placed on the Ready Day Calendar unless it has received at least one pre-trial conference. An attorney familiar with the cause and authorized to act must appear. No adjournment shall be granted except at the call and then only for urgent reasons. The deputy clerk for calendars shall notify the attorneys of record of the time and place of the Assignment and Pre-Trial Conference Call.

NOTE: See also Calendar Rule 13(b)(1) for preparation requirements.

(d) *Ready Day Calendars.*

At least three days before the opening of the October Term and on each court day thereafter, the deputy clerk for calendars shall publish by calendar number and title Ready Day Calendars for each of the classifications set forth in Rule 4. *The Ready Day Calendars shall consist of the first 100 cases on the Jury Personal Injury and Death Calendar and the first 25 cases on each of the other four calendars.* The causes shall be taken in the order in which they are marked ready at the Assignment and Pre-Trial Conference Call unless the Chief Judge or Part 1 Judge shall otherwise direct. *Causes on the Ready Day Calendar must be ready to proceed to trial on 24*

hour telephonic notice to the attorneys. When a case reaches this status, the attorneys shall be considered on actual notice by publication of the case in the New York Law Journal. No excuses for failing to proceed to trial when notified will be accepted by the deputy clerk for calendars, Part 1 Judge or trial judge except to the extent provided in Rule 7 (b) below.

There will be no call of causes on the Ready Day Calendars, except that the Part 1 Judge may call for Final Conference causes on the Ready Day Calendar. The deputy clerk for calendars shall notify the attorneys of record of the time and place of the Final Conference.

(e) Ready Waiting List.

Whenever the number of causes marked ready by the Part 1 Judge exceeds 100 in the case of the Jury Personal Injury and Death Calendar or 25 in the case of the other four calendars, the deputy clerk for calendars shall add the excess causes to a Ready Waiting List. He shall determine the number of causes on the Ready Waiting List to be published. These causes shall appear by calendar number only immediately following the published Ready Day Calendar for each of the respective calendar classifications. There will be no call of causes on the Ready Waiting List, except that the Part 1 Judge may call such causes for Final Conference.

(f) Assignment of Causes for Trial.

As needed by the judges in the trial parts, the Part 1 Judge shall assign cases on the Ready Day Calendar for trial. The deputy clerk for calendars shall then notify the attorneys of such assignment. Marked copies of the pleadings and trial briefs and either requests to charge in jury cases, or proposed findings of fact and conclusions of law in non-jury cases shall be submitted to the trial judge in advance of trial, as required by Calendar Rule 13(b) (1).

RULE 7. Adjournment and Holding of Causes**(a) Reserve Calendars.**

Causes appearing on the Reserve Calendars may be adjourned on written consent of all attorneys of record by use of an "Adjournment Slip" in such form as may be prescribed. An adjournment slip shall not be effective unless approved in writing by the deputy clerk for calendars.

An adjournment slip may be filed with the deputy clerk for calendars not later than 3 P. M. on any day while the cause is on the Reserve Calendar, unless the attorneys have been notified that the cause is scheduled for an Assignment and Pre-Trial Conference. Only three adjournments by consent shall be allowed. If an opposing attorney does not consent that a cause on the Reserve Calendar be adjourned, an application may be made in writing to the Part 1 Judge, with notice to the other parties and the deputy clerk for calendars. The time and place of the application shall be arranged with the deputy clerk for calendars.

(b) Ready Calendars.

A cause on the Ready Day Calendar or Ready Waiting List may not be adjourned except for good reason arising after it has been published.

(1) Ready Day Calendars.

When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. The application shall be in writing; it shall be filed with the deputy clerk for calendars; served upon the other parties, and shall be returnable before the Part 1 Judge and shall be heard by him promptly. Such applications must be

made in the event that by reason of engagement or illness of counsel, unavailability or illness of witnesses, or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make whatever disposition is necessary in the interests of justice.

Attorneys who fail to apply to the Part 1 Judge as provided above and who are unable to proceed to trial when assigned shall be subject to sanctions as provided in Rule 16.

(2) Ready Waiting Lists.

If there is a change in the readiness status of a cause on the Ready Waiting List, written application must be made promptly to the Part 1 Judge upon notice to all parties and to the deputy clerk for calendars. The time and place for hearing the application shall be arranged with the deputy clerk for calendars. It shall be within the discretion of the Part 1 Judge to retain a cause on the Ready Waiting List, or to place it on another appropriate calendar or to take any action consistent with justice including the imposition of sanctions in accordance with Rule 16.

(3) Recording of orders.

All orders granting or denying applications for adjournment on either ready calendar shall be immediately presented for filing to the deputy clerk for calendars.

(c) After Assignment to a Trial Part.

Where good cause for adjournment has arisen after assignment to a trial part, application for adjournment shall be made to the trial judge. If the application is granted, the trial judge shall either mark the case down for trial before him at a future date, or shall return the case to the deputy clerk for calendars with instructions as to what its calendar assignment shall be.

RULE 8. Information Concerning Causes on Trial Calendar and Notification of Attorneys in Next Causes on Ready Day Calendars

(a) The deputy clerk for calendars shall post on bulletin boards in his office information indicating the status of each cause on trial in each trial part. The deputy clerks in the parts shall report the progress of the trial parts to the deputy clerk for calendars as directed by him. The deputy clerk for calendars shall answer all inquiries by telephone or otherwise as to the disposition or status of the causes on the calendars and on trial.

(b) When a trial part is, or is about to be, disengaged, the deputy clerk for calendars as directed by the Part I Judge shall notify the attorneys of record in the next cause on the Ready Day Calendar by telephone to report in a designated trial part, in such manner that they will have reasonable opportunity to reach there in time. The time of notification shall be indicated on the case record. The responsibility for the appearance of attorneys, parties and witnesses in court in readiness for trial is on the attorneys of record and is not on the deputy clerk for calendars.

RULE 9. Dismissal or Discontinuance of Causes by Stipulation or by the Court

Where parties to a cause have stipulated its dismissal or discontinuance, the attorney of record for the plaintiff shall submit the proper order, and shall pay the statutory fees of the clerk and marshal then unpaid. Where the cause is on the calendar, the attorney for the plaintiff shall forthwith give notice of the dismissal or discontinuance to the deputy clerk for calendars.

RULE 10. Preferences

The following causes only are entitled to preferences:

(a) Issues in bankruptcy framed by an answer to a bankruptcy petition which are triable by a jury;

(b) Causes entitled to a preference under any statute of the United States;

(c) Causes restored to the calendar for a new trial by the setting aside of a former verdict, by reversal of a former judgment or after a mistrial;

(d) Causes in which a receiver appointed by any court, or a trustee or debtor-in-possession in a bankruptcy proceeding is a party, when the application is made by the receiver, trustee or debtor-in-possession; and

(e) Causes which in the judgment of the chief judge are entitled to a preference for exceptional and meritorious reasons.

Preferences shall be granted only by order of the chief judge. The application shall be based on affidavits setting forth the merits of the action and the reasons why it should be preferred, and shall be returnable before the chief judge on three days' written notice. All papers pertinent to the application for preference, or in opposition thereto, shall be submitted to the deputy clerk for calendars not later than the day before the return day. Unless otherwise ordered, a cause so preferred shall be placed at the head of the Ready Day Calendar for a day designated by the chief judge. When there are several preferred causes ordered placed at the head of the Ready Day Calendar for a given day, they shall, unless the chief judge otherwise directs, be placed at the head of the calendar in the order in which the orders of preference have been entered, except that a cause preferred under subdivision (a) shall always be placed first.

RULE 11. Juries

Under direction of the chief judge, jurors for all trial parts (including the criminal parts) shall be assembled under the supervision of the deputy clerk for jurors. Sufficient numbers drawn from the jury wheel in the office of the deputy clerk for jurors shall be sent by him to each trial part as required.

RULE 12. Subpoenas

Subpoenas to testify or produce documents at a trial shall be returnable at the court, with a direction to the witness to appear in the office of the deputy clerk for calendars for information as to the trial part in which the cause is to be tried.

RULE 13. Pre-Trial Conference*(a) Pre-Trial—Specially Ordered*

After joinder of issue and *at any time* before the cause appears on the Assignment and Pre-Trial Conference Call, the Chief Judge, on written notice and for good cause shown, may set the cause for pre-trial conference for a day certain. The deputy clerk for calendars shall thereupon mail a notice of the conference to the attorneys of record. *The notice shall be in the form set forth in Rule 13(b) (1) below, except that the attorneys shall conform their respective memoranda to the type of cause at hand, and to the stage of the proceedings at the time of Conference.*

(b) Part 1 Pre-Trial Conference

At the Assignment and Pre-Trial Conference, the Part 1 Judge shall informally pre-try all causes before they are placed upon the Ready Day Calendar, unless such causes have previously been pre-tried before a judge.

The notice in the Law Journal shall designate the conferences "Assignment and Pre-Trial Conferences" and shall indicate that the attorneys are required to meet in advance of and in preparation for the pre-trial conference *in accordance with the requirements set forth in the court order received in advance by the attorneys of record. (See Rule 13(b)(1) below).*

(1) *Preparation for Pre-Trial Conference and for Trial.*

When a case is advanced to one of the Reserve Calendars, the following notice in the form of a court order, shall be forwarded by the deputy clerk for calendars to the attorneys of record, over the signature of the then presiding Part 1 Judge.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

....., Plaintiff, <i>against</i> , Defendant.	} Civ.	ORDER
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The attorneys in the above captioned action are hereby notified that this case will shortly be called for Pre-Trial Conference and Assignment pursuant to Calendar Rules 6 and 13. Counsel will be notified by the deputy clerk for calendars of the exact time and date of this Conference.

The following steps are to be taken in preparation for such Conference and failure to comply with these requirements may lead to the imposition of penalties contained in Calendar Rule 16.

I. Within seven (7) days of the date of this order, trial counsel must be appointed by all parties and the designation thereof shall immediately be filed with the Clerk of the Court.

II. Counsel are advised that by the filing of a note of issue, *or the failure to make objection thereto*, they have certified to the Court that all discovery matters have been completed and the case is in all respects ready for trial.

III. Within fifteen (15) days of the date of this Order, the attorneys for all parties shall meet together at a convenient time and place for the purpose of arriving at stipulations and agreements, all for the purpose of simplifying the issues to be tried. At this Conference between counsel, all exhibits should be exchanged and examined and counsel shall also exchange a list of the names and addresses of all witnesses to be called at the trial including therein the specialties of experts to be called. Each side shall then prepare a pre-trial memorandum which shall be filed with the deputy clerk for calendars not later than twenty-five (25) days from the date of this Order. If agreement can be reached, this memorandum may be prepared jointly between counsel and so submitted.

The memorandum shall be as concise as possible, and shall *state the date the conference between the attorneys was held*, and cover the following items:

- (a) A brief statement as to federal court jurisdiction.
- (b) A brief statement of the positions of the respective parties including therein any relevant and material facts as to which there is no dispute.
- (i) With respect to negligence cases, the plaintiff should set forth:

Acts of negligence claimed.

Specific laws and regulations alleged to have been violated.

A statement as to whether the doctrine of *res ipsa loquitur* is relied upon, and the basis for such reliance.

A detailed list of personal injuries claimed.

A detailed list of permanent personal injuries claimed, including the nature and extent thereof.

The age of the plaintiff.

The life and work expectancy of the plaintiff, if permanent injury is claimed.

An itemized statement of all special damages, such as medical, hospital, nursing, etc., expenses, with the amount and to whom paid.

A detailed statement of loss of earnings claimed.

A detailed list of any property damage.

In wrongful death actions, *the further information as follows:*

Decedent's date of birth, marital status, including age of surviving spouse, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under the mortality tables, general physical condition immediately prior to date of death.

The names, dates of birth, and relationship of decedent's dependents.

The amounts of monetary contributions or their equivalent made to *each of* such dependents by decedent for a five-year period prior to date of death.

A statement of the decedent's personal expenses and a fair allocation of the usual family expenses for decedent's living for a period of at least three years

prior to the date of death; amount claimed for care, advice, nurture, guidance, training, etc., by the deceased, if a parent, during the minority of any dependent.

* * *

The defendant shall set forth any acts of contributory negligence claimed, in addition to any other defenses he intends to interpose.

(ii) In contract cases, the parties should set forth:

Whether the contract relied on was oral or in writing.
The date thereof and the parties thereto.

The terms of the contract which are relied on by the party.

Any collateral oral agreement, if claimed, and the terms thereof.

Any specific breach of contract claimed.

Any misrepresentations of fact alleged.

An itemized statement of damages claimed to have resulted from any alleged breach, *the source of such information, how computed, and any books or records available to sustain such damage claim.*

Whether modification of the contract or waiver of covenant is claimed, and if so, what modification or waiver and how accomplished.

(iii) In the event this case does not fall within the above enumerated categories, counsel shall, nevertheless, set forth their positions with as much detail as possible.

(c) The facts that are not admitted and that, therefore, will be litigated. This shall be a concise recital of all evidentiary and ultimate facts which each party contends, still remain at issue to be litigated at trial.

(d) Any amendments required of the pleadings.

(e) Any tender of issues in the pleadings that are to be abandoned.

(f) A brief statement with respect to the applicable law, containing therein citation to all cases and statutes relied upon.

(g) A list of all the exhibits each party expects to offer at the trial, with a description of each exhibit sufficient for identification, the purpose for which it is offered and a specification of any objections counsel may have. If no such specification is noted, it will be presumed that counsel has no objection to the introduction of these exhibits.

(h) A list of the witnesses which each party intends to call, along with the specialties of experts to be called.

IV. On the day of the Conference counsel for the plaintiff shall submit to the Court a "Proposed Pre-Trial Order" in accordance with the form set forth in Calendar Rule 14(a)(1) insofar as it is applicable.

V. Counsel shall be prepared to discuss any other pre-trial relief sought.

VI. *Counsel are cautioned to obtain prior authority from their clients to enter into stipulations at the Pre-Trial Conference with reference to the facts and issues in the case.*

SUBSEQUENT TO PRE-TRIAL.

At least one day before a case is actually scheduled to go to trial, there shall be submitted to the trial judge, unless notified to contrary, the following:

(a) *Marked pleadings as required by General Rule 6(b).*

- (b) A trial brief *by each party*. The brief shall contain a clear and concise statement of the facts and law relied upon. Briefs must be typewritten, and shall be double-spaced, except for quotations. Copies of all foreign statutes involved should be supplied, together with references to the sources thereof.
- (c) In non-jury cases proposed findings of fact and conclusions of law *by each party, the citation or citations, if available, for each proposed conclusion of law*.
- (d) In jury cases *by each party* requested charges to the jury covering the issues to be litigated, together with appropriate citations of authority *for each request*.

Dated:

U. S. D. J.

(2) *Records of Compliance*

The deputy clerk for calendars shall advise the Part 1 Judge of all memoranda which have not been submitted on the due dates. *The Part 1 Judge shall impose sanctions immediately upon such notification, unless the attorney shall have submitted an affidavit prior to this time setting forth good and sufficient reason why the memorandum has not been submitted.* The Part 1 Judge may notify the attorney to appear before him to explain further the reasons for counsel's failure to comply with this rule.

The deputy clerk for calendars shall keep the following record for each case:

Date of Preliminary Conference

between Attorneys: -----

Pre-Trial Memorandum Due:

Pre-Trial Memorandum Received:

Conference held in Part I:

Pre-Trial Order entered:

The memoranda and proposed orders to be submitted by counsel will be made part of the official court file along with the pre-trial order entered by the Part 1 Judge.

(c) *Settlement*

The matter of settlement may be discussed at the pre-trial conference but the discussion shall not be mentioned in the order entered on the pre-trial conference. If an attorney for a party fails to appear at a pre-trial conference, the pre-trial judge may act as in the case of a non-appearance for trial.

RULE 14. The Pre-Trial Order

(a) *At any pre-trial conference held pursuant to Calendar Rule 13, the judge shall make an order which shall recite the action taken at the pre-trial conference, to which order the attorneys shall affix their signatures with respect to stipulations and agreements set forth in the order. The order when entered shall control the subsequent course of the action unless modified by the pre-trial judge, or by the trial judge, to prevent manifest injustice.*

The pre-trial judge in his discretion may enter an order in accordance with any of the categories set forth below:

(1) The judge may enter an order in the following form subject to such additions and modifications as he may deem advisable:

(CAPTION)

The parties to this action or their attorneys having appeared before the court at a pre-trial conference pursuant to Rule of Civil Procedure 16, the following action was taken:

- (i) It is ordered that the following amendments to the pleadings are allowed:
- (ii) The parties agreed that the trial of this action shall be based upon the pleadings as amended, except that the following issues raised by the pleadings are abandoned:
- (iii) The parties stipulated the following facts:
- (iv) The parties agreed that the following documents, which were marked for identification, may be received in evidence:
- (v) The parties agreed to limit the number of expert witnesses as follows:
- (vi) The parties agreed that the following are all of the claims for damages or for other relief in this action, as of the date of this conference:
- (vii) The parties also agreed on the following matters:
- (viii) The issues to be tried are formulated by the court as follows:

NOTE: Blank copies of the pre-trial order may be obtained at the office of the deputy clerk for calendars.

(2) *The judge may enter the "Proposed Pre-Trial Order" submitted by the plaintiff pursuant to Calendar Rule 13(b)(1).*

(3) The judge may dictate into the record, in the presence of the attorneys, all actions taken at the conference. This shall be transcribed by the court stenographer and signed by the judge and shall constitute the pre-trial order.

(4) The judge may prepare and sign any other memorandum of the actions taken at the conference, which shall be entered as the pre-trial order.

RULE 15. Calendar Applications Not Covered By These Rules

All calendar applications not specifically covered by these rules shall be made returnable before the Part I Judge on notice to all parties. They shall be based on affidavit and, if the application is one to restore or place a cause on the calendar, the affidavit shall set forth that the cause is in all respects ready for trial. The time and place of the application shall be arranged with the deputy clerk for calendars and the moving papers and papers in opposition thereto are to be submitted to him on the day before the return day.

RULE 16. Sanctions

In the sound discretion of any judge of this court, one or more of the following sanctions may be imposed for failure to comply with the Calendar Rules.

(a) Preclusion Orders

Where counsel has failed to complete trial preparations prior to his filing of a note of issue or permitting the

filing thereof pursuant to Calendar Rule 5, counsel may be precluded from offering specific evidence or from raising certain issues where said evidence was obtained or said issues were first raised after the note of issue was filed.

(b) Dismissal or Default

Failure of counsel for any party to appear before the court at pre-trial conference or to complete the necessary preparations therefor, or to be prepared for trial when assigned, may be considered an abandonment or failure to prosecute or defend diligently, and judgment may be entered against the defaulting party either with respect to a specific issue or on the entire case.

(c) Imposition of Costs on Attorneys

If counsel fails to comply with any of the Calendar Rules and the judge finds that the sanctions in sections (a) and (b) above are either inadequate or unjust to the parties in light of the facts or circumstances, he may, in addition to, or in lieu of, such sanctions assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business.

*see 2/2/66
assessment
\$250. vs atty.
61-Civ-1753
LEVET, J.*

Calendar Rules

of

United States District Court

For the Eastern District of New York

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**CALENDAR RULES OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK**

RULE 1—Calendars

The Clerk shall keep three permanent calendars of causes awaiting trial, namely, Civil Jury, Civil Non-Jury and Admiralty.

(a) At any time subsequent to ten days after the service of the first answer, any party desiring a trial may file with the Clerk, with proof of service thereof upon the attorneys of all parties who have appeared, a note of issue stating the title of the case, the docket number, names, addresses and telephone numbers of the attorneys, the time when the first answer was served, the specific nature and object of the action, whether and by whom a jury has been demanded and the date of the service of such demand.

(b) A plaintiff so filing must at that time submit a statement by counsel with due proof of service showing (1) that issue has actually been joined; (2) that defendant has either examined plaintiff or had reasonable opportunity to do so; (3) in personal injury cases, that defendant has either had or had reasonable opportunity for a physical examination of the plaintiff; (4) that the parties have held or had opportunity to hold any other necessary examinations before trial, and any other necessary discovery proceedings or interrogatory proceedings have been completed, or opportunity has been given defendant to complete them; (5) that the case is in all respects ready for trial, and (6) that he has unsuccessfully approached the other party as to the possibility of settlement or the reason why he has not done so. A defendant so filing must submit a similar statement covering plaintiff's opportunity to adequately prepare for trial.

(c) Subsequent to ten days after the filing of the papers required by Rule 1(b) *supra*, the Clerk shall place the case on the appropriate calendar in the order of filing, unless within said ten-day period the attorney for any party shall have served and filed with the Clerk his opposition to placing the case on the calendar, together with an affidavit giving the reason therefor. These applications shall be referred to the Part I Judge for hearing at such time as he may set and for disposition by him.

(d) The Part I Judge shall call the cases on the Calendars in regular order and make such disposition of them as he finds to be in the interests of justice, including fixing the time for a pre-trial or settlement conference, marking a case off calendar, or assigning a case to a trial part.

Where the Part I Judge finds a case to be ready for trial, if he does not immediately order it set down for trial on a day certain or before a particular judge, he will order it to be marked "ready and passed" and placed upon the appropriate Ready Calendar.

RULE 2—Calendar Call

Day calendars shall be made up by the clerk from the permanent calendars, and called in such manner as the trial judge may direct.

If upon the call of a day calendar a cause shall be stricken therefrom, it can be replaced on the permanent calendar by stipulation approved by a judge, or order entered on motion.

NOTE: This rule is substantially Eastern District General Rule 9.

RULE 3—Preferences

The following causes shall be entitled to preference:

(a) Issues in bankruptcy framed by an answer to any bankruptcy petition.

(b) Causes entitled to a preference under any statute of the United States.

(c) Causes restored to the calendar for a new trial by the setting aside of a former verdict, the reversal of a former judgment, or after a mistrial. No new note of issue need be served or filed.

(d) Causes to which a receiver appointed by any court, or a trustee in bankruptcy or debtor in possession, or a trustee under other Chapters of the Bankruptcy Act, is a party. Causes in this class shall be allowed a preference only on the application of the receiver, trustee or debtor in possession.

(e) Causes which in the judgment of the judge before whom the particular calendar is called are entitled to a preference for exceptional and meritorious reasons.

All applications for preference shall be made on two days' notice (unless notice is waived by both parties) before the judge calling the calendar in trial term Part I Civil Jury, Admiralty, or Civil Non-Jury, as the case may be. A cause so preferred shall be placed at the foot of any day calendar designated by the judge.

NOTE: Former General Rule 10 Eastern District and Calendar Rule 20 Southern District furnish the basis for this rule.

RULE 4—Reserve Calendars

The Clerk shall prepare and publish reserve calendars as the court may direct.

NOTE: Rule is new.

RULE 5—Pre-Trial

An application for a pre-trial conference shall be made orally to the trial judge on the call of the calendar.

NOTE: Rule is new, substantially the same as notice published in Law Journal each term.

Civil Rules

of

United States District Courts

For the Southern and Eastern Districts of New York

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CIVIL RULES FOR THE SOUTHERN AND EASTERN DISTRICT OF NEW YORK

RULE 1—Address of Party or Original Owner of Claim to be Furnished

A party shall furnish to any other party, within five days after demand, a verified statement setting forth his post office address and residence, and, if a corporation, the names, post office addresses and residences of its principal officers. In the case of an assigned claim, the statement shall include the post office address and residence of the original owner of the claim and of any assignee thereof. Upon non-compliance with the demand, the court, on *ex parte* application, shall order the furnishing of the statement, and in a proper case, on motion, may direct that the proceedings on the part of the non-complying party be stayed, or make such other order as justice requires.

RULE 2—Security for Costs

The court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

RULE 3—Removal of Cases from State Courts

(a) A defendant or defendants desiring to remove a civil action or proceeding from a state court in this district shall file in this court a verified petition as required by 28 U. S. C.

Sec. 1446, and, except where a bond is not required by law, shall file a bond in the penal sum of \$500.00, complying with the provisions of the General Rules, conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that the case was not removable or was improperly removed.

(b) If the court's jurisdiction is based upon diversity of citizenship (28 U. S. C. §1332) the petition for removal shall set forth the State of citizenship and residence address of each party named in the caption and, in the case of a corporation, the State of incorporation and of its principal place of business, regardless of whether service of process has been effected on all parties. If such information or a designated part thereof is unknown to defendant, defendant may so state, and in that case plaintiff within twenty (20) days after removal shall file in the office of the clerk a statement of the omitted information.

(c) Within twenty (20) days after filing the petition and bond, the petitioner shall file with the clerk a copy of all records and proceedings had in the state court.

(d) Upon the entry of an order, remanding a case to the state court, the plaintiff shall deposit with the clerk a copy thereof to be certified and mailed by the clerk to the clerk of the state court.

RULE 4—Order of Taking Depositions

From and after the fortieth day after commencement of an action, unless otherwise ordered by the court for good cause shown, neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition, shall prevent another

party, adverse or otherwise, from noticing or taking the deposition upon oral examination of party or witness concurrently with the taking of such deposition noticed or commenced earlier.

It shall be the duty of all attorneys to make every reasonable effort to stipulate as to the exact places, dates and times for the commencement and resumption of the taking of all such concurrent depositions. In the event that attorneys are unable to so stipulate, any party may apply to the court for an order fixing the same and other terms and conditions to govern such depositions, as well as for any other order or relief relating thereto.

RULE 5—Counsel Fees on Taking Depositions in Certain Cases

(a) When a proposed deposition upon oral examination, including a deposition before action, or pending appeal, is sought to be taken at a place more than 100 miles from the courthouse, the court may provide in the order therefor, or in any order entered under Rule of Civil Procedure 30(b), that prior to the examination the applicant pay the expense of the attendance at the place where the deposition is to be taken of one attorney for each adversary party, or expected party, including a reasonable counsel fee. The amounts so paid shall be a taxable cost in the event that the applicant recovers costs of the action or proceeding.

(b) An order, pursuant to Rule of Civil Procedure 27(a)(2), appointing an attorney to represent the absent expected adversary party and to cross-examine the proposed witness, shall fix his compensation to include his expenses; the compensation so fixed shall be paid by the petitioner prior to the appearance of such attorney upon the examination.

RULE 6—Masters

(a) *Agreement on a master.* The parties to a civil action may stipulate in writing for the appointment of a master to report upon particular issues, or upon all the issues. The stipulation may suggest the master, in which case the court may appoint the person named. The procedure covering such a reference shall be the same as that governing any other reference to a master.

(b) *May sit outside district.* A master may sit within or outside the district. Where he is requested to sit outside the district for the convenience of a party and there is opposition thereto by another party, he may make an order for the holding of the hearing, or a part thereof, outside the district, upon such terms and conditions as shall be just. Such order may be reviewed by the court upon motion of any party, served within ten (10) days after notice to all parties by the master of the making of the order.

(c) *Report.* The court in passing upon the report of a master in non-jury actions shall be deemed to have adopted the findings of fact enumerated in the report, except where its order rejects the report in its entirety, or except to the extent that it specifically rejects enumerated findings.

(d) *Fees taxable.* After a master's compensation and disbursements have been allowed by the court, the prevailing party may pay such compensation and disbursements, and on payment the amount thereof shall be taxable cost against the unsuccessful party or parties. Where, however, the court directs by order the parties against whom, or the proportion in which such compensation and disbursements shall be charged, or the fund or subject matter out of which they shall be paid, the party making the payment to the master shall be entitled to tax such compensation and disbursements only against such parties and in such proportions as the

court has directed, and to payment of such taxable cost only out of such fund or subject matter as the court has directed.

(e) *Order of reference.* Whenever an order of reference to a master is made, the attorney procuring the order shall, at the time of filing thereof, deposit with the clerk a copy to be furnished to the master.

(f) *Filing of report.* Upon the filing of his report the master shall furnish the clerk with sufficient copies of a notice of filing thereof addressed severally to the parties or their attorneys, to enable the clerk to mail copies to them.

(g) *Confirmation etc., of master's report.* A motion to confirm or to reject, in whole or in part, a report of a master shall be heard by the judge appointing such master.

RULE 7—Proposed Findings of Fact and Conclusions of Law

In any civil action, where findings of fact and conclusions of law are required, the court may require from either or both parties, before or after the announcement of its decision, proposed findings of fact and conclusions of law, for the assistance of the court, but, unless adopted by the court, such proposed findings of fact and conclusions of law shall not form any part of the record of the action.

RULE 8—Default Judgment

(a) *By the clerk.* When a party is entitled to have the clerk enter a default judgment pursuant to Rule of Civil Procedure 55(b)(1), he shall submit with his form of judgment a statement showing the principal amount due which shall not exceed the amount demanded in the complaint giving credit for any payments and showing the amounts and dates thereof, a computation of the interest to the day of judgment,

and the costs and taxable disbursements claimed. An affidavit of the party or his attorney shall be appended to the statement showing: (1) that the party against whom judgment is sought is not an infant or an incompetent person; (2) that he has made default in appearance in the action; (3) that the amount shown by the statement is justly due and owing and that no part thereof has been paid except as therein set forth; and (4) that the disbursements sought to be taxed have been made in the action or will necessarily be made or incurred therein. The clerk shall thereupon enter judgment for principal, interest and costs.

(b) *By the court.* An application to the court for the entry of a default judgment, pursuant to Rule of Civil Procedure 55(b)(2), shall be accompanied by a certificate of the clerk of the entry of the default, and by a copy of the pleading to which no response has been made.

RULE 9—Stenographic Transcript

Subject to the provisions of Rule of Civil Procedure 54(d), the expense of any party in necessarily obtaining all or any part of a transcript, for purposes of a new trial, or for amended findings or for appeal shall be a taxable cost against the unsuccessful party at the rates prescribed by the Judicial Conference.

RULE 10—Notice of Sale

In any civil action, the notice of any proposed sale of property directed to be made by any order or judgment of the court, unless otherwise ordered by the court, need not set out the terms of sale specified in the order or judgment, and the notice will be sufficient if in substantially the following form:

UNITED STATES DISTRICT COURT
EASTERN [SOUTHERN] DISTRICT OF NEW YORK

NOTICE OF SALE

Pursuant to _____
(Order or Judgment)
of the United States District Court for the Eastern [South-
ern] District of New York, filed in the office of the Clerk of
said Court on _____ in the cause
(Date)
entitled _____
(Name and Docket Number)
the undersigned will sell at public sale at _____
(Place of Sale)
_____ on _____
(Date and Hour of Sale)
_____ at _____ o'clock in this _____ noon
the property in said _____
(Order or Judgment)
described and therein directed to be sold, to which _____
_____ reference is made for the
(Order or Judgment)
terms of sale and for a description of the property which may
be briefly described as follows:

Dated:

Signature and Official Title

The notice need not describe the property by metes and bounds or otherwise in detail and will be sufficient if in general terms it identifies the property by specifying its nature and location. However, it shall state the approximate acreage of any real estate outside the limits of any town or city, the street, lot and block number of any real estate within any town or city, the termini of any railroad and a

general statement of the character of any improvements upon the property.

NOTE: As to executions and judicial sales see 28 U.S.C. Secs. 2001-2004.

RULE 11—Fees in Stockholder and Class Actions

Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively. The court, in its discretion, may direct that the notice also be given the New York Regional Office of the Securities and Exchange Commission. Where the court directs notice of a hearing upon a proposed voluntary dismissal or settlement of a derivative or class action, the above information as to the applications shall be included in the notice.

RULE 12—Entry of Order or Judgment

The attorney causing the entry of an order or judgment shall append to or endorse upon it a list of the names of the parties entitled to be notified of the entry thereof and the names and addresses of their respective attorneys.

RULE 13—Appeals

(a) A notice of appeal shall exhibit the names of the several parties to the judgment, and the names and addresses of their respective attorneys of record. Upon the filing of the notice of appeal the appellant shall furnish the clerk with a sufficient number of copies thereof to enable him to comply with the provisions of Rule of Civil Procedure 73(b).

(b) Whenever a notice of motion to enforce the liability of a surety upon an appeal or a supersedeas bond is served upon the clerk pursuant to Rule of Civil Procedure 73(f), the party making such motion shall deposit with the clerk one additional copy for each surety to be served.

RULE 14—Contempts

(a) A proceeding to adjudicate a person in civil contempt of court, including a case provided for in Rule of Civil Procedure 37(b)(2)(IV), shall be commenced by the service of a notice of motion or order to show cause. The affidavit upon which such notice of motion or order to show cause is based shall set out with particularity the misconduct complained of, the claim, if any, for damages occasioned thereby, and such evidence as to the amount of damages as may be available to the moving party. A reasonable counsel fee, necessitated by the contempt proceeding, may be included as an item of damage. Where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the papers upon which it is based may be served upon his attorney; otherwise service shall be made personally, in the manner provided for by the Rules of Civil Procedure for the service of a summons. If an order to show cause is sought, such order may upon necessity shown therefor, embody a direction to the United States marshal to arrest the alleged contemnor and hold him in bail in an amount fixed by the order, conditioned for his appearance at the hearing, and further conditioned that the alleged contemnor will hold himself thereafter amenable to all orders of the court for his surrender.

(b) If the alleged contemnor puts in issue his alleged misconduct or the damages thereby occasioned, he shall upon demand therefor, be entitled to have oral evidence taken

thereon, either before the court or before a master appointed by the court. When by law such alleged contemnor is entitled to a trial by jury, he shall make written demand therefor on or before the return day or adjourned day of the application; otherwise he will be deemed to have waived a trial by jury.

(c) In the event the alleged contemnor is found to be in contempt of court, an order shall be made and entered (1) reciting or referring to the verdict or findings of fact upon which the adjudication is based; (2) setting forth the amount of the damages to which the complainant is entitled; (3) fixing the fine, if any, imposed by the court, which fine shall include the damages found, and naming the person to whom such fine shall be payable; (4) stating any other conditions, the performance whereof will operate to purge the contempt; and (5) directing the arrest of the contemnor by the United States marshal, and his confinement until the performance of the condition fixed in the order and the payment of the fine, or until the contemnor be otherwise discharged pursuant to law. Unless the order otherwise specifies, the place of confinement shall be the Federal House of Detention. No party shall be required to pay or to advance to the marshal any expenses for the upkeep of the prisoner. Upon such an order, no person shall be detained in prison by reason of the non-payment of the fine for a period exceeding six months. A certified copy of the order committing the contemnor shall be sufficient warrant to the marshal for the arrest and confinement. The aggrieved party shall also have the same remedies against the property of the contemnor as if the order awarding the fine were a final judgment.

(d) In the event the alleged contemnor shall be found not guilty of the charges made against him, he shall be discharged from the proceeding and, in the discretion of the

court, may have judgment against the complainant for his costs and disbursements and a reasonable counsel fee.

RULE 15—Procedure in Absence of Rule

Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.

Criminal Rules

of

United States District Courts

For the Southern and Eastern Districts of New York



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CRIMINAL RULES

RULE 1—Notice of Appearance

Attorneys representing defendants named in an information or indictment shall file a notice of appearance in the clerk's office and serve a copy on the United States attorney; or, in cases wherein a complaint has been filed with the United States commissioner, a notice of appearance shall be filed with him and a copy served on the United States attorney.

NOTE: Former General Rule 36 Eastern District required notice to be filed in felony cases only.

Former General Rule 5 Southern District required a notice of appearance in all cases including cases where a complaint only has been filed.

RULE 2—Attendance of Defendants

A defendant in a criminal prosecution admitted to bail shall attend before the court at all times required by the Rules of Criminal Procedure for the United States District Courts, and at any time upon notice from the United States attorney.

NOTE: Former General Rule 26 Southern District provided that a defendant in a criminal prosecution admitted to bail shall not be required to attend any term of court except upon notice from the United States attorney.

Rule of Criminal Procedure 43 states the times when defendant's presence is required; on arraignment, trial, including impaneling of jury, verdict and sentence; and provides for trial continuance in event of voluntary absence after trial begins. Provision is also made for trial in misdemeanor cases without personal attendance, upon written consent.

RULE 3—Motions

(a) Except as otherwise provided by statute, rule or order of the court, motions in criminal proceedings and

*Amended
eff 12/4/67*

COURT RULES

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

CRIMINAL RULES

AMENDMENT TO RULE 3

Effective December 4, 1967

In the Matter of the Amendment of Criminal Rule 3 of the United States District Court for the Southern District of New York.

This Court, upon its own motion, does hereby

ORDER that the following amendment to Rule 3 of the Criminal Rules of this Court is adopted and approved effective at the beginning of business on December 4, 1967:

Rule 3

MOTIONS

(a) Except as otherwise provided by statute, rule or order of the court, motions in criminal proceedings and motions for remission of forfeiture of bail shall be made upon eight (8) days' notice to the adverse party, returnable on Tuesday at 2:15 p.m. in the criminal calendar part. No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

(b) The notice of motion and any supporting affidavits with proof of service must be filed with the clerk of the court in Room 340 no later than 4:00 p.m. on the Thursday before the return day. Motion papers shall consist of the following:

(1) A notice of motion setting forth the nature of the motion and the statutory or other authority upon which the motion is based.

(2) An affidavit or affidavits, where required, setting forth all facts material to the determination of the motion.

(3) A memorandum of law which succinctly sets forth all legal theories and authorities submitted in support of the motion.

forth briefly the questions to be reviewed by the appellate court.

NOTE: Rule of Criminal Procedure 46(a)(2) provides that bail may be allowed by trial judge, appellate court, by any judge thereof, or circuit justice pending appeal or certiorari, only if it appears that the case involves a substantial question which should be determined by the appellate court.

Rule of Criminal Procedure 38(c) provides that an application for bail pending appeal may be made to the appellate court, or a judge thereof, or justice of the Supreme Court; that the application shall be upon notice, and show the disposition thereof by the court below with the reasons given for the denial, if the motion was denied. Court of Appeals Rule 23, provides that all such applications be made to the judge who imposed sentence, and that upon refusal, application may be made to the Court of Appeals on notice, and in compliance with Rule of Criminal Procedure 38(c).

RULE 5—Writs of Habeas Corpus

Writs of habeas corpus in criminal, removal, and extradition proceedings shall be heard in the criminal calendar part.

NOTE: Former General Rule 11 Eastern District and former General Rule 11 Southern District. 28 U.S.C. 2243 prescribes the time for filing the return and time for hearing.

RULE 6—Approval of Bail Bonds

In causes wherein the amount of bail has been fixed by the judge, the clerk may approve the bond of a corporate surety holding a certificate of authority from the Secretary of the Treasury, and may approve the bond of an individual furnishing such bail in cash or Government bonds.

Bail bonds of individual sureties shall be approved by one of the officers specified in 18 U. S. C. Sec. 3041.

NOTE: Title 6 U.S.C. Sec. 6 covers surety companies. Rule is same as former General Rule 25 Southern District and former General Rule 29 Eastern District, excepting for omission of last paragraph of these two identical rules. Last paragraph of former rule now included in new General Rule 29.

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ADMIRALTY RULES

RULE 1—Process. Return of Same

All process shall be issued by the clerk. Process in personam shall be returnable on the return day thereof at the clerk's office not less than eight days from its issuance, and shall be served not less than four days before the return day, unless otherwise ordered. Process in rem shall be returnable and called by the clerk at the next general motion day, not less than eight days from its issuance unless otherwise ordered. The return upon such process shall state the date of seizure or of sale, as the case may be. Appearance or claim shall be filed on or before the return day, and when none is filed, a proper decree, interlocutory or final, may be entered.

NOTE: Former Rules 1 and 2 in the two Districts are combined in this rule.

RULE 2—Publication: Sale

(a) Unless otherwise ordered or provided by law, notice of arrest of property in suits *in rem*, shall be published once at least one week before the date on which the process is returnable and shall contain the title of the cause, the nature of the cause of action, the amount demanded, the time and place of the return of process and names of the marshal and proctor, and shall state that all interested persons should appear, otherwise default will be noted and condemnation ordered.

(b) When the *res* remains in custody of the marshal, the cause will not be heard until after publication of process shall have been made in that cause, or in some other pending cause in which the property is held in custody. No

final decree shall be entered ordering the condemnation and sale of property, not perishable, arrested under process *in rem*, unless publication of process in that cause shall have been duly made.

(c) Unless otherwise ordered or provided by law, notice of sale of property after condemnation in suits *in rem* shall be published daily for at least six days before sale.

(d) No sale of the *res* shall be ordered by interlocutory decree before the sum chargeable thereon is fixed by the court, except by consent of the parties or by order of the court.

NOTE: This rule combines former Rules 4, 5 and 6 in both districts, with exceptions. No reference is here made to newspapers where publication shall be made, since general rule 27 so provides. The only reference in Supreme Court Admiralty Rules to publication is in rule 10—that the marshal shall give public notice of the arrest of a vessel, the time assigned for the return of the cause “in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct”.

Section 736 of Title 28 U.S.C. entitled “Seizure for Forfeiture”, and which provided for 14 days publication of notice of seizure and libel when any vessel or merchandise is seized by the customs authorities and prosecuted for forfeiture was repealed by the Act of June 25, 1948 c. 646, Section 39, 62 Stat. 992. This section was the only one fixing the number of days for publication in matters brought on behalf of the United States or under the revenue laws. It is understood that since such repeal, the United States attorney has followed the former local admiralty rule for publication in matters involving property arrested or sold by or on behalf of the United States. Accordingly, this rule would also have application to causes on behalf of the United States or under the revenue laws.

RULE 3—Property in Possession of Collector

(a) In suits *in rem* when the *res* is in the custody of the collector of customs the marshal shall, in addition to the publication of the process provided for by Rule 2, deliver

a copy of the process to the collector together with notice of the attachment of the property therein described and require the collector to detain such property in custody until the further order of the court.

(b) In case the collector is not found within the district, then a copy of such process and notice shall be delivered to the custodian of the property within the district.

(c) Notice of the attachment shall also be given to the owner or his agent if found within the district and, if the owner or his agent cannot be found within the district or if such owner or agent be unknown, then the publication of such notice shall be deemed sufficient, unless the court shall otherwise direct.

NOTE: (1) The language of former Rule 3 in both districts apparently did not require publication of notice of arrest where property was in the possession of the collector.

(2) Publication of such notice is not necessary to confer jurisdiction where the libel is by the United States, provided the *res* is in possession of the collector when the libel is filed. (Benedict, Vol. II, §300; *The Underwriter* (2 C.A.), 13 F.(2d) 433).

(3) *Upon the filing of an independent libel*, however, publication of the notice of attachment is required, where the *res* is in the possession of the collector, before the attachment can be binding upon the owner or parties, other than the collector, who may be interested in such *res*. (*The Algie* (E.D.N.Y., Campbell, J.), 50 F.(2d) 624, 625). Supreme Court Admiralty Rules 9 and 10 require publication in *all suits in rem*.

(4) The rule as it formerly existed did not provide for the contingency of notice to an owner or agent who could not be found within the district. In suits *in rem* notice to the owner in some form must be given if the decree is to be conclusive upon them. Publication is accepted as a sufficient notice or invitation to appear when the owner cannot be found within the district. (*The Lottawanna*, 87 U. S. (20 Wall.) 201; *The Rio Grande*, 90 U. S. (23 Wall.) 458).

(5) The marshals in both districts appear to properly require publication of all independent process *in rem*, even where the *res* may be in the possession of the collector of customs.

RULE 4—Possessory, Petitory and Licitation Suits

In all possessory, petitory and licitation suits, the process shall be returnable at the first general motion day not less than three days after date of the issuance of the process, unless otherwise ordered by a judge. Unless otherwise ordered, the answer shall be filed upon return of the process duly served, and a day of hearing then fixed.

NOTE: This is a modification of former Rule 37 in both districts. Supreme Court Admiralty Rule 19 defines the process employed in possessory and petitory suits "by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit". Former rule 37 provided "Notice by publication will not be required unless specially ordered". This sentence has been deleted from the present rule because Supreme Court Admiralty Rule 10 requires publication in all suits and proceedings *in rem*.

RULE 5—Suits in Forma Pauperis

Unless allowed by the court, no process *in rem* shall issue in forma pauperis suits except upon proof of twenty-four hours notice to the owner of the *res* or his agent, of the filing of the libel.

NOTE: Former Rule 38 in both districts provided that suits could be prosecuted or defended in forma pauperis, by allowance of the court, and without the requirement of a stipulation for costs. It also provided for notice to the owner of the *res*, of the filing of the libel. Only that portion relating to notice is now preserved in the present rule because by the Judicial Code, Title 28, Sections 1915(a) and 1916 citizens and seamen may institute or defend in forma pauperis without prepayment of fees and costs or security therefor.

RULE 6—Security for Costs

(a) No libel, petition, appearance, claim or answer shall be filed, except on the part of the United States, or on the special order of the court, or when otherwise provided by

law, or by these rules, unless the party offering the same shall file a stipulation for costs, conditioned that the principal shall pay all costs awarded by the court, and, in case of appeal, by any appellate court, against him, it or them. In suits in personam, such stipulation shall be in the sum of \$100; in suits in rem, or where process of attachment is to be issued, the stipulation shall be in the sum of \$250. In lieu of a stipulation the party may deposit the necessary amount in the registry of the court. A separate stipulation for costs shall not be required where a stipulation for value is given and the amount of such stipulation, as fixed by the court or by agreement, is increased by the amount of the appropriate stipulation for costs.

(b) Seamen suing for wages in their own right and for their own benefit for services on board American vessels, salvors coming into port in possession of the property libelled, petitioners for money in the registry of the court, and the City of New York, shall not be required to give such security in the first instance. The court, however, may on motion order the usual stipulation to be given.

NOTE: The language is substantially the same as that of Rule 7 in both districts with some rearrangement of the wording.

RULE 7—Stipulations

(a) All stipulations shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate.

(b) Where the party offering a stipulation for costs resides or has a place of business within the Southern or

Eastern District of New York, one surety shall be sufficient, if a resident of either district.

NOTE: Rule 8 of both districts was revised. The form of stipulation is covered by General Rule 28(b), except so much thereof as is peculiarly applicable to admiralty.

RULE 8—General or Standing Stipulations

Whenever the owner or owners of any vessel shall execute and deliver to the marshal a general bond or stipulation as provided by Title 28, U. S. Code, Section 2464 and Supreme Court admiralty rules, conditioned to answer the decree of the court in all or any cases that shall thereafter be brought against the said vessel, notice of the process shall be given to the principal and surety or sureties in said bond by service of a copy thereof by the marshal upon each of the persons named in said bond. Failure to receive such notice shall in no wise affect the liability under such bond; all other notices shall be given and the cause proceed as if such vessel had been taken into actual custody.

NOTE: This is former Rule 45 of the Southern District with slight modification of language and correction of statute reference; the former rule spoke of "Section 941 of the Revised Statutes, as amended (28 U. S. Code Section 754)", which was repealed by the schedule attached to Public Law 773. The posting of special bond is now governed by Section 2464 of Title 28. The Eastern District heretofore did not have a rule on this subject.

RULE 9—Stipulators, Justification by

(a) Stipulators may justify on short notice before the clerk, a commissioner, or a notary public, who, if required by the opposite party shall examine the sureties under oath as to their sufficiency, and annex their depositions to the bond or stipulation.

(b) In all cases where the surety on bonds or stipulations is not a corporate surety holding a certificate of authority

of the Secretary of the Treasury and the bond or stipulation is not approved by proctors, reasonable notice of application for approval by a judge shall be given. In the absence of the judges, the approval of the clerk, on like notice, shall be sufficient.

NOTE: The first paragraph is the language of former Rule 9 of both districts, the term "deputy clerk" having been omitted in view of the definition rule in local general rules and which includes the "deputy" within the designation "clerk". The second paragraph is an amendment of the former rule by the addition of the words "In all cases * * * Treasury" to confirm the practice of requiring notice of application for approval of individual sureties.

RULE 10—Verification of Pleadings and Interrogatories

Verification of claims to property, pleadings and answers to interrogatories shall be by the parties or one of them, and if a corporate party, by an officer thereof. If the individual party or all officers of the corporate party are not within the City of New York, the verification may be made by an agent, attorney-in-fact or proctor, who shall state briefly the sources of his knowledge or information, declare that the document affirmed to is true to the best of his knowledge, information and belief, and state the reason why the verification is not made by the party. If the personal oath of a party or all the parties be demanded, a motion may be made for a stay pending the procurement of such verification by commission or otherwise.

NOTE: This is in substantially the same language as former Rule 12 in both districts, except that it provides for claims to property and also for corporate verification. It is not in conflict with or repetitious of Supreme Court admiralty rules, of which Rules 25, 26 and 31 deal with verification of pleadings and other papers, each merely providing that the papers be "on oath or solemn affirmation" or "under oath". Rule 33 of the Supreme Court admiralty rules provides for issuance of a commission, in the court's discretion, where a party is out of the country or unable from sickness or other casualty to make answer on oath or solemn affirmation at the proper time.

RULE 11—Time to Plead or Except; Interrogatories

Unless the court directs otherwise:

(a) When process is issued the answer, exceptions or exceptive allegations to the libel or petition, (except in possessory, petitory and licitation suits), shall be filed within three weeks after the return day.

(b) When process has not been issued, but a claim or notice of appearance has been filed, the answer, exceptions or exceptive allegations shall be filed within three weeks thereafter.

(c) Exceptions or exceptive allegations to the answer must be filed within three weeks after service of a copy of the answer.

(d) If a party submit to exceptions he shall amend his pleading with respect to the matters excepted to within three weeks after service of a copy of the exceptions.

(e) If exceptions to pleading or to an interrogatory be overruled, the party excepting may answer within two weeks after the service of a copy of the order on his proctor.

(f) In all suits in which the United States shall be respondent in admiralty, the notice of appearance shall be filed within two weeks after the completion of the prescribed service of the libel, and the answer within four weeks after the completion of said service.

NOTE: This rule combines former Rules 13 and 14 in both districts.

The time to plead or except under former Rule 13 in the Eastern District was two weeks and in the Southern District three weeks. By this rule the period of three weeks has been fixed for both districts. Time to plead in possessory suits is taken care of by local Rule 4 and Supreme Court Admiralty Rule 19.

The last paragraph of former Rule 13 in both districts relating to the entry of a decree *pro confesso* is here omitted, but included in Rule 22 dealing with decrees on default in *in rem* suits.

The last paragraph of former Rule 14, relating to interrogatories, and the answer or exceptions thereto, is omitted. Supreme Court Rule 31 (in effect September 1, 1939) is that interrogatories shall be excepted to or answered within fifteen days. It also provides the method of bringing exceptions on for hearing "with notice as in case of motion". Therefore, no provision is here required for interrogatories, the answers or exceptions thereto.

Sub-division (e) of this rule provides a time period within which to answer, when the time is not otherwise specified in the order.

This rule is not in conflict with or repetitious of Supreme Court Admiralty Rules 26, 27, 28, 29 and 39. Rule 26 defines requisites of the answer. Rule 27 provides that parties may except to pleadings or interrogatories. Rule 28 permits the default upon failure to answer and also the setting aside of the default upon application to the court. Rule 29 provides that the court may compel a further answer. Rule 39 permits the court to grant a rehearing within sixty days after the decree has been entered, the term of the court being deemed extended for this purpose until the expiration of sixty days. This rule is superseded by statute, Title 28, U.S.C. §139.

RULE 12—Joinder

(a) Except as governed by Supreme Court admiralty rules, parties may sue and parties (including a vessel or other *res*) may be sued either jointly, severally or alternatively in one suit, and persons having separate causes of action may join in one suit if the causes of action involve substantially the same questions and arise out of the same transactions.

(b) Persons who, under the preceding paragraph of this rule, might have joined as co-libellants, and, in suits for wages, any other seamen claiming wages for the same voyage, not made parties in the original libel, may, upon petition, be admitted to prosecute as co-libellants upon such terms as the court may deem reasonable.

NOTE: This rule is in the same language as former Rule 15 of both districts, with the addition, in the first paragraph, of the words "Except as governed by Supreme Court admiralty rules". This modification is recommended because by Supreme Court Ad-

miralty Rule 15 suits for assault on the high seas "shall be *in personam* only", except in the event of the owner's or master's misconduct in certain specified respects; special provision is made for petitory and possessory suits by Supreme Court Admiralty Rule 19 "by arrest of the ship and by a monition to the adverse party or parties to appear and make answer to the suit". The right of joinder in suits not specified in Supreme Court admiralty rules was left an open question by the Supreme Court and sustained by the lower courts, although it is expected that the practice would be upheld if the question were ever presented to the Supreme Court. Other Supreme Court admiralty rules on the subject of joinder are 16, which provides for joinder of suits *in rem* and *in personam* upon a "mere maritime hypothecation of ship or freight", Rule 18 which permits suits for salvage service *in rem* and *in personam* and Rule 34 which permits a third party to intervene upon filing a pleading and stipulation. Rule 56 permits the claimant or respondent to bring in any other vessel or person who may be partly or wholly liable to libellant or to such claimant or respondent by way of remedy over, contribution or otherwise. It also provides the method of procedure.

RULE 13—Consolidation

When various suits are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the court may consolidate or compel said suits to be tried together, and enter a single decree or decrees in each cause.

NOTE: This is substantially the language of former Rule 16 of both districts. There is no Supreme Court admiralty rule on the subject.

RULE 14—Severance

At any stage of the proceeding, if it appears to the court's satisfaction that the libellant is entitled to recover a part of the claim or claims set forth in the libel and respondent does not claim any recoupment, offset, or counter-claim in respect of said part, the court may, upon motion, make an order of severance and enter an appropriate decree all with-

out prejudice to the further prosecution of the cause with respect to the remaining issues.

NOTE: This rule is a revision of former Eastern District Rules 17a and 29 and Southern District Rule 29. The structure of the former rule was criticized by the Court of Appeals, Second Circuit in *Galveston Drydock & Construction Co. v. Standard Dredging Company*, 1938 A.M.C. 862, 40 F.(2d) 442. The former rule provided "In case the respondent or claimant in his answer does not deny that the libellant is entitled * * *". The Court of Appeals pointed out that in admiralty failure to deny any allegation may not be treated as identical with its admission, that Supreme Court Admiralty Rule 29 requires libellant to except, if respondent does not answer fully, and therefore there must be some declaration of the court that the allegations not denied are to be taken *pro confesso*.

RULE 15—Substitution of Parties

When by reason of the death or incompetency of any of the parties, changes of interest in the suit, defects in the pleadings or proceeding, or otherwise, new or substituted parties to the suit are necessary or proper, persons, upon their own petition or upon petition of any party to the cause, may be made parties by appropriate order *ex parte* if no appearance or claim has been filed, otherwise the said application shall be made on notice to all parties who have filed appearance or claim. The order may provide for the issuance of process.

NOTE: Former Rule 18 in both districts was amended by this rule. It contained the phrase "the death" of any of the parties, while the present rule adds the words "or incompetency". The former rule made no reference to *ex parte* applications, those on notice or the issuance of process in an appropriate case.

RULE 16—Recoupment and Cross-Libel

If a respondent or claimant shall desire to recoup or set off any damages sustained by him growing out of the transactions referred to in the libel, he must in his answer state the facts and his own damages in like manner as upon filing

a cross-libel, and such statement shall be without prejudice to any other defense which he may interpose. He shall not, however, be entitled to any affirmative recovery upon such answer. In any case where a cross-libel *in personam* will lie, service of such cross-libel may be made on the proctors for the libellant.

NOTE: This is in the same language as former Rule 17 in both districts. There is no provision in Supreme Court admiralty rules with respect to recoupment, but Supreme Court Rule 50 dealing with "Security on cross-libel" provides that where the respondent or claimant in the original suit shall have given security, the respondent in the cross-libel shall give security, unless the court shall otherwise direct, and also that all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

RULE 17—Cross-Claim Against Co-Respondent or Claimant

A respondent or claimant may, by petition or pleading, state a claim, arising out of the transaction, occurrence or property that is the subject matter of the original cause, against a co-party who has appeared or claimed in the suit. The petition or pleading may be served upon the proctor for the party against whom the claim is asserted, and in such case the party so pleaded against shall except to or answer the petition or other pleading within three weeks after such service upon its proctor.

NOTE: This rule is new and serves to clarify the procedure suggested by Judge Learned Hand in *Vane v. Wood* (S.D.N.Y. 1916), 231 Fed. 353, 356; *The Sif* (C.A. 2), 266 Fed. 166, 169.

RULE 18—Attachments

(a) In proceeding *in personam* where the debts, credits or effects named in any process of foreign attachment are not delivered up to the marshal by the garnishee or are denied by him to be the property of the respondent it shall be a sufficient service of such foreign attachment to leave a copy thereof

with such garnishee, or at his usual residence or place of business, with notice of the property attached. On due return thereof by the marshal the libellant, on proof satisfactory to the court that the property belongs to respondent, may proceed to a hearing and final decree in the cause.

(b) In proceedings *in rem*, process against freight or proceeds of property in possession of any person, and all orders granted by the court under the Supreme Court admiralty rules in similar cases may be served in like manner.

NOTE: This rule is the substance of former Rule 19 in both districts with rearrangement of language. It does not conflict with Supreme Court Rule 36. In foreign attachment proceedings ownership of attached property by respondent is a jurisdictional requisite.

RULE 19—Appraisements and Appraisers

(a) In case of seizure of property in behalf of the United States, an appraisement for the purpose of bonding the same may be had by any party in interest, on giving one day's previous notice of motion for the appointment of appraisers. If the parties or their proctors and the United States attorney are present in court, such motion may be made *instanter*, after seizure and without previous notice.

(b) Orders for the appraisement of property under arrest or attachment at the suit of a private party may be entered as of course, at the instance of any party interested, or upon the consent of the proctors for the respective parties.

(c) Only one appraiser is to be appointed, unless otherwise ordered, and, if the respective parties do not agree in writing upon the appraiser to be appointed, the judge shall name him.

(d) The appraiser shall give one day's notice of the time and place of making the appraisement to the proctors in the

cause. The appraisement when made shall be filed with the clerk.

NOTE: This rule is substantially in the language of former Rule 20 in both districts, with these exceptions: The former rule required the appraiser to take an oath, which is not necessary in the present rule since the general rules require it; the former rule provided for the posting of a notice by the appraiser of the time and place of making the appraisement. It is deemed unnecessary for the appraiser to give notice except to proctors in the cause. There is no Supreme Court admiralty rule on the subject of appraisement.

RULE 20—Release of Seizures

Property seized by the marshal may be released as follows:

(a) By giving bond as provided by Title 28 U. S. Code, Section 2464 and Supreme Court Admiralty Rules.

(b) In suits for sums certain, by paying into court the amount alleged in the libel as due, with interest as claimed therein up to the term next succeeding the return day, or by filing an approved stipulation for such alleged amount, with interest, and by payment into court of the costs of officers of the court already accrued, and by depositing also the sum of \$250, to cover further costs; or in lieu of such deposit for costs giving a stipulation for costs in the usual form.

(c) In suits, other than possessory, petitory or licitation, by filing an approved stipulation for the amount of the appraised or agreed value of the property seized with interest (unless the same is modified by an order of the court), conditioned to abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree rendered by the court, or by any appellate court, if an appeal intervene, with interest.

(d) In possessory, petitory and licitation suits upon the order of the court only, and on such security and terms as ordered.

(e) By an order duly entered by the clerk upon the written consent of the proctor for the party on whose behalf the property is detained.

NOTE: This rule is in the same language as former Rule 21 of both districts. The rule is not in conflict with but supplements and brings into one local rule all methods of release covered by 28 U.S.C. §2464 (formerly R.S. 941), Supreme Court Admiralty Rule 5 (foreign attachment), Rule 24 (stipulation for costs), Rule 12 (release of vessels) and Rule 57 (release of property generally in custody of marshal).

RULE 21—Summary Release From Arrest or Attachment

Where there is an arrest of the person, or where property is attached, the party arrested or any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant be entitled to an order requiring the libellant to show cause instantly why the arrest or attachment should not be vacated. This rule shall have no application to suits for seaman's wages when process is issued upon a certificate of sufficient cause filed pursuant to Sections 4546 and 4547 of the Revised Statutes (Title 46 U. S. Code, Sections 603 and 604).

NOTE: This is a substantial restatement of former Rule 22 of both districts.

RULE 22—Decree of Default

(a) On the expiration of the time to answer, if no pleading, exceptions or exceptive allegations have been filed, the libellant or petitioner may enter, by default, an interlocutory or final decree as may be appropriate, without notice, unless the claimant or respondent has appeared by proctor, in which case at least five days notice of the submission of such decree shall be given.

(b) In any suit *in rem*, or *in personam*, where debts, credits or effects have been attached and there has been no appearance, a final decree will not enter unless notice of the suit has been given by personal service or by mail, to the owner or agent of the property arrested or attached at his last known address or to the master or person in charge of a vessel in custody. Such notice shall be in addition to the proof of publication of the notice of arrest and shall specify the date the libel was filed and by whom and the date the property was arrested or attached. If it be made to appear to the court that such notice cannot be given or is unnecessary, then proof of the publication of the process and attachment of the *res* thereunder shall be sufficient.

(c) Unless the court otherwise directs, in all cases where an interlocutory decree may be entered under sub-division (a), a final decree on default may be entered where the libel is for breach of contract and the damages are liquidated, upon affidavit or other proof satisfactory to the court, without the requirement of a reference to a commissioner.

NOTE: Paragraph (a) of this rule is a revision of former Rule 13 in both districts. Former Rule 13 of the Eastern District permitted the entry of a decree, without notice in all cases. Supreme Court Admiralty Rule 28 permits a default upon failure to answer and also the setting aside of the default upon application to the court. Rule 39 permits the court to grant a rehearing, after default, within 60 days after the decree has been entered, the term of the court being deemed extended for that purpose until the expiration of 60 days. The former rule in both districts provided "Such decree shall not be set aside except on application to the Court, and on such terms as the Court may impose". These words are deemed unnecessary in view of Supreme Court Admiralty Rules 28 and 39, both of which permit the setting aside of the default upon application of the respondent or claimant. The 60 day provision referred to in Supreme Court Admiralty Rule 39 has been superseded by statute, Title 28, U.S.C. §139.

Paragraph (b) is a revision of former Rule 28 in both districts. There is no Supreme Court admiralty rule touching the service of notice of suit before the entry of final decree, although Supreme Court Admiralty Rule 10 provides for public notice in all cases of seizure. The former rule which was the

same in both districts (Rule 28) provided for the entry of final decree on default "after actual notice to the owner or agent, etc." had been given. In the Eastern District *pro forma* notice by the marshal at the time the arrest was made was deemed sufficient compliance with the Rule. In the Southern District the word "actual" was more strictly construed and led to practical difficulties where the owner or agent was located beyond the Eastern or Southern District of New York or was unknown. The provision for additional notice was a precautionary measure, apparently designed to give the owner of the property a last clear chance to pay the claim or make application to the court to vacate the default.

Paragraph (c) is new and had not been the subject of rule in either district. It is proposed to enable the entry of a final decree without the necessity of a reference where the proof otherwise would be largely *pro forma*.

RULE 23—Tender, and Notices Before Trial in Limitation of Damage

(a) A tender *inter partes* before suit shall be of no avail in defense, or in discharge of costs, unless, before the answer is filed, the amount so tendered shall be deposited in court to abide the final order or decree. In case of such deposit, the respondent or claimant shall recover costs, unless the libellant shall recover a sum in excess of the amount of the tender, without interest after the date of the tender.

(b) The libellant may at any time on notice take an order for the withdrawal of so much of the tender or amount deposited as the court may allow, without prejudice to continuing the litigation for a larger amount, leaving in the registry a sum sufficient to cover the respondent's or claimant's costs, in case the amount deposited should be held in the court, or in any appellate court, to be a sufficient tender.

(c) If the respondent or claimant serves on the proctor for the libellant written notice of consent that the whole, or any specific part, of the tender deposited be paid to the libellant, the respondent or claimant shall not be liable thereafter for interest on so much of the libellant's claim.

(d) At any time before trial a respondent or claimant may serve and file a written offer to allow a decree to be entered for a sum therein specified, with costs to the date of the offer. The respondent or claimant shall recover costs from the date of filing of the offer unless the libellant shall recover damages in excess of the amount of the offer, without interest after the date of filing of the offer.

(e) Nothing, however, in this rule shall be held to control the discretion of the Court in respect of costs and disbursements.

NOTE: This rule is in the same language as former Rule 23 in both districts, with slight modification. There is no Supreme Court admiralty rule on this subject.

RULE 24—Offer of Damages After Interlocutory Decree

At any time after an interlocutory decree in favor of the libellant, the respondent or claimant, without prejudice to his right to appeal, may serve and file a written offer to allow libellant's damages to be assessed at a sum of money therein specified with interest, if allowable, and with costs, to be taxed to the date of the offer. Said respondent or claimant shall recover costs from the date of the offer, unless the libellant shall obtain a final decree wherein the damages awarded (without interest or costs after offer) exceed the amount of the offer.

NOTE: This rule is in the same language as former Rule 24 of both districts, except that the words "with interest if allowable, and" are added in order to avoid the question, after reference, as to the sufficiency of the offer of damages.

RULE 25—Commissioners' Reports and Fees

(a) When a reference is made, the clerk shall forthwith notify the commissioner of his appointment. Any of the parties may fix the time and place for the hearing by giving at least ten days' notice in writing to the other parties or their procutors and to the commissioner.

(b) The report of the commissioner, together with the transcript of the proceedings and the exhibits, shall be filed by him with the clerk. Upon the filing of his report, the commissioner shall furnish the clerk with sufficient copies of a notice of filing thereof addressed severally to the parties or their proctors to enable the clerk to mail a copy to each of them. In no event shall the commissioner retain his report as security or withhold prompt filing of the same because of failure to pay his fee.

(c) If the fee of the commissioner shall not have been paid upon the filing of the report, he shall certify, by endorsement on the report, the amount of the fee and the fact that it has not been paid. Exceptions to the amount of such fee may be filed in like manner as to the report. After the filing of such report, if it appears that the fee of the commissioner has not been paid, the court by appropriate proceedings may enforce payment thereof in favor of such officer against any party or the *res* liable therefor. At the instance of any party the fee of such commissioner shall be taxed as costs by the clerk.

(d) Exceptions to the reports of commissioners shall be filed within ten days after service of notice of filing of the report, in default of which the report may be confirmed at the instance of any party by order entered without notice, upon proof of service of notice of filing the report and default in filing exceptions.

NOTE: Paragraph (a) of this rule is new.

Paragraphs (b) and (c) are patterned after former Rule 26 of the Southern District, with some amendments. There is omitted language of the former rule which provided that the fee of the commissioner should be paid by the libellant or moving party upon notice of the commissioner that the report was ready for filing, and in cases where the fee was agreed upon.

Paragraph (d) is in the same language as former Rule 27 of both districts, except that the time within which to file exceptions is 10 days instead of 5 days.

Former Rule 26 of the Eastern District did not protect the commissioner in the payment of his fee.

This rule is not in conflict with Supreme Court admiralty rules of which Rule 43 provides that the court may refer any matter in cases where it deems it expedient or necessary for the purpose of justice, and Rule 43½ provides that the report is treated as presumptively correct, though subject to review by the court. There is no Supreme Court admiralty rule fixing the time within which exceptions to the commissioner's report shall be filed.

RULE 26—Judicial Sale, Return of, by Marshal

(EASTERN DISTRICT) (a) When money shall come to the hands of the marshal under or by virtue of any order or process of the court, he shall forthwith pay over the gross amount thereof to the clerk, with a bill of his charges thereon and a statement of the time of the receipt of the moneys by him; and, upon the filing of such statement and the taxation of such charges, the same shall be paid to the marshal out of such moneys; and an account of all property sold under the order or decree of this court, shall be returned by the marshal and filed in the clerk's office, with the execution or other process under which the sale was made.

(SOUTHERN DISTRICT) (a) When any money shall come to the hands of the marshal under or by virtue of any order or process of the court, he shall forthwith present to the clerk a bill of his charges thereon and a statement of the time of receipt of the money and upon the filing of the statement and the taxation of the charges he shall forthwith pay to the clerk the amount of said money less his charges as taxed. An account of all property sold under the order or decree of this court shall be returned by the marshal and filed in the clerk's office, with the execution or other process under which the sale was made.

(EASTERN and SOUTHERN DISTRICTS) (b) Wharfage, storage and like charges which accrue while the vessel or other prop-

erty is in the marshal's custody shall not be included in the marshal's bill of charges, except by consent of all interested parties, lienors who have appeared, or their proctors. If such charges are not consented to in the marshal's bill, they may be claimed by petition filed, unless otherwise ordered, not later than ten days after sale of the vessel or other property, against the proceeds or against any party claimed to be responsible therefor. The wharfinger or other person entitled to such charges shall be given notice of settlement of the final decree and order of distribution of proceeds.

NOTE: The first two paragraphs differ in the two districts by reason of established procedure which apparently cannot be conveniently changed. Supreme Court Admiralty Rule 40 on this subject provides as follows: "All sales of property under any decree of admiralty shall be made by the Marshal or his deputy, or other proper officer assigned by the Court, where the Marshal is a party in interest, in pursuance of the orders of the Court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the Court by the officer making the sale, to be disposed of by the Court according to law."

The third paragraph is new. The courts have disapproved of the early practice of including in the Marshal's bill, as a disbursement, wharfage and like charges and have stated that such claims should be asserted by way of libel for preferential payment. See *Larsen v. New York Dock Co.*, 166 F.(2d) 687 (C.A. 2); *The Poznan*, 274 U. S. 117; *Isbrandtsen Company v. S/S Pan Orleans*, 1948 A.M.C. 1296 (not otherwise reported).

RULE 27—Claims After Sale, How Limited

✓ In proceedings *in rem*, claims upon the proceeds of sale of property under a final decree, except for seamen's wages, will not be admitted in behalf of lienors who file libels or petitions after the sale, to the prejudice of lienors who filed libels or petitions before the sale, but shall be limited to the remnants and surplus, unless for cause shown it shall be otherwise ordered.

NOTE: This rule is in the same language as former Rule 40 of both districts, with slight correction in language.

RULE 28—Informations, Admiralty Procedure to Apply

In all informations, whether *in rem* or in *personam*, the practice and procedure of admiralty shall apply in respect of process (mesne or final), pleadings and exceptions thereto, delivery of property on stipulation, sale of the same and intervention and appearance of claimants.

NOTE: This rule is in the same language as former Rule 36 in both districts.

RULE 29—Stenographic Transcript

Subject to the provisions of Rule of Civil Procedure 54 (d), the expense of any party in necessarily obtaining all or any part of a transcript, for purposes of a new trial, or for amended findings or for appeal shall be a taxable cost against the unsuccessful party at the rates prescribed by the Judicial Conference.

NOTE: The foregoing is a repetition of Civil Rule 8 and note in connection therewith is applicable.

RULE 30—Stay of Execution

Execution shall not issue for 10 days after service of a copy of the decree with notice of entry upon the adverse party, or his proctor, unless the decree shall have been entered on default or the court shall otherwise order.

NOTE: This rule is in the same language as former Rule 30 in both districts.

RULE 31—Summons and Severance Abolished

Parties interested jointly, severally, or otherwise in a judgment or decree may join in an appeal therefrom; or, without summons and severance, any one or more of them

may appeal separately or any two or more of them may join in an appeal.

NOTE: The language of this rule is borrowed from Rule of Civil Procedure 74 with the words "or decree" added after the word "judgment".

RULE 32—Depositions: Taking and Use of

(EASTERN DISTRICT) (a) The taking and use of depositions of witnesses within the United States shall be governed as provided in Sections 863 to 865, inclusive, Revised Statutes (former Sections 639 to 641, inclusive, Title 28, United States Code).

(b) The taking and use of depositions of adverse parties is authorized, and shall conform to the Federal Rules of Civil Procedure to the extent not specially provided for in the Supreme Court Admiralty Rules. A deposition of an adverse party so taken shall not be admissible in evidence at a trial in admiralty when sought to be offered as a deposition of a witness unless the taking and offering thereof also meet the requirements of Sections 863 to 865 inclusive, Revised Statutes (former Sections 639 to 641 inclusive, Title 28, United States Code), but this proviso shall not prevent the use of such a deposition, or parts thereof, for the purpose of impeaching or contradicting the testimony of the deponent as a witness, or otherwise as may be permitted by the rules of evidence.

NOTE: Supreme Court Admiralty Rule 46 reads:

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. When deemed necessary by the court or the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise, and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs."

Rule 44 of the Supreme Court makes provision for the regulation by the District Courts of their practice in all cases "not

provided for by these rules or by statute", the rule *in toto* being:

"In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

The only existing statutory authority for the taking of depositions are the so-called *de bene esse* statutes enumerated in the proposed rule as Revised Statutes, Sections 863, 864 and 865. In the pre-revision Code they were numbered Sections 639-641 and, though not repealed, they have not been carried forward into the new Code. Nevertheless, they are still in effect (See Title 28 U.S.C. Chapter 117, note).

It should be noted that there formerly existed in both districts Rule 25 as follows:

"Discovery, inspection and taking of a photograph of any article, property or place under the control of a party may be had by any other party, upon order of the Court.

In suits for personal injuries, the Court may require the libellant to appear before a commissioner and submit to a physical examination by a physician or surgeon appointed in the order, and to answer such questions of the physician or surgeon as the commissioner may determine are necessary to ascertain the extent of the injuries, subject to the right of appeal *instantly* to the Court from any ruling of the commissioner."

Rule 25 was superseded by Supreme Court Admiralty Rules 32 to 32C, which were added May 22nd, 1939 and became effective September 1st, 1939. Supreme Court Rule 32 relates to discovery and production of documents and other objects, Rule 32A relates to physical and mental examination of persons, while Rule 32B has to do with the admission of facts and of genuineness of documents. Rule 32C covers the subject of penalties in the event of refusal to answer upon oral examination, failure to comply with an order and similar subjects. These rules were adopted from the Civil Rules, Rules 32 having been taken from Civil Rule 34, 32A from Civil Rule 35, 32B from Civil Rule 36 and 32C from Civil Rule 37.

(SOUTHERN DISTRICT) The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except that their use shall be limited as follows:

Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.

(3) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

This rule shall be superseded by any subsequent statutes, Supreme Court admiralty rules or agreement of parties.

NOTE: The text of this rule was promulgated by order of the court (Southern District) dated May 10, 1950.

Rules
of the
United States Court of Appeals
For the Second Circuit

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RULES OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RULE 1—Name

The name of the court, as fixed by 28 U. S. C. §§ 41, 43(a), is "United States Court of Appeals for the Second Circuit."

NOTE: Before 1949, the court was known as "United States Circuit Court of Appeals for the Second Circuit."

RULE 2—Seal

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Second Circuit" in two lines, in the center, with a dash beneath.

RULE 3—Terms

One term of this Court shall be held annually at the City of New York on the third Monday of September, or on such other Monday of September or October as the court may designate. It shall be adjourned to such times and places as the court may from time to time direct.

NOTE: Traditionally the new term each year was convened on the first Monday of October. To meet the increases of court business, the rule was amended several years ago to provide for commencement of the new term on the last Monday of September. In 1964, the rule was amended to provide for the opening of court as early as the third Monday of September.

RULE 4—Quorum

(a) Adjournment for Lack of Quorum.

Two judges shall constitute a quorum. If, at any time, a quorum does not attend on any day appointed for holding a session of the court, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during

a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

(b) *Orders by a Single Judge.*

Any judge, attending when less than a quorum is present, or at any time when the court is in recess, may make all necessary orders touching any suit, proceeding, or process pending in or returned to the court preparatory to hearing, trial, or decision thereof.

NOTE: In each of those relatively few weeks when the court is in recess, a single judge, in accordance with a prearranged schedule, hears and determines matters brought before him which cannot await a regular session of the court including a proposal to the Chief Judge of the necessity for convening an emergency session of the court.

This means that this court, or a single judge thereof, is scheduled to hear matters each of the fifty-two weeks of the year.

During the past seven years, panels of three judges for each of the weeks of the summer recess have been scheduled to take under advisement on submission of the papers and to decide those motions brought by incarcerated pro se litigants.

RULE 5—Clerk

(a) *Office.*

The clerk's office shall be kept at the United States Court House, New York City.

(b) *Practice of Law Prohibited.*

The clerk shall not practice, either as attorney or as counselor, in this court or in any other court while he shall continue to be clerk of this court.

(c) *Oath and Bond.*

Before he enters on the execution of his office, the clerk shall take an oath in the form prescribed by 28 U. S. C. § 951, and shall give bond, as required by 28 U. S. C. § 952(a). Such

COURT RULES

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Amendment to Rule 5

October 11, 1967

Rule 5(d) of the rules of this court has been amended to read as follows:

Rule 5

CLERK

(d) **Release of Papers.** Except as provided in Rule 11 and for certifying and transmitting the record and proceedings in this court to the Supreme Court of the United States for filing with a petition for writ of certiorari, the clerk shall not permit any original record or paper to be taken from the courtroom or from the office without an order from a judge of this court.

By order of the court.

Dated: October 11, 1967.

A. Daniel Fusaro, Clerk.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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By order of the court.

Dated: October 11, 1967.

A. Daniel Fusaro, Clerk.

1. A designation of the Court whose judgment or order is sought to be reviewed; and the title of the case.
2. The date on which such judgment or order was made, or on which an application or rehearing with respect thereto was denied.
3. The nature of the matter adjudicated by such judgment or order, together with a copy of, or the citation to, any opinion of the court below, if readily available to the applicant.

bond shall be filed in the Administrative Office of the United States Courts, and a copy shall be kept on file in the clerk's office.

(d) *Release of Papers.*

Except as provided in Rule 11, the clerk shall not permit any original record or paper to be taken from the courtroom or from the office without an order from a judge of this court. ✓

NOTE: The clerk may, however, under the court's "Standing Directions to the Clerk" permit the removal of original records by counsel for the parties for short periods of time for the purpose of conforming the paging and arrangement of their office copies for use in reproducing appendices and in writing their briefs. Original records may also be borrowed by counsel for the parties for the purpose of filing same with the Supreme Court of the United States in connection with an application for a writ of certiorari.

Rule 15(c) requires the pages of the appendices (printed portions of the record) to the briefs to contain references to those pages of the record from which they have been copied. Rule 17(a)(2) requires a reference to the pages of the record and/or appendix relied upon in support of each point.

(e) *Preservation of Appendices and Briefs.*

He shall carefully preserve in his office one copy of all appendices and briefs in every case submitted for consideration of the court.

RULE 6—Attorneys and Counselors

(a) *Requirements for Admission.*

It shall be requisite to the admission of attorneys or counselors to practice in this court that they shall have been admitted to practice in some one of the Courts of the United States or in the highest courts of the State, to which they respectively belong and that their private and professional characters shall appear to be fair.

NOTE: The court requires counsel of record as well as those who argue before it to be admitted to its Bar.

(b) *Oath; Fee.*

They shall respectively take in open court the following oath or affirmation, viz.:

I, _____, do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of the court uprightly, and according to law; and that I will support the Constitution of the United States,

and they shall respectively subscribe the roll in the office of the clerk of this court. Each applicant upon admission shall pay to the clerk a fee of \$10, which shall be held by the clerk in an appropriate depository and expended upon order of the Chief Judge for the expenses of the Law Library of the court located in the United States Court House, Foley Square, New York City or for out-of-pocket expenses incurred by attorneys or counselors assigned by the court to represent indigent persons.

NOTE: In actual practice, the fee of \$10 is collected at the time the necessary papers are filed.

(c) *Application.*

Motions for admission shall be heard on any Monday the court is in session, and a notice of intention to apply for admission, together with an affidavit of the candidate's sponsor, who must be a member of the Bar of this court, must be filed not later than the Friday preceding the motion day. Motions for admission of out-of-town counsel who have filed the necessary papers may be heard on any day on which they have cases to be argued.

NOTE: While the rule calls for the hearing of applications for admission on any Monday the court is in session, for good cause shown, the clerk may arrange the hearing of an application on any day the court is in session.

An applicant for admission to this Bar must be orally sponsored. However, any member of this Bar may make the oral motion. He need not be the member who drew the affidavit sponsoring the applicant.

RULE 7—Process

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

RULE 8—Custody of Prisoners on Habeas Corpus

The court adopts Rule 49 of Revised Rules of the Supreme Court of the United States, effective July 1, 1954, so far as applicable to this court, as governing the custody of prisoners on proceedings for habeas corpus and appeals therein.

Note:—Said Rule 49 of the Supreme Court reads as follows:

1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, or discharging a rule to show cause why such a writ should not be granted, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court in which the case is pending, or to a judge or justice thereof, may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court in which the case is pending, or of a judge or justice thereof, surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals, but also the further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard.

5. This rule applies only to cases arising or pending in Courts of the United States. For the purpose of this rule, a case is pending in the court possessed of the record until a notice of appeal or a petition for writ of certiorari has been filed, or until the time for such filing has expired, whichever is earlier; and is pending on review in the appellate court after the notice of appeal or the petition for writ of certiorari has been filed.

RULE 9—Death of a Party

The substitution of a party during the pendency of an appeal shall be in accordance with Rule 25 of the Federal Rules of Civil Procedure, except that such substitution shall be made within 60 days after the event calling therefor; and if not then made, the court may take such action as it shall deem appropriate, including dismissal of the appeal. Death of a party does not affect the taking of an appeal; see Rule 73(b) of the Federal Rules of Civil Procedure.

NOTE: The substitution of a party may be accomplished by stipulation.

RULE 10—Appeals from District Courts

(a) Civil Actions; Admiralty; Bankruptcy.

The procedure for taking appeals from the United States district courts in civil actions, in bankruptcy proceedings where no leave to appeal is required, and in admiralty cases is as prescribed by the second paragraph of subdivision (a) and by subdivision (b) of Rule 73 of the Federal Rules of Civil

Procedure. The provisions of subdivisions (c), (d), (e), and (f) of that rule, governing bonds for costs on appeal and supersedeas bonds, as well as those of Rule 74 abolishing summons and severance, are also applicable.

(b) *Application for Leave to Appeal in Bankruptcy.*

Appeals under § 24 of the Bankruptcy Act, as amended, 11 U. S. C. § 47, from orders involving less than \$500 or under §§ 250, 498, 11 U. S. C. §§ 650, 898, from orders making or refusing to make allowances of compensation or reimbursement under Chapters X and XII may be taken only upon allowance of this court. Application shall be made by filing in this court a petition of appeal and such other papers as may be necessary to inform the court of the matters sought to be reviewed. Copies thereof must be served on the opposite party or parties within the time fixed by the statute for the taking of an appeal, and shall be accompanied by a notice of not less than 4 days of a hearing upon the application at the next regular motion day of the court. If leave to appeal is granted, the appellant must within 10 days file in the district court a copy of his petition and of the order granting leave, together with the usual bond for costs where required by law.

(c) Criminal Actions.

The procedure for taking appeals in criminal cases is as prescribed by subdivision (a)(1) of Rule 37 of the Federal Rules of Criminal Procedure. The provisions as to stay of execution and bail of subdivisions (a) and (b) of Rule 38 and subdivisions (a)(2), (c), (d), (e), (f), and (g) of Rule 46 of those rules are also applicable.

(d) *Interlocutory Appeals Under 28 U. S. C. § 1292(b).*

All applications for interlocutory appeals under 28 U. S. C. § 1292(b) will be submitted for consideration and decision on

the basis of the papers on file and without oral argument. The application, made within the time allowed by the statute, shall show the order made by the trial court, and shall state and support in reasonable detail the grounds upon which the appeal is sought and is believed to be allowable under the statute. Opposing parties may reply in like detail in five days. Papers need not be printed; an original and three copies shall be furnished. The application will be submitted to and finally decided by the panel sitting at the expiration of the time allowed for reply or, if no panel then be sitting, to the next succeeding regular panel or, when the court is in summer recess, to a panel that may be specially convoked by the chief judge. If the application is granted, notice of appeal shall be filed within five days after the grant.

NOTE: While motions for leave to appeal falling within section (b) of this rule are heard orally in open court on a motion day, motions for leave to appeal falling within the purview of this section are taken on submission of the papers only.

RULE 11—Record on Appeal from District Courts

(a) Original Papers to Constitute Record on Appeal.

Appeals from the district courts in all cases, civil and criminal, including admiralty cases, shall be heard on the original papers, which papers shall constitute the record on appeal. [See Rule 75(o) of the Federal Rules of Civil Procedure, Rule 39(b) of the Federal Rules of Criminal Procedure, and 28 U. S. C. § 2071.]

(b) Transmission of Record on Appeal.

Promptly after notice of appeal is filed in the district court and within the time prescribed by the rules referred to in Rule 10, unless the district court by order has fixed a shorter time, the clerk of the district court shall transmit to the clerk of this court all the original papers in the file dealing with the action or proceeding in which the appeal is taken, with the

For the purpose of conforming the Rules of this Court to the Act of July 18, 1966, Rule 27(b) of this Court has been amended to read as follows:

(b) **For or Against the United States.** No costs shall be allowed for or against the United States in civil cases in which the award of costs against the United States or an officer or agency thereof is specifically prohibited by statute or in criminal cases.

(The amendment hereby made to Rule 27(b) removing the restriction against the allowance of costs for or against the United States or an officer or agency thereof in civil actions shall not be applicable to civil actions filed on or prior to July 18, 1966.)

For the purpose of conforming the Rules of this Court to the recent amendment of the Federal Rules of Civil Procedure, Rule 11 of this Court has been amended to read as follows:

Rule 11

RECORD ON APPEAL FROM DISTRICT COURTS

(1) **Composition of the Record on Appeal.** The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases. The parties may agree by written stipulation filed in the district court that designated parts of the record need not be transmitted to the court of appeals, in which event the parts shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmission, but the parts thus designated shall nevertheless be a part of the record on appeal for all purposes. (See Rule 75(a) of the Federal Rules of Civil Procedure; Rule 39(a), Federal Rules of Criminal Procedure; 28 U.S.C. § 2071.)

(2) **Transmission of the Record.** Within the time provided or fixed under the provisions of Rule 73(g) of the Federal Rules of Civil Procedure for filing the record and docketing the appeal, the clerk of the district court shall transmit the record to the clerk of the court of appeals. The appellant shall comply with the provisions of Rule 75(b) of the Federal Rules of Civil Procedure and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of the said Rule 75(b) and the provisions of this subdivision, and a single record shall

be transmitted. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks of both courts for the transportation and receipt of bulky or weighty exhibits.

Upon stipulation of the parties, or by order of the district court at the request of any party, the clerk shall retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall cause the record to be filed and the appeal to be docketed in the court of appeals within the time provided or fixed under the provisions of Rule 73(g) of the Federal Rules of Civil Procedure by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree, or as the court may order, the appellant shall request the clerk of the district court to transmit the record. (Rule 75(e), Federal Rules of Civil Procedure.)

(3) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for admission to bail, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk at the request of any party shall transmit to the court of appeals such parts of the original record as the parties shall designate. (See Rule 75(g), Federal Rules of Civil Procedure.)

(4) Return of Original Papers to District Court. After the appeal has been disposed of, the original papers comprising the record on appeal shall be returned to the custody of the district court with the mandate of this court.

exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. With the original papers the clerk of the district court shall transmit a copy, certified by him, of the relevant docket entries in the district court.

NOTE: In actual practice, the clerk of the district court will not certify the record until requested by counsel and not until after counsel has page numbered the original papers and has supplied four copies of an index.

Counsel should not renumber the pages of the transcript of testimony. The court reporter's numbering should be maintained. The papers filed in the district court other than the testimony should be compiled chronologically and page numbered commencing with a number consecutive to the last page number of the testimony. A copy of the docket entries of the district court numbered by letters should be placed above the original papers immediately following the index.

The first item of the index should be the docket entries. The other items of the index should be listed chronologically irrespective of the lack of consecutiveness of their corresponding page numbers.

Filed papers not certified as part of the record for whatever reason, may be certified later as a supplemental record.

(c) *Record for Preliminary Hearing.*

If, prior to the time the complete record on appeal is transmitted to this court, a party desires to make in this court a motion for dismissal, for admission to bail, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall transmit to the clerk of this court such of the original papers in the action or proceeding in the district court as are needed for that purpose.

(d) *Certain Provisions of Federal Rules of Civil Procedure Not Applicable.*

The provisions of subdivisions (a) (Designation of Contents of Record on Appeal), (b) (Transcript), (c) (Form of Testimony), (d) (Statement of Points), (e) (Record to Be Abbreviated), (f) (Stipulation as to Record), (g) (Record to Be Prepared by Clerk—Necessary Parts), and (i) (Order as to Original Papers or Exhibits) of Rule 75 of the Federal Rules of Civil Procedure are not applicable to appeals to this court from a district court.

NOTE: Speedier transmittal of the record and elimination of various intermediate steps requiring time and effort of counsel prompted this section of the rule.

(e) *Return of Original Papers to District Court.*

After the appeal has been disposed of, the original papers comprising the record on appeal shall be returned to the custody of the district court with the mandate of this court.

RULE 12—Review of Decisions of The Tax Court of the United States

The procedure for review of decisions of The Tax Court of the United States is by a petition for review filed within the times and in the places required by the governing statutes. The record shall be prepared in substantial conformity with Rule 11.

RULE 13—Review or Enforcement of Orders of Administrative Agencies, Boards, Commissions, and Officers

(a) *Petition for Review.*

A petition to enjoin, set aside, suspend, modify, or otherwise review an order of an administrative agency, board, commission, or officer shall be addressed to this court and shall

contain a concise statement of the nature of the proceedings as to which review is sought, the facts upon which venue is based, the grounds on which relief is sought, and the relief prayed. When so required by statute the petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency, board, commission, or officer. In each case the agency, board, commission, or officer concerned shall be named as respondent. The United States shall also be deemed a respondent, if so required by statute, even though not so designated in the petition. The petition, together with a copy thereof for each respondent, shall be filed with the clerk of this court and, unless otherwise provided by statute, shall be served by the clerk in the manner prescribed by subdivision (b) of Rule 73 of the Federal Rules of Civil Procedure.

NOTE: Though not stated in the rule, twenty-four printed copies of the petition for review are required to be filed. Seven typewritten copies will be accepted for filing within the required time subject to the filing of printed copies later either in a separate pamphlet or as a part of the appendix to the petitioner's brief.

(b) *Joint and Several Petitions and Consolidated Records.*

If the interests of any two or more persons entitled by the applicable statutes to petition this court for review of the same order of an administrative agency, board, commission, or officer are of such a nature as to make joinder practicable, they may file a joint and several petition for review, following the procedure prescribed by the applicable statute and by this rule for a single petitioner. Where two or more persons petition for review of the same order, whether on a joint and several petition or not, a single record on review shall be prepared containing all the matter designated by the parties without duplication.

(c) *Application for Enforcement.*

An application for enforcement of an order of an administrative agency, board, commission, or officer shall be ad-

addressed to this court and shall contain a concise statement of the nature of the proceedings in which the order sought to be enforced was entered, the facts upon which venue is based, and the relief prayed. The application, together with a copy thereof for each respondent, shall be filed with the clerk of this court and, unless otherwise provided by statute, shall be served by the clerk in the manner prescribed by subdivision (b) of Rule 73 of the Federal Rules of Civil Procedure.

NOTE: Printed copies of the petition for enforcement must be filed in the same number as required of a petition for review.

(d) *Answer to Application for Enforcement.*

When an application for enforcement of an order of an administrative agency, board, commission, or officer is filed, the respondent shall, within 20 days after the service of the application upon him, file with the clerk of this court his answer to the application, together with a copy thereof for the applicant for enforcement. The answer shall be served by the clerk in the manner prescribed by subdivision (b) of Rule 73 of the Federal Rules of Civil Procedure. If the respondent fails to file an answer within the time prescribed, the court may, by reason of the default, enter a decree granting the relief prayed.

NOTE: Printed copies of the answer must be filed in the same number as required of a petition for review.

(e) *Cross-Application for Enforcement.*

When a petition for review of an order of an administrative agency, board, commission, or officer is filed, the agency, board, commission, or officer may, if this court has jurisdiction to enforce the order, file a cross-application for its enforcement, together with a copy thereof for the petitioner for review. The cross-application shall be served by the clerk in

the manner prescribed by subdivision (b) of Rule 73 of the Federal Rules of Civil Procedure. No answer need be filed thereto.

NOTE: Printed copies of a cross petition for enforcement must be filed in the same number as required of a petition for review.

(f) *Intervention.*

A person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene. The motion shall contain a concise statement of the nature of the moving party's interest and the grounds upon which intervention is sought. An intervenor will not be permitted to participate in the designation of the record unless he shall have filed his motion to intervene within 10 days after the filing of the petition for review or enforcement.

(g) *Transcript in Review Proceedings; Time for Filing; Contents; Abbreviation by Stipulation or Order.*

Where no definite time is prescribed by the applicable statute for filing the transcript of the record in a review proceeding, such transcript shall be filed within 40 days after service of the petition for review upon the agency, board, commission, or officer, or within such further time as the court in its discretion and with or without motion or notice may fix. Within the time prescribed for filing the transcript the agency, board, commission, or officer in lieu of actually transmitting the entire transcript to the clerk of this court may file with him a certified list of all the documents, transcripts of testimony, exhibits, and other material comprising the record in the proceeding, adequately describing each and indicating its page numbers. The custodian of the records of such agency, board, commission, or officer shall thereupon retain and hold all the material comprising the record in the proceeding for

and on behalf of the clerk of this court and subject to his orders and shall transmit the same or any part thereof to him when and if required by the court for its use in the review proceeding. The filing of a certified list of the material in the record and the holding of such material for and subject to the directions of the clerk of the court shall be deemed the full equivalent of the filing of the entire transcript of the record in the court. The transcript of the record on review shall include the entire record in the proceeding before the agency, board, commission, or officer when so required by the applicable statute. In review proceedings in which the applicable statute does not require the transcript of the record on review to include the entire record the transcript shall include the pleadings, evidence, and proceedings before the agency, board, commission, or officer, or such portions thereof (1) as the petitioner and the agency, board, commission, or officer concerned may by written stipulation designate to be included therein or (2) as the court upon motion of either party or, after a prehearing conference, upon its own motion may by order designate to be included therein. Such a stipulation or order may provide in an appropriate case that no transcript of the record need be filed. Any such stipulation shall be filed in the office of the clerk of this court. If, pursuant to such a stipulation or order, there is omitted from the transcript any portion of the record which the court subsequently determines to be necessary for it to consider to enable it to review the order in question the court may direct that a supplemental transcript of such additional portion of the record be filed.

(h) *Omission from or Misstatements in Transcript.*

If anything material to any party is omitted from the transcript by error or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation or this court may at any time direct that the omis-

sion or misstatement be corrected and, if necessary, that a supplemental transcript be certified or a supplemental record prepared and filed.

(i) *Order as to Original Papers or Exhibits.*

Upon the suggestion of any party that original papers or exhibits should be inspected by the court or filed with the court in lieu of copies, the court may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) *Extensions of Time.*

The time for taking any action under this rule (except where the time is fixed by statute and no enlargement is permissible) may be enlarged by this court upon motion and for good cause shown; and if any action is not taken within the time prescribed or as enlarged by order, the court on its own motion or that of a party may enter such order, unless good cause be shown, as shall to it seem appropriate.

(k) *Prehearing Conferences.*

In any review or enforcement proceeding the court may in its discretion direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the proceeding unless modified to prevent manifest injustice.

(1) *Preparation of Decrees Enforcing Orders; Settlement; Entry.*

When an opinion of this court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the agency, board, commission, or officer concerned shall within 10 days serve upon the respondent and file with the clerk a proposed decree in conformity with the opinion. If the respondent objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument.

RULE 14—Docketing Cases

(a) *Time Within Which Record Must Be Filed.*

In appeals in civil and admiralty cases the appellant shall docket the action and file the record in this court within 40 days after filing the notice of appeal with the district court, or within any added time granted by the district judge within 40 days after the filing of the notice of appeal, but in no case later than 90 days after such filing [Rule 73(g) of the Federal Rules of Civil Procedure]. In an appeal in a criminal case the appellant shall docket the case and file the record within the time fixed by Rule 39 of the Federal Rules of Criminal Procedure. If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless so ordered by this court or a judge thereof if this court is not in session, or an order on consent has been or is being entered as provided in Rule 29(9).

NOTE: Counsel for the appellant is responsible for the arrival of the papers in the office of the clerk of the court of appeals paged and indexed and for the payment of the docketing fees within the required time.

A motion for an extension of time to file the record should be made only after failure to obtain a stipulation.

(b) *Motion to File Record.*

This court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision (a) hereof, except upon a showing by affidavits, or otherwise as the court may order, (1) that the delay has been due to causes beyond the control of the moving party, or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal, and (3) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

(c) *Dismissal by the Clerk.*

If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this court, in which event it shall stand for argument, or have the action dismissed by the clerk of this court upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that 4 days' notice in writing has been served on the appellant or his attorney that application will be made to the clerk of this court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the court and upon a showing similar to that required under subdivision (b) hereof.

NOTE: Filing papers in opposition to such a motion will avail the appellant nothing since the clerk has no alternative but to dis-

miss the appeal if he finds the requisites of the rule have been observed.

It is more difficult to vacate a dismissal than it is to obtain an extension of time.

(d) *Dismissal on Consent.*

Whenever the appellant and appellee by their attorneys of record shall sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due him, the clerk shall enter the case as dismissed and shall give a copy of the agreement filed to any party requesting it. Dismissal under this rule shall not be necessary where an appeal has not been docketed and the court from which the appeal has been taken has dismissed the appeal on stipulation of the parties or upon motion and notice by the appellant.

RULE 15—Printing and Filing of Briefs and Appendices

(a) *Time of Filing; Printing.*

On all appeals or petitions for review to be fully heard by the court the appellant or petitioner shall file his brief and appendix within 30 days after the record is filed; the appellee or respondent shall file his brief, with appendix, if any, within 20 days thereafter; and if the appellant or petitioner then chooses to file a reply brief, he shall file it, with appendix, if any, within 15 days thereafter and at least one day before argument. Where an appendix is voluminous it may be bound separately from the brief which it accompanies. Except where permission has been given, the briefs and appendices shall be printed as provided in subdivision (f) of this rule and shall not be typewritten; but the court may dispense with printing on motion of a party or on its own motion at any time. Unless the court otherwise orders, the briefs shall be limited to those herein stated; and the limitation shall also apply to

all appeals consolidated for a single hearing, even though a party may have taken appeals from several orders or judgments or may have filed a cross-appeal.

NOTE: To comply with the limitation of three briefs only in an action even though both parties have appealed, the court expects counsel with the heavier oar to file a brief setting forth all of his points on appeal, and counsel for the cross-appellant to file one brief firstly answering the contentions of his adversary and secondly setting forth his own points on appeal. The main appellant may then file a combined reply and answering brief. Rule 17(c) should settle disputes of who files the first brief.

(b) *Contents of Appendices.*

The appendix to the main brief of the appellant or petitioner shall contain the judgment, decree, or order appealed from or sought to be reviewed or enforced (excluding the caption and purely formal parts); the opinion, findings of fact and conclusions of law of the court or administrative agency, or the charge of the court, if any; and such other parts of the record as are deemed necessary by the appellant or petitioner fairly to present the issues on appeal. The material thus included shall be preceded by a statement either in summary form or by quotation of the appropriate docket entries in the tribunal below, which shall show the time and manner of institution of the proceeding below and all steps taken therein by the tribunal, with dates and appropriate description, so far as applicable to the matters under appeal. The appendix of the appellee or respondent shall set forth any other parts of the record which he thinks similarly necessary. And the appendix to the reply brief shall contain any further parts of the record which the appellant or petitioner thinks have become necessary by the parts printed by the appellee or respondent.

NOTE: The court has expressed such a strong desire for a joint appendix that counsel should strive for this accomplishment before resorting to the individual appendices provided for in this rule. However, where counsel cannot agree to such, they should produce appendices complete to the extent that decision by the

court can be rendered without resort to examination of the original record.

Nothing but that which is in the record may be reproduced in the appendices.

Counsel have found writing the brief before preparing the appendix, a practice that will insure the inclusion in the appendix of all of the necessary record material.

(c) *Form of Appendices.*

Each appendix shall contain an index of the names of the witnesses and of the papers printed, and the printed pages shall contain references to those pages of the record on file from which they have been copied. In the case of testimony the fact that parts have been omitted shall be indicated by asterisks. The appendices shall not be counted as pages of the brief under Rule 17(e). It is expected that the parties will not indulge in unnecessary or repetitious printing, having in mind the fact that the record under Rule 11 is always available to the court for reference or examination. Infractions of this rule may be penalized by the denial or award of costs.

NOTE: Repeating in an appendix matter already printed in another appendix in the action should not be indulged in, even for the sake of continuity.

(d) *Joint Appendix.*

In lieu of the separate appendices above, and by stipulation of the parties or on order of the court, there may be filed a joint printed appendix containing, in addition to the matters stated in subdivision (b) hereof, those matters of record which are relied on by the parties in their briefs and which the parties desire the court to read. Unless otherwise stipulated, the responsibility for the printing shall be upon the appellant or petitioner; but he shall have no responsibility to include in the joint appendix any part of the record on behalf of any other party when such other party fails or neglects to supply him not later than 5 days after the time for filing of the final brief a clear and specific designation of the record to be printed on

behalf of such other party. The joint appendix need not be printed before the briefs or until 10 days before the day set for argument; but the parties shall take particular care that their briefs, as well as the joint appendix, shall be so indexed and paged as to make ready reference to the certified record accurate and clear.

NOTE: In addition to being more desirable to the court, counsel have found a joint appendix to be more convenient than individual appendices.

(e) *Costs; Denial of Costs for Unnecessary Printing.*

Each party shall pay in the first instance for the printing of those parts of the record which he prints, the appellant or petitioner paying for the joint appendix, if any, unless the parties otherwise stipulate; but the amount paid will be included as taxable disbursements unless the court otherwise orders. Unless otherwise ordered by the court, no parts of the record need be printed except as set forth in subdivisions (b) to (d) hereof; if any additional parts are printed without order, no costs shall be recovered therefor.

(f) *Form of Printing.*

All appendices, briefs, or other papers printed for the use of the court, if produced by ordinary typographic methods, must be in such form and size that they can be conveniently bound together so as to make an ordinary octavo volume having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches, except that records in patent cases may be printed in such size as is necessary to utilize copies of patent documents; viz., 7 by 11 inches. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than small pica or 11-point type) adequately leaded; and the paper must be opaque and unglazed. Such printing may also be done by the process of offset duplicating, in which case it shall be on pages not ex-

ceeding 8-1/2 by 11 inches, with type matter not exceeding 6-1/2 by 9-1/2 inches. The clerk shall refuse to receive any appendix or brief which has been printed otherwise than in substantial conformity to this rule.

(g) *Number of Copies.*

Twenty-four copies of the appendix and 15 copies of the brief shall be filed with the clerk, and 3 copies served upon opposing counsel.

RULE 16—Exhibits, Models, and Diagrams

(a) *Number of Copies.*

Whenever original papers, exhibits, charts, plans, diagrams, or other papers or documents which counsel wish considered or which it is intended to refer to on the argument are not printed, 3 copies of them must be furnished for the use of the court or they must be set forth in the brief or appendix unless otherwise ordered by the court.

NOTE: If the exhibits are not printed in the appendices, three copies and a list of them should be left with the clerk at least several days in advance of the argument.

(b) *Custody of Clerk.*

Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, where not transmitted by the clerk of such court under Rule 11(b), but submitted by the parties or their counsel in any case pending in this court on appeal, shall be placed in the custody of the clerk of this court until removed as provided in subdivision (c) hereof.

(c) *Removal by Parties.*

All models, diagrams, and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case must be taken away by the parties within

one month after the case is decided. It shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within the time above specified, he shall destroy them or make such other disposition of them as to him may seem best.

RULE 17—Briefs

(a) Contents of Appellant's Brief.

The brief for appellant or petitioner shall contain in the order here stated—

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, the manner in which they are raised, and the errors claimed; and in all briefs, a prefatory page or pages containing the titles and citations of all the decisions, statutes, or rules cited in the body of the brief.

(2) A brief of the argument, exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of the record and/or appendix and the authorities relied upon in support of each point. When a statute is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

(b) Contents of Appellee's Brief.

The brief for appellee or respondent shall be of a like character with that required of the party seeking review, except that no statement of the case shall be required unless that presented by the appellant is controverted.

(c) Where Both Parties Appeal.

Where both parties allege error in the proceedings below, the original plaintiff shall be considered appellant for the pur-

poses of this rule in the absence of other direction by the court or stipulation of the parties.

(d) *What Briefs May Be Filed.*

No briefs further than those allowed by Rule 15(a) shall be filed without special leave of the court.

(e) *Length of Briefs.*

Unless permission is obtained by application under Rule 19(c), the clerk will not receive a brief of either party of more than 50 pages, or a reply brief of more than 20 pages.

NOTE: Since Rule 19 has been recently amended, it should be considered that "19(c)" was meant to be deleted and "19(g)" was meant to be inserted in place thereof.

RULE 18—Clerk's Fees

Except in those cases where the party seeking review is by law exempt from prepayment of fees, there shall be prepayment of fees to the clerk before a case on appeal or review or any other proceeding is docketed or service rendered as prescribed by the schedule hereinafter set forth:

(1) For docketing a case on appeal or review or docketing any other proceeding, \$25.

NOTE: A \$25. docketing fee shall be prepaid for each action below which has been appealed whether or not consolidated below with one or more other actions.

(2) For making a copy (except a photographic reproduction) of any record or paper, and a certification thereof, 65 cents per page.

(3) For a photographic reproduction and certification of any record, or paper, and comparison, 50 cents per page.

(4) For comparing with the original thereof any copy (except a photographic reproduction) of any transcript of record, entry, record or paper when such copy is furnished

by the person requesting its certification, 10 cents for each page, and 50 cents for each certificate.

(5) For comparing with the original thereof any photographic reproduction of any record, or paper not made by or under the supervision of the clerk, 5 cents for each page, and 50 cents for each certificate.

(6) For every search of the records of the court and certifying the result of the same, \$1.

(7) For copy of an opinion of the court, \$2.50, except that no charge shall be assessed for a copy of an opinion furnished to a party of record or to persons whose names appear on a "Public Interest List" established by this court, and that a copy of each opinion shall be furnished to persons entering into a subscription for such opinions at an annual fee established from time to time by this court.

NOTE: A slip sheet copy of each opinion printed during the week is mailed to each subscriber on Friday afternoon.

RULE 19—Motions

(a) *Form.*

An application for an order or other relief shall be made by filing a motion in writing, which shall state the order or other relief sought and the grounds therefor. Any affidavits or other papers or memoranda or briefs, which the moving party desires the court to consider, shall be filed with the motion. Except for the motions provided for in paragraphs (g) and (h) of this rule, all motions and supporting papers shall be served on adverse parties and proof of service filed with the motion, save as a judge by order to show cause may otherwise provide. Motions, supporting papers and any response thereto may be typewritten. Except in the case of motions pursuant to paragraphs (e) and (g) of this rule, an original and three copies of all papers shall be filed.

(b) *Motions to be heard at regular sessions of the Court.*

Motions seeking substantive or significant procedural relief will normally be determined by a panel conducting a regular session of the Court. These include, without limitation, motions seeking bail upon appeal; extension of time to file records or briefs, or for late filing, in the absence of stipulation; dismissal or summary affirmance, including summary enforcement of a board or agency order; mandamus or prohibition to a judge; stay or injunction pending appeal; leave to appeal under Rule 10(b); to dispense with printing; to file briefs *amici curiae*; to intervene or to add or drop parties; for certificates of probable cause, leave to proceed *in forma pauperis*, or assignment of counsel (save as provided in subdivision (d) of this Rule); or for a preference. Except as otherwise provided in these rules, all such motions will normally be noticed for a Monday when the Court is in session, with notice by the movant to the adverse party to be served not later than the preceding Monday, the motion and supporting papers to be filed not later than the preceding Thursday, and any papers in response to be served and filed not later than 2 P.M. on the preceding Friday.* Upon appropriate showing of urgency by counsel, the clerk may alter these periods or may set the motion for a hearing on any day the Court is in session. When the clerk thus sets a hearing for a time not later than 24 hours after application to him during the period Monday to Thursday, or for Monday morning during the period after Thursday, the clerk may endorse on the motion papers a direction that the parties will be expected to maintain the status quo and such direction shall have the effect of a stay, unless a judge on application to him shall otherwise direct. Any motion for extension of time to file records or briefs, or for late filing, shall include a statement as to any previous application with respect to such relief and the disposition thereof.

* In the case of motions to dismiss appeals of incarcerated prisoners not represented by counsel for untimeliness or lack of timely prosecution, the motion shall not be noticed for a date earlier than fifteen days after the date when prison officials shall certify the motion was received by the prisoner.

NOTE: This recently amended rule gives longer notice of a motion to an adverse party.

It requires four copies of the papers of all counsel to be filed with the clerk in advance of the motion day.

Notes of issue need not be prepared or filed any longer. The fourth copy of the motion papers will be used in lieu thereof.

Stipulations whenever possible take much less effort than motions and are pleasing to the court.

(c) *Motions to be heard by a panel which has rendered a decision.*

Motions addressed to a previous decision or order of the court (other than a petition for rehearing which is dealt with in Rule 25), or for the stay, recall or modification of any mandate or decision of the court or to withdraw or dismiss an appeal argued but not decided shall be made on five days' notice and shall be referred by the clerk to the judges rendering the previous decision.

NOTE: Motions under this section are not heard because usually that panel of the court which rendered the decision is not the same panel which happens to be in session when these motions are made. These motions are taken under advisement on the submission of the papers.

(d) *Pro se motions by incarcerated prisoners under 28 U.S.C. §§ 2253 and 2255.*

Pro se motions by incarcerated prisoners under 28 U.S.C. §§ 2253 and 2255 for certificates of probable cause, leave to proceed *in forma pauperis*, or assignment of counsel shall be made on seven days' notice to the state or the United States, and will be taken on submission, without being calendared, at such time as the material necessary for the court's consideration shall have been assembled by the deputy clerk designated for the purpose.

(e) *Motions to adjourn argument of an appeal.*

A motion to adjourn the argument of an appeal which has been set for argument shall be made on not less than three days' notice, shall state whether or not the other party

or parties object, what urgency has arisen requiring the adjournment and will be referred by the clerk for decision to the judge assigned to preside at the argument.

NOTE: Papers opposing motions under this section are unnecessary since the movant is required to contact opposing counsel and to incorporate in his moving papers the feeling of counsel for the other side concerning an adjournment.

(f) *Hearing before a single judge.*

When the court is not in session, certain of the motions normally returnable before a panel as provided in subdivision (b) may be heard and decided by a single judge. Arrangements for such a hearing shall be made through the clerk.

(g) *Motions for permission to file briefs exceeding size provided by Rule 17(e).*

A motion for permission to file a brief exceeding the size provided by Rule 17(e) shall be accompanied by a statement of reasons therefor, and will be disposed of by the clerk or referred by him to a judge as standing directions of the court provide.

(h) *Other motions.*

Any motion not provided for in this rule or in other rules of this court shall be submitted to the clerk, who will dispose of it in accordance with standing directions of the court or, if these are inapplicable, as directed by the judge assigned for the hearing of motions when the court is not in session. The clerk will notify counsel if and when appearance before the court or a judge is required.

(i) *Periods of time.*

Any periods of time stated in this Rule may be shortened by a judge (or by the clerk) if the interests of justice so require.

RULE 20—Bail

Where an appeal has been taken in the case of a conviction for any crime the appellant may apply for bail pending the appeal to the judge who imposed the sentence, and after refusal may apply on 4 days' notice to the Court of Appeals, or to any circuit judge when the court is not in session. The application shall show compliance with Rule 38(c) of the Federal Rules of Criminal Procedure.

NOTE: Since the recently amended Rule 19 includes motions for bail, it should be considered that the words "on 4 days' notice" were meant to be deleted.

RULE 21—Adding Cases to Calendar

(a) General Calendar.

The clerk shall add an appeal to the general calendar 30 days after the record and appellant's brief and appendix have been filed with him pursuant to these rules, except that after the first Monday in April in any term, no case except a criminal case shall be added to the general calendar for that term unless the court shall so order upon motion made in open court. In criminal cases the appeal shall be set for argument at the opening of the session next following the addition of the case to the general calendar unless reached sooner in regular order.

(b) Day Calendar.

(1) Cases shall be placed by the clerk on the day calendar for argument in their order of docketing unless it be otherwise specially ordered.

NOTE: Submission of an appeal on the briefs is fairly rare and only after leave of the court. With few exceptions, argument is heard in every action.

The argument is scheduled two to three weeks in advance for a date certain. Counsel can rely on being heard on the advised

date. The court will sit as late as necessary to hear the conclusion of the arguments set for a particular day.

Except where a preference or acceleration has been granted or ordered, an appeal will not be heard before thirty days elapse after the filing of appellant's brief. However, the court reaches arguments on appeal so rapidly that only a few days more than the thirty elapse, if any.

(2) Out-of-town counsel may stipulate, subject to approval by the clerk, a date for the argument of their cases if they so desire. Otherwise their cases will be put at the head of the day calendar when reached in regular order.

NOTE: A stipulation of out-of-town counsel setting the argument of an appeal for a date certain will be honored only if received in the clerk's office before argument has been set.

RULE 22—Parties Not Ready

(a) Nonappearance of Appellee.

Where the party successful below fails to appear when the case is called for hearing, the court may proceed to hear an argument on the part of the party seeking review, and to give judgment according to the right of the case.

(b) Nonappearance of Both Parties.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the party seeking review.

(c) Application for Adjournment.

An application for adjournment of the argument of an appeal must be made in the form of a motion, on notice, on a regular motion day, or when the case appears on the day calendar in regular order.

NOTE: Since the recently amended Rule 19 includes motions to adjourn the argument of an appeal, it should be considered that this section was meant to be deleted.

RULE 23—Oral Arguments

(a) Opening Arguments.

The appellant shall be entitled to open the argument of the case. And when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open the argument in the absence of other direction by the court or stipulation of the parties.

(b) Number of Counsel to Be Heard.

Only one counsel will be heard for each party on the argument of a case, except by leave of the court.

(c) Time Allowed.

The court will allow such time for argument as it considers adequate, but no more than 45 minutes on each side unless leave is obtained before argument begins.

NOTE: Since the oral argument takes place very close to thirty days after the appellant's brief has been filed and since the date of said argument is set two to three weeks in advance, counsel should complete the blank time request form sent to each and return it to the clerk as soon as possible. Failure to receive the completed time request form promptly, is construed as meaning that counsel will need any amount of time for argument which the court will allow. The court has often in these situations allowed twenty minutes or less.

RULE 24—Opinions of the Court

(a) Delivery.

Opinions will be delivered at any time, whether the court is in session or not, and are delivered by handing them to the clerk, to be by him recorded.

NOTE: When an opinion is filed before noon, Monday through Thursday, printed copies of opinions will be available in the clerk's office early in the afternoon of the next regular business day following rendition. Copies of opinions filed Friday morning

may be had in the afternoon of the following Monday or next regular business day thereafter. The original opinion may be examined any time during regular business hours.

(b) *Preservation of Original Opinions.*

The original opinions of the court shall be filed with the clerk of this court for preservation.

(c) *Recording Reproduced Opinions.*

Opinions reproduced under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but are deemed recorded as reproduced.

RULE 25—Petitions for Rehearing

(a) *Time; Form.*

Any petition for rehearing shall be filed with the clerk of the court within 15 days from the filing of the opinion in the clerk's office. Unless otherwise ordered, the petition must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that it is presented in good faith and not for delay. Twenty-four copies of the petition shall be filed. An answer to a petition for rehearing will not be received except by order of the court.

(b) *Disposition.*

Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or *sua sponte*, shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argu-

ment and upon the papers then before the court, unless otherwise ordered.

NOTE: Prior to a recent change in the statute a senior judge could not vote on whether there ought be a rehearing in banc.

(c) *Effect on Issuance of Mandate.*

If a petition for rehearing be filed within the time herein limited, no mandate shall issue pending the disposition of said petition, except by special order of the court.

(d) *Petitions filed for purposes of delay.*

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding \$100 against petitioner in favor of his adversary, to be collected with the costs in the case.

RULE 26—Interest

(a) *How Calculated.*

Where an appeal is prosecuted in this court, and the judgment, decree, or order of the lower court is affirmed, the interest shall be calculated from the date of the judgment, decree, or order below until the same is paid, at the same rate that similar judgments, decrees, or orders bear interest in the courts of the State or Territory where such judgment, decree, or order was rendered.

(b) *Damages for Appeal for Delay.*

In all cases where an appeal shall delay the proceedings on the judgment, decree, or order of the lower court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment, decree. or order.

RULE 27—Costs*(a) To Whom Allowed; Transcript.*

In all cases heard by or submitted to the court, costs, so far as taxable, shall be allowed as of course to the prevailing party unless the court otherwise orders.

NOTE: The only taxable items of costs in this court are the \$25. docketing fee, the cost of printing the appendix and in admiralty, the cost of printing briefs up to certain small amounts.

(b) In Actions by or against the United States.

No costs shall be allowed in this court either for or against the United States, except where otherwise provided by statute or specially directed by this court.

(c) Judgment to Contain.

When costs are allowed in this court it shall be the duty of the clerk to insert the amount thereof in the body of the judgment, or other proper process, sent to the clerk below, and annex to the same the bill of items taxed in detail.

RULE 28—Judgment; Taxing Costs; Mandate*(a) Entry of Judgment; Costs to Be Taxed.*

Upon the filing of any decision by this court the clerk shall enter judgment. Thereafter the clerk will prepare and tax the bill of costs.

NOTE: The time to apply for a writ of certiorari to the Supreme Court begins to run from the date of the judgment or decree of this court. This date usually is the same date as the date of the opinion of this court. The date of the issuance of the mandate of this court and/or the date of the receipt of the mandate in the court below have no relevancy to the time to apply for a writ of certiorari.

(b) *Issuance of Mandate.*

A mandate may issue at any time on order of this court, but unless otherwise ordered the clerk shall issue it without submission to the court at the expiration of 15 days from filing of the opinion of this court in the clerk's office unless delayed by the filing of a petition for rehearing. Unless otherwise directed by the court no formal mandate shall be prepared, but it shall suffice for the clerk to send to the proper court a copy of the opinion or order of this court and a certified copy of the judgment of this court.

(c) *Stay Pending Application for Certiorari.*

If application for certiorari to the Supreme Court of the United States be made, application to stay the mandate or decree pending such certiorari shall be made only to this court, except in vacation, when such application may be made to any judge of this court. During recesses any judge of this court may grant an order to show cause (with stay) why the issuance of mandate should not be withheld or why the execution of decree should not be stayed, making, however, such order to show cause returnable at the next motion day of this court.

(1) If a stay be granted it shall not be for more than 30 days, at which time the stay shall expire and the mandate issue forthwith.

(2) Provided that if within 30 days there is filed with the clerk of this court the certificate of the clerk of the Supreme Court of the United States that the certiorari petition, record, and briefs have been filed, thereupon the stay shall continue until the final disposition of the case by the Supreme Court. Immediately upon the filing of a copy of an order denying the writ, the clerk of this court shall issue the mandate.

RULE 29—Entry of Orders by the Clerk

The clerk shall enter the following orders without submission to the court:

(1) Orders for the dismissal of an appeal under Rule 14(c);

(2) Orders for dismissal or discontinuance on consent, including the provision for the issuance of a mandate;

(3) Orders on consent for the substitution of attorneys;

(4) Orders on consent for the substitution of parties under Rule 9;

(5) Orders on consent for the substitution of a public officer in the place and stead of his predecessor;

(6) Orders on consent for the correction of a record to accord with the facts;

(7) Orders on mandate from the Supreme Court of the United States;

(8) Judgments in appeals from The Tax Court of the United States based on a stipulation of the parties;

(9) Orders on consent for an extension of time to file the record on appeal or the appendices and briefs of the parties;

(10) Orders on consent consolidating appeals;

(11) Orders and judgments on decisions by the court in motions and appeals.

NOTE: Except in the situation required by Rule 13(1) or by request of the court, no proposed or counter proposed orders, judgments or decrees will be accepted. These are usually entered by the clerk.

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