

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
8W UNITED STATES COURTHOUSE  
300 SOUTH FOURTH STREET  
MINNEAPOLIS, MINNESOTA 55415

12-BK-005

ROBERT J. KRESSEL  
JUDGE

MEMORANDUM

To: The Advisory Committee on Bankruptcy Rules  
Eugene R. Wedoff, Chair

From: Robert J. Kressel  
United States Bankruptcy Judge

Date: December 27, 2012

Re: Comments on Proposed Amendments to the Federal Rules of  
Bankruptcy Procedure

I offer the following comments to the proposed amendments to the  
Federal Rules of Bankruptcy Procedure:

Rule 1014 Dismissal and Change of Venue

I am at a loss as to how a judge has jurisdiction to enter  
orders affecting parties in a case pending in another  
district in front of a different judge.

Rule 8001(a)

I think the phrase "United States" is unnecessary.

Rule 8002(c) (1)

I think the phrase "to a district court or BAP" is  
unnecessary.

Rule 8002(d)

While the rule provides that the declaration accompanying the notice of appeal must indicate that first class postage has been paid, the rule itself does not require that first class postage has been paid. I would suggest that that requirement be added in the first sense of the rule.

Rule 8003(b)(1)

This rule ends with the sentence "They may then proceed on appeal as a single appellant." Frankly, I just do not know what this means or what the significance of it is.

Rule 8003(c)(1)

While this concept, in various forms, has been around forever, I have never understood why it is that the clerk is transmitting copies of the notice of appeal to parties to the appeal, whoever they are. Why is the appellant not responsible for serving the notice of appeal? I think this responsibility should lie with the appellant rather than shifting that responsibility to the clerk - especially in this time of declining resources.

Rule 8003(c)(1)

While the title of Rule 8003(c) and this subdivision refer to parties being served, Rule 8003(c)(1) does not require the clerk to serve the notice of appeal, only to transmit it. I think that there is an inconsistency in that the word "serve" should be eliminated in both places.

Rule 8003(d)(2)

I think this rule is a little ambiguous about the duties of the district or BAP clerk, starting with the use of the phrase "bankruptcy court action," which is a phrase that I am not familiar with and I am not sure appears anywhere else in the rules. Also, what about the appellee's name? I think the rule either needs to be much more specific about what caption the rule makers want the appellate court to use or simply say something about creating an appropriate caption for the appeal.

Rule 8004(c) (2)

This rule has the same issues regarding the creation of the caption.

Rule 8005(a)

Do you intend to eliminate the separate writing requirement currently found in Rule 8001(e) (1)? I hope not. I would hope that you would add language to this rule emphasizing the fact that the appropriate official form for the statement of election needs to be a separate document from the notice of appeal form.

Rule 8005(b)

I am concerned about the requirement that the BAP clerk transmit documents to the clerk of the district court. This would be a new procedure in our Circuit and I am not sure that it will be well received by the district court clerks. They are used to receiving appeals and related documents from the clerk of the bankruptcy court. The Eighth Circuit BAP, when it receives a timely election by an appellee, returns the appeal to the clerk of the bankruptcy court, who is then responsible for transmitting it to the clerk of the district court. I would suggest that as a preferable procedure, or at least it should be an acceptable alternative procedure.

Rule 8007(b) (1)

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. That is how an appellate court acquires jurisdiction. If the committee feels otherwise, the rule seems to be devoid of how a motion made before the filing of a notice of appeal gets in front of the appropriate appellate court.

Rule 8007(c)

Doesn't the bond need to be approved by the bankruptcy court after it is filed there?

Rule 8009

The whole designated record on appeal is fairly archaic.

For several years now, the Eighth Circuit BAP has had a rule which simply provides that the record in front of the bankruptcy court is the record on appeal and has eliminated the requirement that a record be designated or copied, in either paper or electronic form. We require only that a party refer to an appropriate docket entry on the bankruptcy court's docket in its brief. The exception, of course, is that transcripts need to be ordered and docketed and if there are trial exhibits that have not been docketed in the bankruptcy court, someone needs to make an electronic copy of those and file them. This has made appeals easier for parties and made it clearer that BAP judges can review the bankruptcy court record in its entirety to get a complete picture of what happened, and it eliminated any potential trap for someone who neglects to designate an important document as part of its record. I certainly hope that the rule can be amended to, at a minimum, accommodate our procedure. Something like the language in Rule 8018(e) would be helpful.

Rule 8009(b) (5)

I assume this is intended by the Committee, but it might be appropriate to make it clearer that the transcript referred to in this subdivision, is the transcript described earlier in Rule 8009(b) (1)-not a transcript that a party has created on its own account and either included in a brief or as a separate document.

Rule 8009(c)

While I am sure that this rule is intended to be helpful, it concerns me, at least without a definition of "unavailable." I can guarantee you that many appellants will argue that their inability to afford to pay for a transcript makes it unavailable. I hope that this is not what the Committee has in mind. If you keep this rule, please define "unavailable."

Rule 8009(d)

Another well intentioned rule which I fear will reek havoc on the appellant process and irritate the daylights out of bankruptcy judges.

Rule 8011(a)(2)(B)

This has always been a bad rule and one which I have never understood. Why shouldn't briefs and appendices be filed like any other document? I would strongly request the committee to revisit this rule and make the filing of briefs and appendices effective when actually received by the clerk, like every other document.

Rule 8011(a)(2)(C)

Again, the rule, like Rule 8002(d), itself lacks the requirement that the postage be paid. It only requires that the notarized statement state that the postage has been prepaid.

Rule 8011(b)

Again, this rule talks about service by the clerk, which I think is a mistake. The clerk should never be required to serve anything.

Rule 8018(e)

In my review, I now come across this rule allowing the BAP to dispense with the appendix. In this regard, I am not exactly clear how the appendix to the brief referred to in this rule differs from the statement of the record and the record referred to in the earlier rules. Language like that of this rule should be included in Rule 8009.

Rule 8019(b)

I think it is a mistake to indicate that there is a presumption of oral argument or to limit the basis for not having it. Oral argument is not granted for other reasons, including the need for the appeal to be decided on an expedited basis or, frankly, more and more these days, based on issues of cost.

One last general comment. I find the recurrence of the acronym "BAP" rather jarring. For the sake of consistency with the reference to the district court, I would prefer that the rules refer to the "the bankruptcy appellate panel." If the committee has irrevocably settled on "BAP," at least it should be preceded by the word "the."

Thank you for the opportunity to comment on these rules. If some of my comments are the result of gross misunderstanding on my

part, I apologize. I certainly have not spent as much time and energy going over these rules as the members of the committee and its reporter have. Thank you for your hard work. I know, from personal experience, how demanding, yet interesting the work is.