United States Bankruptcy Court
EASTERN DISTRICT OF CALIFORNIA
United States Courthouse
501 I Street, Suite 3-200
Sacramento, California 95814

12-BK-033

CHRISTOPHER M. KLEIN
CHIEF JUDGE

916-930-4510

February 14, 2013

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

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

Dear Mr. McCabe:

Transmitted herewith by U.S. mail and electronic mail are comments due February 15, 2013, on proposed amendments to the Federal Rules of Bankruptcy Procedure.

As a former member of the Advisory Committee on Bankruptcy Rules and as former chief judge of the Bankruptcy Appellate Panel of the Ninth Circuit who advocated within the committee the updating of the 8000-series appellate rules, I applaud the project and its work-product. My comments focus on technical issues that might improve the result and reduce opportunity for confusion.

The comments also address Rules 1014(b) and 7004(e), together with the cluster of adjustments proposed in light of the Supreme Court's decision in Stern v. Marshall, ____ U.S. ___, 131 S.Ct. 2594 (2011).

Please note that the comment to Rule 7004(e) is so substantial that it might be regarded as a proposal for a new rule.

I am at the disposal of the Committee, should it desire further information from me.

Very truly yours,

Christopher M. Klein
United States Bankruptcy Judge

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge
to Proposed Amendments to Bankruptcy Rules

Rule 1014(b).

The proposed change in Rule 1014(b) to the stay process in related-case-multiple-venue situations may create more problems than it solves. The current rule-mandated stay generally has worked in practice without significant dysfunction. Shifting to the more passive alternative of waiting for the first-filed judge to order a stay of the later-filed case invites mischief in a manner that could trigger the Law of Unintended Consequences in the name of fixing a problem that has not proven in practice to be dysfunctional.

Currently, judges in later-filed cases must stay their cases pending a venue decision by the first-filed judge. This has the effect of forcing the parties in the second-filed case to be cautious about proceeding because there is a risk that measures taken in the second-filed case might be called into question by virtue of the mandatory stay requirement.

Under the new dynamic, the later-filed case would proceed unabated until the first-filed judge orders the second-filed judge to stop. Since judges are inherently reluctant affirmatively to order each other around, this shift in the dynamic means that stays are less likely to occur and, concomitantly, that there is a greater chance of multiple, inconsistent orders being issued in the respective cases involving the same or related debtors. The risk is accentuated when parties try to exploit the multiple venue situation to achieve tactical advantages that would not be permitted if the cases were proceeding before the same judge.

I have been involved, or on the near sidelines, in about a dozen Rule 1014(b) situations, both as first-filed judge and later-filed judge, during twenty-five years on the bench. Some have been cases in which the debtors are merely related; others have involved the same debtor with cases filed in multiple venues. Some situations have been benign. Others have been infected with less-than-honorable ploys in which the choice to file the later case in a different venue was no accident, but rather a stratagem designed to sneak an advantage.

All of those situations have worked out smoothly once the respective judges coordinated with each other. Where cases are merely tangentially related, the judges commonly agree that the cases will proceed separately until someone makes a Rule 1014(b) motion. When the overlap appears to be a problem, the judges are

able to call the Rule 1014(b) situation to the attention of the parties and use the presumptive-stay feature to spur the parties to get the venue question resolved. The current mandatory stay feature of Rule 1014(b) operates as an incentive for the judges to talk to each other. The proposed revision would diminish that incentive.

Rule 1014(b) has been of greatest utility in smaller cases in which parties in interest other than the debtors are not well-financed and not sufficiently well-represented to be nimble about jumping to a different venue to seek a prompt stay order and prompt venue determination, as well as the opportunity for exploitation by fraudsters. The latter concern – exploitation by fraudsters or by persons who cynically seek to award themselves a new venue by filing a new case when events in an existing case become uncomfortable – has been present in a number of situations I have encountered. While the susceptibility to abuse problem is less of a concern in larger cases where well-represented and well-financed parties are likely to be able to vindicate their rights under either regime, the opportunity for dysfunction and manipulation in the smaller cases is worrisome.

In that context, the reference in the first paragraph of the Committee Note to "disruption of other cases" does not ring true to my actual experience, especially in the smaller cases.

In practice, "disruption" is obviated when the second-filed judge coordinates with the first-filed judge in order to determine what should be done in the second case pending a venue decision. The current presumptive-stay version of Rule 1014(b) operates as an incentive for the second-filed judge to seek to coordinate with the first-filed judge. The several situations in which I have been involved have followed this pattern and have not entailed disruption; rather, some inappropriate games have been squelched.

The proposed new rule would materially change this dynamic of coordination and communication between judges in two respects. First, the incentive to resolve the status of the second case is diminished. Second, there is a subtle but meaningful difference between persuading a judge affirmatively to stay an action pending before another judge and merely noting that the rules mandate a stay. One judge may be reluctant to stay another judge; in contrast, a rule-mandated stay invites cooperation between the respective judges.

In short, the proposed shift in the Rule 1014(b) stay provision may create actual mischief in the name of avoiding a "disruption" that is more theoretical than real.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Rule 7004(e).

Rule 7004(e) is dysfunctional and in need of radical surgery, but reducing the time limit for service of a summons and complaint from 14 days to 7 days in the name of, as the Committee Note says, "encourag[ing] prompt service after issuance of a summons" will only make the existing problems worse and will operate to prolong adversary proceedings.

The underlying bankruptcy policy of prompt completion of pleadings in the name of expeditious resolution of adversary proceedings is, of course, important and worthy of being promoted.

The problem with Rule 7004(e) lies in the implicit rule that the summons expires when the designated time elapses. Although that rule is not expressly stated, it is implied by the third sentence of Rule 7004(e): "If a summons is not timely delivered or mailed, another summons shall be issued and served." Thus, service actually accomplished but done one day after the Rule 7004(e) deadline is invalid, and the serving party must do it again with "another summons" issued for free, which prolongs the process without achieving any apparent gain. This limited-life summons is an oddity in a legal world in which the summons in general federal practice and most state practice does not expire.

On countless occasions in my twenty-five years as a bankruptcy judge, I have been required to accommodate the need for extra time to obtain and serve a fresh summons as defendants have successfully challenged service or, knowing that a default judgment cannot be entered if a proof of service shows that the summons was stale, have not responded. Each iteration prolongs the adversary proceeding for about forty-five days because Rule 7012 fixes the time to answer as thirty days after issuance of the summons. Further shortening the life of the summons will only increase the probability that a plaintiff, especially a general practice attorney or a pro se party, will stumble into this trap for the unwary who incorrectly assume that the bankruptcy summons, like the summons in general federal practice and most state practice, does not expire.

The problem is exacerbated because the adversary proceeding, especially the nondischargeability adversary proceeding under 11 U.S.C. § 523(a), is one of the primary points at which a general practice attorney becomes involved in a bankruptcy case. The

limited-time summons is not part of their experience, and when they stumble over it, the unfortunate facets of the "bankruptcy-is-different" mentality are triggered in a fashion that operates as an unnecessary barrier to entry to the bankruptcy courts and gives bankruptcy a bad name in the general legal community.

The better solution to promote expeditious completion of good service in an adversary proceeding would be to: (1) delete the Rule 7004(e) time limit for service; (2) revise Rule 7012(a) to mirror the times specified in Fed. R. Civ. P. 12(a); and (3) revise the incorporation of Fed. R. Civ. P. 4(m) (incorporated by Fed. R. Bankr. P. 7004(a)) to reduce Rule 4(m)'s time limit for service to less than the 120 days specified in the Civil Rule.

The rationale for such a measure is that the current Rule 7004(e)/7012(a) construct, which dates back to the Bankruptcy Rules under the former Bankruptcy Act when the Civil Rules lacked a time limit for service, has since become obsolete. That obsolescence began to set with the enactment of the Rule 4(j) (now 4(m)) deadline for completing service as part of the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2. After thirty years of life in the bankruptcy courts under the Rule 4(j)/4(m) regime, the limited-life bankruptcy summons no longer serves a productive purpose.

The time has come to recognize that the structure of the Rule 4(m) time limit is superior to the limited-life summons construct of Rules 7004(e) and 7012(a). The bankruptcy policy of prompt completion of pleadings in the name of expeditious resolution of adversary proceedings would be better served by reducing the Rule 4(m) time limit for completion of service from 120 days to some lesser period and adjusting Rule 7012(a) to require answers in 21 days after service rather than 30 days after issuance of the summons.

A trap for the unwary that does not effectively serve a useful purpose would be eliminated when this aspect of bankruptcy procedure is conformed to the structure of general federal (and state) practice.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Rules 7008, 7012(a), 7016, 9027 & 9033.

The proposed revisions designed to deal with procedure in the wake of Stern v. Marshall are generally salutary, but leave three matters unclear. First, there is an ambiguity about the term "bankruptcy court" that warrants a definition. Second, there is a gap in Rule 9033 procedure regarding coordination between the district and bankruptcy courts. Third, there should be a rule enabling a district court in an appeal to deem findings of fact and conclusions of law to be a report and recommendation addressed under Rule 9033 procedure if it concludes that the bankruptcy judge lacked constitutional power to hear and determine the matter.

1. Need for Definition of "Bankruptcy Court."

The shift in nomenclature to the use of the term "bankruptcy court" to refer only to judicial officers who do not exercise the judicial power of the United States invites confusion that could be solved by adding a new definition of "bankruptcy court" to Rule 9001.

In principle, Rules 7008, 7012, 7016, and 9027 apply in adversary proceedings in the district court, as well as in the bankruptcy court. See Fed. R. Bankr. P. 1001, Advisory Committee Note to 1987 amendments ("This amended Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to cases and proceedings under title 11, whether before the district judges or the bankruptcy judges of the district."); Fed. R. Bankr. P. 9001(4), Advisory Committee Note to 1987 Amendments ("Since a case or proceeding may be before a bankruptcy judge or a judge of the district court, 'court or judge' is defined to mean the judicial officer before whom the case or proceeding is pending.").

When a district judge is acting as the primary court in a bankruptcy case (by way of withdrawal of the reference or the case having been assigned to a district judge in the first instance) there will be a tendency to regard the district court as the bankruptcy court in a generic sense, but there will be no need for consent to entry of final orders or judgment because the presiding judicial officer is vested with the full judicial powers of the United States.

Greater clarity would be introduced by adding a definition of "bankruptcy court" as a new Rule 9001(2.1):

> (2.1) "Bankruptcy court" means the unit of the district court as designated by 28 U.S.C. § 151.

The related advisory committee note could explain the distinction:

> The definition of "bankruptcy court" is added in conjunction with the amendments to Rules 7008, 7012, 7016, 9027, and 9033 in which that term is used to identify judicial officers appointed pursuant to 28 U.S.C. § 152 (bankruptcy judges) who are not vested with the full judicial powers of the United States that are exercised by an Article III judge. The revisions clarify procedure to be implemented with respect to acts by a bankruptcy judge that need to be validated by a judge excising the full judicial power of the United States.

An analogue of this type of clarification may be found in the 1987 amendments to Rule 9001 and the accompanying advisory committee note.

2. Coordination Between Bankruptcy and District Courts.

Rule 9033 would benefit from designation of a process for transmitting the report and recommendation to the district court, perhaps in a fashion similar to proposed Rule 8003(d).

Although, for example, the rule assigns a role to the district judge in the process of preparing the record (Rule 9033(b): "A party objecting to the bankruptcy judge's proposed findings of fact and conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs"), no procedure is designated for how the matter is communicated or transmitted to the district court.

Leaving the manner to local practice invites divergent local practices that will operate as barriers and traps for parties from outside the local circle.

Since Rule 9033(b) provides for objections to be filed with the bankruptcy court clerk, a logical time would be after the deadline for filing objections so that the clerk could certify to the district court that objections were, or were not, filed. Whether there is an objection likely would be of considerable interest to the district court as it approaches its review.

3. Deeming an Appeal to be a Report and Recommendation.

Following Stern v. Marshall, local procedures have been adopted in various districts that have the effect of authorizing the district court in an appeal to adjust the procedure to that of the Rule 9033 report and recommendation if the district court discerns constitutional invalidity in the judgment rendered by the bankruptcy judge. Under such procedures, existing findings of fact and conclusions of law are deemed to be the equivalent of a report and recommendation without the need to require a further report from the bankruptcy judge.

Indeed, the district court in the Marshall case itself transformed an appeal to a report and recommendation and conducted de novo evidentiary proceedings. In re Marshall, 275 B.R. 5, 10 (C.D. Cal. 2002). That aspect of the district court decision was approved on appeal.

A uniform national rule authorizing the transformation of an appeal into a report and recommendation would be more appropriate than reliance on local ad hoc procedures. Any such rule also should authorize a bankruptcy appellate panel to transfer an appeal to a district court if it discerns such a constitutional invalidity in a judgment rendered by a bankruptcy judge. If a district court were to disagree with a BAP about the existence of a constitutional defect, it would be able to re-transfer the appeal to the BAP. Cf. Fed. R. Bankr. P. 8001(e)(2).

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Part VIII Rules

These comments are made from the perspective of a bankruptcy judge who served ten years on the Ninth Circuit Bankruptcy Appellate Panel and who as a seven-year member of the Advisory Committee on Bankruptcy Rules was present at the inception of this Part VIII project.

The product is impressive and a great leap forward for bankruptcy appellate procedure.

Here are some suggestions for improvement.

Rule 8002 – Time For Filing Notice of Appeal.

Two of the aspects of Fed. R. App. P. 4 that have been omitted are good candidates for modification and inclusion: Rule 4(a)(6) ("Reopening the Time to File an Appeal") and Rule 4(a)(7) ("Entry Defined"), both of which apply to bankruptcy appeals from district courts and BAPs to the courts of appeals.

1. Reopening the Time to File an Appeal.

This rule should include a version of Fed. R. App. P. 4(a)(6) regarding reopening the time in which to appeal.

Fed. R. App. P. 4(a)(6) ("Reopening the Time to File an Appeal"), applies in bankruptcy appeals to the courts of appeals from district courts and BAPs. Compare Rule 4(a)(6), Fed. R. App. P., with Fed. R. App. P. 6(b)(1)(A). It permits the appeal time for one who has not received notice of entry of judgment within 21 days of entry to be extended to the earlier of 180 days after the judgment was entered or 14 days after receiving notice of entry of the judgment on the further condition that the court finds no party would be prejudiced.

Since the rule applies to the second tier of bankruptcy appeals, it ought to apply to the first tier as well. There is no apparent reason that it could not be modified to be subject to the same no-extension restriction for the six categories of bankruptcy orders for which time is deemed to be of the essence, as set forth in proposed Rule 8002(d)(2).

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

As to appeals that are not in the "no-extension" categories in proposed Rule 8002(d)(2), the case for having short times to appeal, especially times shorter than those specified in Fed. R. App. P., is at best an uneasy case.

The proposition that time is so vital in bankruptcy that there must be less time allowed for filing a notice of appeal loses force outside proposed Rule 8002(d)(2)'s categories and devolves into a mantra that may tend to cloud vision. Accordingly, it is important to suspend disbelief as one starts to think about situations in which time might not be quite so important.

First, there is the irony (if not contradiction) that once the appellant hurries up and files a notice of appeal sixteen days before the thirty days otherwise applicable in federal civil practice, the appellate courts are not required to resolve the appeal expeditiously. Indeed, the thirty-day period of Fed. R. App. P. 4(a)(1) (and sixty days for the United States) applies to all bankruptcy appeals (including Rule 8002(d)(2) categories) from the district courts or BAPs to the courts of appeals, whose disposition times are measured in years, not months or weeks. In other words, "hurry up and wait – for years."

A crude measure of appeals that genuinely deserve speedy resolution is the direct appeal under 28 U.S.C. § 158(d). As for the remainder, the substantial majority that do not qualify for direct appeal are tolerated by the rules to be resolved in due course without precedence over the many other pressing matters burdening those courts.

Second, there are categories of appeals that plainly are less time-sensitive than the matters listed in proposed Rule 8002(d)(2). Consider, for example, two-party disputes that may affect the individual debtor's discharge or the dischargeability of a particular debt. It is of little consequence to the operations of the trustee or the bankruptcy system that the resolution of such matters consumes time. In the end, the reality is that time is vital in some situations and not so vital in others.

I would add that on a number of occasions during my twenty-five years on the bench, I have entered judgments in two-party disputes that squarely framed an important issue worthy of resolution on appeal so there would be a precedent for the

benefit of future cases only to have a party irretrievably miss the appeal deadline. The overall bankruptcy case would not have been materially affected by the outcome of the appeal. This has led me to realize the appeals that are lost for that reason constitute social costs that deprive the law of the opportunity for the purification through appeal and that create an appearance of injustice.

Reopening ought not to be a common event. It would be particularly rare if prevailing counsel exploit the incentive in Fed. R. App. P. 6(a)(6) to make sure the losing party gets formal notice of a judgment so as to shorten the 180 days to 14 days after notice. But having the tool in the toolbox would help create an impression of integrity in the bankruptcy process.

2. Entry Defined.

It would be useful to add a modified version of Fed. R. App. P. 6(a)(7), to proposed Rule 8002 to conform to the separate order requirement that applies in adversary proceedings but not to other bankruptcy matters. Specifically, Fed. R. Civ. P. 58 applies in adversary proceedings by virtue of Fed. R. Bankr. P. 7058. The problem is as arcane and confusing under the Bankruptcy Rules as it is under the Civil Rules, and Fed. R. App. P. 6(a)(7) provides a useful clarification.

Rule 8004 - Appeal by Leave – How Taken, Docketing the Appeal.

Two matters in Rule 8004 deserve attention – one minor, one major.

1. Clarify Rule 9014 Inapplicable to Motions for Leave.

Purposes of parallelism with proposed Rule 8006(f)(4) and of obviating arguments by negative implication would be served by specifying that the motion is not governed by Rule 9014.

2. Clarify Bankruptcy Court Power Pending Interlocutory Appeal.

One of the most frequent questions directed to me as a BAP

veteran by other judges relates to uncertainty about the power of the bankruptcy court during an interlocutory appeal. Judges know that during an appeal as of right from a final order the doctrine of exclusive appellate jurisdiction prevents the trial court from changing the status quo. But there is considerable confusion about interlocutory appeals. The answer is that the court retains plenary authority over the matter on appeal until leave to appeal is granted and the appellate court orders otherwise. In re Rains, — F.3d ___ (9th Cir. ). It would be helpful if Rule 8004 were to clarify the point.

Rule 8005 – Election to Have an Appeal Heard by the District Court Instead of the BAP.

It does not appear that current Rule 8001(e)(2) providing for withdrawal of an election and, with the acquiescence of the district court, transfer to a BAP has been preserved. This is a useful procedure in the current rules that deserves to be preserved.

If Rule 8005(c) ("Determining the Validity of an Election") is intended to encompass the point, it is too oblique and of doubtful efficacy when there has been a valid election as to which the parties later change their mind.

Rule 8006 – Certifying a Direct Appeal to the Court of Appeals.

In Rule 8006(c) ("Joint Certification by All Appellants and Appellees"), it would be useful to provide an opportunity for the court to comment on the suitability for direct appeal of the issue inherent in a joint certification. For example, a court may appropriately note that in the procedural posture of a jointly-certified interlocutory appeal is such that the record is too incompletely developed to enable the court of appeals to have a good view of the entire landscape.

The first paragraph of the Committee Note would be improved if "with the circuit clerk" were added after "timely filed" in the second sentence.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Rule 8007 – Stay Pending Appeal; Bonds; Suspension of Proceedings.

The title of proposed Rule 8007(b) would be less awkward if it were phrased "MOTION IN APPELLATE COURT" or if the order were reversed so as not to list the rarest form first.

In Rule 8007(b)(2)(B), a copy of any written ruling or order by the bankruptcy court ought to be required.

Rule 8007(e) regarding continued proceedings in the bankruptcy court may be confusing in light of the nonstatutory, judge-made doctrine of exclusive appellate jurisdiction. The general understanding of that doctrine subdivides into appeals from final and interlocutory orders. As to appeals from final orders, the usual rule is that a trial court may make orders that preserve the status quo (including other proceedings that are consistent with the order on appeal and that render the appeal moot) but may not make orders that alter the status quo. See Rains v. Flinn (In re Rains), 428 F.3d 893, 903-07 (9th Cir. 2005). As to interlocutory appeals, however, the trial court generally retains plenary authority over the matter unless and until the appellate court grants leave to appeal. If the intent of Rule 8007(e) is to override the doctrine of exclusive appellate jurisdiction, then it would be helpful to be more explicit, either in the text of the rule itself or in the Committee Note.

Rule 8008. Indicative Rulings.

The comment already made about Rule 8007(e) applies with even more force in this rule, which exists solely because of the nonstatutory, judge-made doctrine of exclusive appellate jurisdiction.

The general understanding of that doctrine subdivides into appeals from final and interlocutory orders. As to appeals from final orders, the usual rule is that a trial court may make orders that preserve the status quo (including other proceedings that are consistent with the order on appeal and that render the appeal moot) but may not make orders that alter the status quo. As to interlocutory appeals, however, the trial court generally retains plenary authority over the matter unless and until the appellate court grants leave to appeal.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

While the Committee Note ducks the question ("The rule does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal"), there is so much confusion in this area that it would be useful to note the point as to which there seems general consensus – that a trial court retains plenary authority over an interlocutory order, at least until the appellate court grants leave to appeal.

Rule 8009(e)(1).

In subparagraph (1) ("Correcting or Modifying the Record"), there is appended a sentence not contained in its model at Fed. R. App. P. 10(e) a new provision for a motion to strike any item "improperly designated" as part of the record.

"Improper designation" is a broader concept than the subject of the remainder of the subparagraph – "whether the accurately discloses what occurred in the bankruptcy court and the record conformed accordingly."

Motions to strike from an appellate record may be focused on material that is accurate as to what happened in the trial court but that is irrelevant, unnecessary, or burdensome. Such matters are commonly understood to be "questions as to the form and content of the record" covered by Fed. R. App. P. 10(e)(3), which is replicated in Rule 8009(e)(3).

While it may be useful specifically to mention motions to strike, it would be odd to confer upon the trial court the power to make decisions relating to the scope of the record other than assuring that the record is accurate. The bankruptcy court's appropriate role is to "conform" the record for accuracy as provided in the first sentence of Rule 8009(e)(1). Issues involving "improper designation" are commonly the subject of motions to strike, but are better left to the appellate court.

Hence, the innovative second sentence of Rule 8009(e)(1) should be relocated to Rule 8009(e)(3) as a method for resolving an issue relating to "form and content of the record" so as to avoid the implication that the bankruptcy court has the authority to resolve such matters.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Rule 8010.

Rule 8010(a)(2)(A).

Rule 8010(a)(2)(A) warrants three comments. First, clarity would be served by making a cross reference to Rule 8009(b) -- "Upon receiving an order for a transcript in accordance with Rule 8009(b)," – because Rule 8009(b)(4) requires satisfactory arrangements for paying the reporter at the time of ordering the transcript. This needed emphasis because, in my BAP experience, appellate delay commonly results from failure to obtain a timely transcript because of nonpayment.

Second, the mechanism in Rule 8010(a)(2)(A) requiring the reporter to create and file an acknowledgment of the receipt of a request is likely to function less effectively in the bankruptcy context than it does in the district courts where court reporters are staff, or quasi-staff, members. Most bankruptcy reporters are not court staff, but rather are either a private typist transcribing a recording or a part-time contract court reporter.

Nor is the administrative direction "the reporter must file a request that shows when it was received, and when the reporter expects to have the transcript completed" as explicit and easy to comply with as Fed. R. App. P. 11(b)(1)(A): "Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk."

Third, consideration may also be given to limiting the reporter's Rule 8010(a)(2)(A) duty to file the report of receipt of the request to those requests that are designated for purposes of an appeal. Although Rule 8010 is an appellate rule, transcript requests often have nothing to do with an appeal.

Rule 8010(a)(2)(C)-(D).

Rule 8010(a)(2)(C)-(D) requiring a reporter to seek time extensions and requiring the clerk to report tardiness to the bankruptcy judge will be a toothless tiger. Perhaps the parallel provisions at Fed. R. App. P. 11(b)(1)(B) and (D) have some teeth because the reporter in district court typically works for the district judge, but the bankruptcy judge has no tools and few incentives to do anything but shrug.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Possible Sanction for Noncompliance by Appellee.

Consideration should be given to authorizing a sanction of dismissal of an appeal if an appellant is delinquent in performing any of the appellant's obligations regarding completing the record.

Rule 8011.

Since the final sentence of Rule 5005(a)(1) is replicated at Rule 8011(a)(3) (barring refusal to accept for filing documents in incorrect form), it would also be appropriate to incorporate Rule 5005(c) relating to errors in filing or transmittal.

Rule 8011(e) requires signatures but does not address the consequences of signature. Since Rule 9011 presumably applies, it would be appropriate, at least in the Committee Note, to refer to Rule 9011. If Rule 9011 is to be qualified, there should be clarification of that point.

Comments of Hon. Christopher M. Klein
United States Bankruptcy Judge

Rule 8013.

Rule 8013(d) relating to emergency motions appears to be phrased so as to require "irreparable harm." It is not difficult to conjure situations – such as expediting an appeal as mentioned in Rule 8013(a)(2)(B) – that may warrant emergency consideration even though the situation may not lead to "irreparable harm."

Rule 8013(d)(2)(B) contemplates remanding a motion "for the bankruptcy court to reconsider." As the emergency motion may not have been considered by (or even presented to) the bankruptcy court in the first place, the word "reconsider" might be replaced by "consider." Further, if what is meant by "remanded" is a limited remand to the bankruptcy court to satisfy the niceties of the doctrine of exclusive appellate jurisdiction, the description of what is meant by "remanded" should be more precise.

Rule 8014.

Rule 8014(a)(4)(B) would be improved by inserting the word "appellate" before "jurisdiction."

Rule 8014(a)(4)(D) might also require an assertion that for an interlocutory appeal under 28 U.S.C. § 158(a)(3) leave to appeal has been granted.

Rule 8015.

Rule 8015(f) requiring acceptance of documents that conform to the form requirements of Rule 8015 and also permitting a district court or BAP by local rule or order to accept documents that do not meet all the requirements of Rule 8015 appears inconsistent with Rule 8011(a)(3) forbidding the clerk to "refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice."

If a distinction is being drawn between the court and the clerk of court, it should be explained.

Perhaps it is more accurate to provide that nonconforming documents must be accepted for filing (Rule 8011(a)(3)) but that a court may order a documents not conforming to the requirements

of Rule 8015 later to be stricken if prompt corrective action is not taken.

Another strategy would be to authorize a monetary sanction for nonconforming papers.

Rule 8016.

Since Rule 8016(d) contains length and type-volume limitations analogous to Rule 8015, an analog to Rule 8015(f) should be incorporated. A simple solution would be to parallel the incorporation by Rule 8016(d)(3) of Rule 8015(a)(7)(C) and insert a new subparagraph 8016(d)(4) providing that Rule 8015(f) also applies.

Rule 8019.

In Rule 8019(f) ("Nonappearance of a Party"), it would be useful to include in the Committee Note that the phrase "orders otherwise" encompasses dismissal of the appeal for lack of prosecution.

Rule 8020

Rule 8020(b) would be clarified by addition of the words "or local rule" after "any court order" at the end of the first sentence.

The final sentence of the Committee Note stating that "Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule" is likely to be overlooked because Committee Notes are of uncertain authority and often overlooked and because the assertion in the Committee Note may not satisfy literalists.