12-BK-040

BANKRUPTCY CLERKS ADVISORY GROUP

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February 15, 2013

VIA EMAIL (rules_comments@ao.uscourts.gov)
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
One Columbus Circle, NE
Washington, D.C., 20544

Dear Committee Members:

As chair of the Bankruptcy Clerks Advisory Group (BCAG), I submit the attached comments to the proposed amendments to the bankruptcy rules and forms for consideration by the Committee on Rules of Practice and Procedure (the Committee). Should the Committee need any additional information from the BCAG, please let us know and we appreciate your consideration.

Sincerely yours,

Scott W. Ford

Enclosure
c: Mary Louise Mitterhoff, Acting Chief, Bankruptcy Court Administration Division (w/ encl.)

COMMENTS OF THE BANKRUPTCY CLERKS ADVISORY GROUP ON PROPOSED AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE AND FORMS

The Bankruptcy Clerks Advisory Group (BCAG) submits the following comments to proposed bankruptcy rules 8003, 8004, 8005, 8006, 8007, 8009, 8010, 8015, 8022, 8024, 9027, and 9033 and submits general comments on the proposed Official Forms.

Federal Rules of Bankruptcy Procedure

Rule 8003

- The BCAG supports the comment of Judge Robert J. Kressel (MN) that the last sentence of proposed Rule 8003(b)(1), addressing joint notices of appeal, is ambiguous.
- The proposed change to Rule 8003(c)(1) continues the requirement that the bankruptcy clerk transmit the notice of appeal to the US trustee and other parties. Judge Kressel recommends that the appellant should be responsible for serving the notice of appeal, particularly when the judiciary's resources are declining, and the BCAG agrees. The BCAG also endorses the comment of Judge C. Ray Mullins (GA-N) on behalf of the National Conference of Bankruptcy Judges (NCBJ) in pointing out that there is no similar responsibility for interlocutory appeals under Rule 8004(c)(1); moreover, "there is no reason why the clerk should be responsible for serving notices of appeal at all, since service of papers filed with a court is typically the responsibility of the party filing them."
- The title of subsection (c), as well as the title of subsection (c)(3), should refer to *transmission* instead of *service* in order to be consistent with the rest of the rule. The BCAG supports the comments of Judge Kressel with respect to this issue.
- In subsection (c)(1), the requirement that the clerk must note "on each copy" the date when the notice of appeal is filed appears to be unnecessary because the filing date is captured on the electronic docket within CM/ECF. Thus the new requirement would be redundant.
- Rule 8003(d)(2) refers to a "Bankruptcy court action." The BCAG supports Judge Kressel's comments that this term is not used in the bankruptcy rules or by the bankruptcy court system.
- Rule 8003(d)(2) states that the appellant must be identified in the case caption on the docket, but it does not address identification of the appellee. The BCAG supports the comments of Judge Kressel with respect to this issue.

Rule 8004

- Subsection (a)(3) addresses service electronically by the court. The phrase "unless served electronically using the court's *electronic transmission equipment*"

(emphasis added) should be changed to simply state "unless served electronically by the court." The phrase "electronic transmission equipment" is not used in the bankruptcy court system.

- As in Rule 8003(d)(2), Rule 8004(c)(2) also refers to "bankruptcy court action" and gives instructions to create a caption that seems to exclude the appellee's name. Please see comments to Rule 8003(d)(2) above.
- The first sentence of Rule 8004(c)(3) states: "The motion and any response or cross-motion are submitted without oral argument unless the district court or BAP orders otherwise." This sentence suggests that there may be circumstances where the district court or BAP would require oral argument in order to simply submit a motion, response, or cross-motion. The comment in the Committee Note to this subsection is clearer, stating in part: "Unless the district court or BAP orders otherwise, no oral argument will be held on the motion."

Rule 8005

- Rule 8005(a)(1) and the Committee Note to this rule refer to an official form for a Statement of Election to have an appeal heard by the district court. However, there is no such official form.
- The second sentence of Rule 8005(b) states: "Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must transmit to the district clerk all documents related to the appeal." The BCAG believes that this section should be amended to require that the bankruptcy clerk be notified when the BAP clerk transmits the record to the district clerk.
- The proposed title to this rule does not account for circuits that do not have a BAP, and the BCAG suggests that the Committee Note to the rule clarify that not every circuit has a BAP.

Rule 8006

- This rule addresses certifying a direct appeal to the Court of Appeals. The BCAG supports the comment of Judge Mullins on behalf of the NCBJ that points out that the subsections of this rule are not in logical order and that subsection (g) should reference Fed.R.App.P. 5.

Rule 8007

- This revised rule permits certain motions for relief that are ordinarily filed in the bankruptcy court to be "made in the court where the appeal is pending or where it will be taken." The BCAG notes that the bankruptcy clerk will likely have to check to see if the motion has been filed in the appellate court before action is taken in the bankruptcy court. The BCAG supports the comments of Judge Kressel: "It seems to me that while a motion for stay or other relief pending appeal can be made to the bankruptcy court before or after a notice of appeal is

filed, as provided in Rule 8007(a)(2), a notice of appeal should be required before a similar motion can be heard by any appellate court."

Rule 8009

- The BCAG joins with the comments from Judge Barry S. Schermer (MO-E) and Judge Kressel regarding designating and transmitting the record on appeal as being an archaic process. The BCAG also supports the statement of Judge Schermer that "Language in the proposed revised rule enabling the courts to deem the record of the proceedings at the bankruptcy court level to be the record on appeal in lieu of the assembly and transmittal procedures in proposed Rule 8009 would be very welcome and productive."
- Rule 8009(a)(5) addresses copies for the bankruptcy clerk. The BCAG endorses the comments of Judge Mullins on behalf of the NCBJ that "the responsibility for ensuring an adequate record on appeal ultimately rests with the parties." Rather than furnishing paper copies, the parties should have to go through the usual procedures for paying for them and obtaining them from the clerk. This would eliminate the clerk's office from having to track down the correct number of copies from a party or sending out a bill for copies that may go unpaid.
- In subsections (b)(1), (b)(2), and (b)(3), the proposed amended rule provides that, even when a transcript is not designated, the appellant must file a certificate stating that the appellant is not ordering the transcript. Since both the appellant and the appellee's request for a transcript must be filed with the clerk – as does the reporter's receipt of the transcript order – requiring a certificate stating that the transcript is not being ordered seems unnecessary. Additionally, the certificate requirement suggests that a special form should be created to ensure conformity.
- Rule 8009(c) is patterned after Fed.R.App.P.10(c) and addresses a Statement of the Evidence When a Transcript is Unavailable. This statement must be served on the appellee and objections must be submitted to the bankruptcy court for settlement and approval. The rule also requires that the statement must be included by the bankruptcy clerk in the record on appeal. As proposed by this amendment, the bankruptcy clerk will have to check for service, track the time for filing objections, as well as the settlement and approval of the statement. It also appears that the clerk will have to verify if the transcript is unavailable and it is unclear what constitutes "unavailable" or "verify[ing]" for this purpose. The BCAG supports the comments of Judge Kressel with respect to this issue.
- In the event that Rule 8009(c) remains as amended and allows for a statement of the evidence when a transcript is unavailable, the BCAG points out that the statement will have already been filed with the court under (a)(1). Thus, the BCAG suggests that Rule 8009(c) could be modified to read:

  "~~The statement and~~ Any objections or proposed amendments must ~~then~~ be ~~submitted~~ filed with ~~to~~ the bankruptcy court for settlement and approval."

- Rule 8009(d) addresses an agreed statement as the record on appeal. The BCAG endorses the comment of Judge Schermer, who states:
"This proposed rule, while well intentioned, would be extremely burdensome in the bankruptcy world given the myriad of issues that are disposed of along with the relatively loose standards for what constitutes a final appealable order in bankruptcy cases. This rule would require bankruptcy judges to review statements describing the appealed bankruptcy proceedings, make additions to the statements that they deem necessary, and approve the statements. It would cause much extra work for bankruptcy judges and their staff in their effort to keep up with the already large volume of work generated in their cases. Also, the benefits to the parties and the appellate court when the parties designate the record on appeal is questionable at best."
- Section 8009(f) addresses sealed documents. Currently, sealed documents remain under seal during the appeal. This proposed amendment to section (f) provides that "a party must file a motion with the court where the appeal is pending to accept the document under seal." By requiring this motion, the rule suggests that documents under seal in the bankruptcy court may be unsealed in an appeal in the event this request is not made. The more protective approach would be to keep the document sealed unless requested otherwise, rather than risking that sensitive information inadvertently be released.

Rule 8010

- Rule 8010(a)(1) addresses reporter's duties and states that: "If proceedings were recorded without a reporter being present, the person or service that the bankruptcy court designates to transcribe the recording is the reporter for purposes of this rule." The BCAG notes that bankruptcy courts do not designate a single transcription service, but rather provide a list of such services in order to avoid favoritism or sole-sourcing.
- This proposed rule is not clear in defining how the transcription service (reporter) will be able to estimate when the transcript will be completed as required by section (a)(2)(A) or how the reporter will request an extension of time as provided in section (a)(2)(C). The BCAG notes that rule 8010(a)(2)(C) requires that the request for the extension of time must be made to the bankruptcy clerk, not to the court.
- The amendment to Rule 8010(b) refers to the clerk transmitting the record on appeal. Please see comments above regarding Rule 8009. Allowing a court to deem the record of the proceedings at the bankruptcy court level to be the record on appeal would be a better process. The BCAG also endorses the comment of Judge Mullins on behalf of the NCBJ regarding the problem of the clerk having to transmit the record on appeal "when the record is complete." This does not address when the parties fail to provide all required items for the record on appeal. The NCBJ suggests, to address this problem, there could be a deadline for when

the clerk must transmit the record to the reviewing court and the BCAG concurs with this suggestion.

- Like Rule 8009(a)(5), Rule 8010(b)(4) addresses paper copies. The BCAG supports the comments of Judge Mullins on behalf of the NCBJ with respect to this issue. See comments above regarding Rule 8009(a)(5).

Rule 8015

- The BCAG notes that subsection (a)(7)(C)(ii) refers to an Official Form that does not exist.
- Rule 8015(c) refers to "Paper Copies of Appendices." The BCAG suggests that this phrase should be reworded to say "Paper Filed Appendices" or "Appendices Filed in Paper." Moreover, the first sentence should start with: "An appendix filed in paper . . . ."
- Rule 8015(e)(2) refers to "Paper Copies of Other Documents." Again, the BCAG recommends rewording this to "Other Documents Filed in Paper." The first sentence should start: "Any other document filed in paper . . . ."

Rule 8022

- Subsection (b) refers to the form of the motion for rehearing. It says "Copies must be served and filed as provided by Rule 8011." The BCAG notes that parties do not file copies and suggests this be reworded to say "The motion must be served and filed . . . ."

Rule 8024

- Subsection 8024(c) refers to "Returning Original Documents." Because the bankruptcy clerk would not be transmitting original documents as the record on appeal; this section seems unnecessary. In lieu of "any original," the BCAG suggests that the rule refer to "any paper documents."

Rule 9027

- The last sentence of Rule 9027(e)(3) states: "Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed cause of action." The BCAG suggests that "mail" be changed to "transmit" to reflect that service and notice can be accomplished electronically or by mail. Furthermore, it seems that a copy of the statement is unnecessary and instead a notice would be sufficient.

Rule 9033

- Rule 9033(a) requires the clerk to serve copies of proposed findings of fact and conclusions of law "by mail." Since this process can be accomplished electronically, the BCAG endorses the suggestion in the comment by Judge

Mullins on behalf of the NCBJ that this language be revised to simply state: "The clerk shall serve forthwith copies on all parties."

Official Forms

The BCAG has reviewed the proposed revisions to the forms and is very concerned about the instructions, particularly those addressing Schedules I and J. These instructions are difficult to understand and most likely will create confusion for debtors, especially those filing *pro se*. The BCAG notes that, if a debtor has difficulty understanding the instructions and completing the forms, the clerk's office will spend more time responding to questions, reviewing forms, issuing deficiencies and possibly scheduling hearings to address problems with the completion of the forms. This most likely will result in additional court time for bankruptcy judges. The BCAG suggests that the instructions to the forms be reconsidered to achieve clarity. In support of this position, the BCAG offers the following comments:

1. Credit Reporting Issues Non-Filing Spouse Identified as Debtor

As modified, official form 6J requires a non-filing spouse to be identified as "Debtor 2." Proposed "Paragraph 3 of "How to Fill Out Schedule J" in the Instructions states:

> "Include your non-filing spouse's expenses unless you are separated. If one of you keeps a separate household, fill out separate *Schedule J* for Debtor 1 and Debtor 2 and write *Debtor 1* or *Debtor 2* at the top of page 1 of the form."

This requirement could create an issue for the spouse who is not filing bankruptcy if he or she is identified as a debtor on an official form. If a credit reporting agency obtained this information and used it in a credit report, it could result in credit problems for the non-filing spouse. By having the non-filing spouse identified as "Debtor 2," there could be an assumption that this spouse is filing bankruptcy as well. The BCAG notes that debtors often have difficulty correcting credit reports, and clerk's offices are limited in their ability to assist these debtors. Therefore requiring a non-filing party to be identified as a debtor could create unforeseen credit issues. The forms should clearly delineate between debtors and non-filing spouses.

2. Clarification of "Debtor 2" and "non-Filing Spouse

As noted above, the instructions for Schedule J require that a non-filing spouse must identify himself or herself as "Debtor 2" at the top of page 1. However, the box at the top of page 1 identifies "Debtor 2" only as "Spouse, if filing." There is no place on the form to clearly delineate the non-filing spouse. In addition, the remaining pages only list "Debtor 1" at the top. If a non-filing spouse is required to fill out this form, there is no place for the non-filing spouse to be identified. In addition, Schedule I and Official Form 22 offer a Column B that is identified as "Debtor 2 or non-filing spouse," suggesting that Debtor 2 is not synonymous with a non-filing spouse.

3. Examples in Instructions are not Consistent

The examples listed in the instructions for Schedules I and J are inconsistent (see the fourth paragraph in the instructions for Schedule J). Each form provides examples of how to address income and expenses. However, Schedule I includes an example not included in Schedule J (see sections in in bold and italicized below).

> In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on Schedule J: Your Expenses. ***For example, if you and a person to whom you are not married deposit the income from both of your jobs into a single bank account and pay all household expenses and you list all your joint household expenses on Schedule J, you must list the amounts that person contributes monthly to pay the household expenses on line 11.*** If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on Schedule J. ***However, if you have listed the cost of the rent and utilities for your entire house or apartment on Schedule J, you must list your roommate's contribution to those expenses on Schedule I, line 14. Do not list line 11 contributions that you already disclosed on line 5.***

The BCAG believes that if the examples in both sets of instructions are included, they should be the same.

4. Inconsistency Regarding Terms

The section labeled "Understand the terms used in this form" on Schedules I, J, Official 3B, and all versions of Form 22 suggest that the only instance when a "Debtor 2" would be identified as such would be when there is a joint case with two spouses filing. However, Schedule J requires a non-filing spouse to identify himself or herself as "Debtor 2." This seems to be inconsistent with the explanation on the Forms of when "Debtor 1" and "Debtor 2" are applicable.

5. Committee Note Offers Better Explanation

The Committee Note to Form 6 (Schedules I and J) offers an explanation of the different scenarios that are also set forth in the Instructions to each form. The BCAG believes that the Committee Note offers a much clearer description than the examples included in the instructions of both Schedules I and J.

6. Schedule J- Column B

Column B in Schedule J requires one to list expenses if the current plan is confirmed. The BCAG is concerned that this would be difficult to complete, as it would be hard for the debtor to estimate what expenses would change. Most likely, only line 21 would change. Moreover, this effort may be duplicitous since the plan can address changes.

7. Schedule J- Listing Dependents

Questions 1-3 in "Describe Your Household," address dependents. It seems these questions are a bit repetitive and could be condensed into a single question that clearly addresses which dependents are living in each household.