

COMMENTS OF JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. BANKR. P. 8003 THROUGH 8005

Attached is a marked-up copy of proposed Rules 8003 through 8005 showing changes I think are warranted.

To elaborate on what I state in those mark-ups:

1. Rule 8003(c): Serving the Notice of Appeal:

a. Put the Requirement of Serving the Notice of Appeal on the Appellant. The requirement of the clerk's serving the notice of appeal seems archaic and unnecessary. The rules require the parties, not the clerk, to serve equally momentous documents (e.g., counterclaims; requests for admissions), and I fail to see why a notice of appeal should be treated differently. So I think the appellant should be required to serve the notice of appeal, and that the clerk ought not be required to serve the notice of appeal. So the rule should simply read:

(c) SERVING THE NOTICE OF APPEAL. The appellant shall file with the notice of appeal a certificate of service reflecting that the notice of appeal was served on all parties to the appeal, including stating the date and method of service.

b. If the Requirement of Clerk's Service of the Notice of Appeal is **Not** Eliminated, Then Eliminate the Requirement of Clerk's Service as to Entities That Were Given E-Notice of the Docketing of the Notice of Appeal Upon its Being Docketed. Upon the docketing of a document, the court's Electronic Case Filing system e-mails a notice of the filing (described by the docket text) to all e-filers, and generates a receipt button on the electronic docket system reflecting such transmission. The requirement of clerk's service of the notice of appeal seems silly when all counsel received e-notice of the docketing of the notice of appeal when it was docketed. I suggest that the first sentence of Rule 8003(c)(1) be changed as follows:

The bankruptcy clerk must transmit the notice of appeal to the United States trustee and to counsel of record for each party to the appeal, excluding the appellant and any entity who received electronic notice of the docketing of the notice of appeal at the time the notice of appeal was docketed.

[Added language indicated by highlighting.] Even when all counsel got e-notice of the filing of the notice of appeal upon its docketing, the proposed rule requires the clerk:

- to make a copy of the notice of appeal;
- mark on it when the notice of appeal was filed; and
- then docket that marked-up notice of appeal (which will be served via the ECF system e-transmitting notice of the filing to counsel who already got notification when the notice of appeal was docketed).

That makes for unnecessary work.

2. Rule 8003(d)(1) (Transmitting the Notice). Sometimes the bankruptcy clerk will not have transmitted the notice of appeal before an appellee files an election to have the district court hear the appeal. Accordingly, I suggest that Rule 8003(d) be changed to:

(1) *Transmitting the Notice*. The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district, ~~and~~ the appellant has not elected to have the district court hear the appeal, and no other party has yet filed an election to have the district court hear the appeal.

[Deletions indicated by strike-through; added language highlighted.]

3. Committee Note to Rule 8003. The Committee Note to Rule 8003 needs to address what happens when the appeal is docketed in the BAP (because the appellant did not elect to appeal to the District Court), but after a motion is filed in the BAP for a stay pending appeal, the appellee's 30 day window under § 158(c)(1)(B) to elect to have the appeal heard by the district court has not expired. I suggest that the Note add a concluding paragraph stating:

If the appeal has been docketed in the BAP under subdivision (d), the BAP is to rule on any motion presented to it unless and until the appellee timely elects under § 158(c)(1)(B) to have the appeal heard by the district court. Once an appellee timely elects under § 158(c)(1)(B) to have the appeal heard by the district court, Rule 8005(b) governs the BAP clerk's duty to transmit the appellate documents, including any motion, to the district clerk.

4. Rule 8003(d)(2) (Docketing in the District Court or BAP). This rule is fine as written, but the Committee should alert the appropriate Administrative Office offices and advisory groups that to achieve uniformity in titling of appeals, suggested guidance to district court and BAP clerks, and to the bar, may be warranted.

5. Rule 8004. Appeal by Leave--How Taken; Docketing the Appeal:

a. Rule 8004(c)(1). I suggest that this be changed to:

(1) Transmitting to the District Court or BAP. The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district, ~~and~~ the appellant has not elected to have the district court hear the appeal, and no other party has yet filed an election to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice and motion to the district clerk.

[Deletions noted by strike-through; additions highlighted.]

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

a. Rule 8005(b). I suggest that Rule 8005(b) be amended to read:

(b) TRANSFERRING THE DOCUMENTS RELATED TO THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit to the district clerk all documents related to the appeal. Once the bankruptcy clerk has transmitted an appeal for docketing in the BAP, a party other than the appellant must file any statement of election with the BAP clerk. 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.

This jibes with my suggestion that proposed Rule 8003(d)(1) be amended to reflect that sometimes an appellee might want to file a § 158(c)(1) election prior to the bankruptcy clerk making a transmittal of the appeal. In that instance, the § 158(c)(1) election should be filed with the bankruptcy clerk.

b. Committee Note to Rule 8005. I suggest that the third paragraph of the Committee Note to Rule 8005 be changed to read:

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, and no other party has yet made the election, the bankruptcy clerk must transmit those documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk.

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) *In General.* An appeal from a judgment, order,
3 or decree of a bankruptcy court to a district court or BAP
4 under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by
5 filing a notice of appeal with the bankruptcy clerk within
6 the time allowed by Rule 8002.

7 (2) *Effect of Not Taking Other Steps.* An
8 appellant's failure to take any step other than the timely
9 filing of a notice of appeal does not affect the validity of
10 the appeal, but is ground only for the district court or BAP
11 to act as it considers appropriate, including dismissing the
12 appeal.

13 (3) *Contents.* The notice of appeal must:

14 (A) conform substantially to the appropriate
15 Official Form;

16 (B) be accompanied by the judgment, order,
17 or decree, or the part of it, being appealed; and

18 (C) be accompanied by the prescribed fee.

19 (4) *Additional Copies.* If requested to do so, the
20 appellant must furnish the bankruptcy clerk with enough
21 copies of the notice to enable the clerk to comply with
22 subdivision (c).

Rule 8003(c) seems archaic and unnecessary in requiring service by the clerk. The rules require the parties, not the clerk, to serve equally momentous documents (e.g., counterclaims; requests for admissions), and I fail to see why a notice of appeal should be treated differently. So I think the appellant should be required to serve the notice of appeal, and that the clerk ought not be required to serve the notice of appeal. So the rule should simply read:

(c) SERVING THE NOTICE OF APPEAL. The appellant shall file with the notice of appeal a certificate of service reflecting that the notice of appeal was served on all parties to the appeal, including stating the date and method of service.

(b) JOINT OR CONSOLIDATED APPEALS.

(1) *Joint Notice of Appeal.* When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) *Consolidating Appeals.* When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.

(c) SERVING THE NOTICE OF APPEAL.

(1) *Transmitting to the United States Trustee and Other Parties.* The bankruptcy clerk must transmit the notice of appeal to the United States trustee and to counsel of record for each party to the appeal, excluding the appellant. If a party is proceeding pro se, the clerk must send the notice of appeal to the party's last known address. The clerk must note, on each copy, the date when the notice of appeal was filed.

41
42
43
44
45

(2) *Effect of Failing to Transmit Notice.* The bankruptcy clerk's failure to transmit notice to a party or the United States trustee does not affect the validity of the appeal.

(3) *Noting Service on the Docket.* The clerk must

This requirement seems silly when all counsel received e-notice of the docketing of the notice of appeal when it was docketed. I suggest this sentence be amended to read:
"The bankruptcy clerk must transmit the notice of appeal to the United States trustee and to counsel of record for each party to the appeal, excluding the appellant and any entity who received electronic notice of the docketing of the notice of appeal at the time the notice of appeal was docketed."
[Emphasis added.]
Even when all counsel got e-notice of the filing of the notice of appeal upon its filing, the rule as presently written requires the clerk to make a copy of the notice of appeal, mark on it when the notice of appeal was filed, and then docket that marked-up notice of appeal (which will then be e-transmitted to counsel who already got notification when the notice of appeal was filed).

I suggest that this sentence be changed to:

"The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district, and the appellant has not elected to have the district court hear the appeal, **and no other party has yet filed an election to have the district court hear the appeal.**" [Stricken-through part to be replaced by a comma, and bolded words to be added.]

59

60

note on the docket the names of the parties served and the date and method of the service.

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.

(1) *Transmitting the Notice.* The bankruptcy clerk

must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice to the district clerk.

(2) *Docketing in the District Court or BAP.* Upon

receiving the notice of appeal, the district or BAP clerk must ~~docket~~ the appeal under the title of the bankruptcy court action and must identify the appellant, adding the appellant's name if necessary.

COMMITTEE NOTE

This rule is derived from several former Bankruptcy Rule and Appellate Rule provisions. It addresses appeals as of right, joint and consolidated appeals, service of the notice of appeal, and the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates, with stylistic changes, much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R.App.P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have

Parties and BAP and district clerks would benefit from guidance as to how a docket's title ought to look under this rule. The difficulties are obvious (e.g., if an appealed order sustained an objection to claim, is the bankruptcy case caption to be included as part of the title?; how is the title of the contested matter to be reflected, and how are the parties to be listed?). To assure uniformity, I suggest that the Advisory Committee alert the Bankruptcy Court Administrative Division, and the District Court Administration Division, as well as pertinent advisory groups to the Administrative Office, that this is an issue upon which suggested guidance to district and BAP clerks and members of the bar should be given well in advance of the effective date of the rule.

sufficiently similar interests that their joinder is practicable. It also allows the district court or BAP to consolidate appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R.App.P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require that the bankruptcy clerk serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the district court or BAP until the record was complete and the bankruptcy clerk transmitted it. The new provision, adapted from F.R.App.P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the district court or BAP. Upon receipt of the notice of appeal, the district or BAP clerk must docket the appeal. Under this procedure, motions filed in the district court or BAP prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.



This Committee Note needs to address what happens when the appeal is docketed in the BAP (because the appellant did not elect to appeal to the District Court), but after a motion is filed in the BAP for a stay pending appeal, the appellee's 30-day window under § 158(c)(1)(B) to elect to have the appeal heard by the district court has not expired. I suggest that the Note add a concluding paragraph stating: **"If the appeal has been docketed in the BAP under subdivision (d), the BAP is to rule on any motion presented to it unless and until the appellee timely elects under § 158(c)(1)(B) to have the appeal heard by the district court. Once an appellee timely elects under § 158(c)(1)(B) to have the appeal heard by the district court, Rule 8005(b) governs the BAP clerk's duty to transmit the appellate documents, including any motion, to the district clerk."** [Emphasis added.]

Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal

1 (a) NOTICE OF APPEAL AND MOTION FOR LEAVE
2 TO APPEAL. To appeal from an interlocutory order or decree of a
3 bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file
4 with the bankruptcy clerk a notice of appeal as prescribed by Rule
5 8003(a). The notice must:

- 6 (1) be filed within the time allowed by Rule 8002;
- 7 (2) be accompanied by a motion for leave to appeal
8 prepared in accordance with subdivision (b); and
- 9 (3) unless served electronically using the court’s
10 transmission equipment, include proof of service in
11 accordance with Rule 8011(d).

12 (b) CONTENTS OF THE MOTION; RESPONSE.

13 (1) *Contents.* A motion for leave to appeal under
14 28 U.S.C. § 158(a)(3) must include the following:

- 15 (A) the facts necessary to understand the
16 question presented;
- 17 (B) the question itself;
- 18 (C) the relief sought;
- 19 (D) the reasons why leave to appeal should
20 be granted; and
- 21 (E) a copy of the interlocutory order or
22 decree and any related opinion or memorandum.

I suggest that this sentence be changed to:
"The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district and, the appellant has not elected to have the district court hear the appeal, and no other party has yet filed an election to have the district court hear the appeal."

(2) *Response.* A party may file with the district or BAP clerk a response in opposition or a cross-motion within 14 days after the motion is served.

(c) TRANSMITTING THE NOTICE OF APPEAL AND THE MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.

(1) *Transmitting to the District Court or BAP.* The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice and motion to the district clerk.

(2) *Docketing in the District Court or BAP.* Upon receiving the notice and motion, the district or BAP clerk must docket the appeal under the title of the bankruptcy court action and must identify the appellant, adding the appellant's name if necessary.

(3) *Oral Argument Not Required.* The motion and any response or cross-motion are submitted without oral argument unless the district court or BAP orders otherwise. If the motion is denied, the district court or BAP must dismiss the appeal.

See the comment on page 63 of 238 regarding alerting pertinent offices of the Administrative Office of the need to attempt to assure that there is some uniformity in how parties and district and BAP clerks title an appeal.

38
39
40
41
42
43
44
45

46 (d) FAILURE TO FILE A MOTION WITH A NOTICE
47 OF APPEAL. If an appellant timely files a notice of appeal under
48 this rule but does not include a motion for leave, the district court
49 or BAP may order the appellant to file a motion for leave, or treat
50 the notice of appeal as a motion for leave and either grant or deny
51 it. If the court orders that a motion for leave be filed, the appellant
52 must do so within 14 days after the order is entered, unless the
53 order provides otherwise.

54 (e) DIRECT APPEAL TO A COURT OF APPEALS. If
55 leave to appeal an interlocutory order or decree is required under
56 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the
57 court of appeals under 28 U.S.C. § 158(d)(2) satisfies the
58 requirement.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R.App.P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the district court or BAP.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the district court or BAP, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly to the district court or BAP the notice of appeal and the motion for leave to appeal. Upon receipt of the notice and the motion, the district or BAP clerk must docket the appeal. Unless the district court or BAP orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave. Thus, a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

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

1 (a) FILING OF A STATEMENT OF ELECTION. To
2 elect to have an appeal heard by the district court, a party must:
3 (1) file a statement of election that conforms
4 substantially to the appropriate Official Form; and
5 (2) do so within the time prescribed by 28 U.S.C.
6 § 158(c)(1).
7 (b) TRANSFERRING THE DOCUMENTS RELATED
8 TO THE APPEAL. Upon receiving an appellant's timely
9 statement of election, the bankruptcy clerk must transmit to the
10 district clerk all documents related to the appeal. Upon receiving a
11 timely statement of election by a party other than the appellant, the
12 BAP clerk must transmit to the district clerk all documents related
13 to the appeal.
14 (c) DETERMINING THE VALIDITY OF AN
15 ELECTION. A party seeking a determination of the validity of an
16 election must file a motion in the court where the appeal is then
17 pending. The motion must be filed within 14 days after the
18 statement of election is filed.
19 (d) MOTION FOR LEAVE WITHOUT A NOTICE OF
20 APPEAL—EFFECT ON THE TIMING OF AN ELECTION. If
21 an appellant moves for leave to appeal under Rule 8004 but fails to
22 file a separate notice of appeal with the motion, the motion must be

I suggest that you add this sentence:
"Once the bankruptcy clerk has transmitted an appeal for docketing in the BAP, a party other than the appellant must file any statement of election with the BAP clerk."
[Emphasis added.]
See my suggestion at page 63 of 238 that proposed Rule 8003(d)(1) be amended to permit the appellee's election to be filed in the bankruptcy court if the bankruptcy clerk has not yet transmitted the appeal to the BAP.

23 treated as a notice of appeal for purposes of determining the
24 timeliness of a statement of election.

COMMITTEE NOTE

This rule, which implements 28 U.S.C. § 158(c)(1), is derived from former Rule 8001(e).

As the former rule required, subdivision (a) provides that an appellant that elects to have a district court, rather than a BAP, hear its appeal must file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the district court hear the appeal must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit those documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion seeking the determination of the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

I suggest that you insert this clause before the comma: "**and no other party has yet made the election**".
[Emphasis added.]

COMMENTS OF JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. BANKR. P. 8009(a)(4)

Attached is a marked-up copy of proposed Rule 8009, showing suggested changes to paragraph (a)(4) of that Rule.

To elaborate on what I state in those mark-ups, I suggest that proposed Rule 8009(a)(4) be amended to read:

(4) *Record on Appeal*. The record on appeal must include the following:

- the docket entries maintained by the bankruptcy clerk;
- items designated by the parties;
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification required for a direct appeal to the court of appeals;
- any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings;
- any transcript ordered under subdivision (b);
- any statement required by subdivision (c); and
- any additional items ~~from the record that~~ the bankruptcy court or the court where the appeal is pending orders.

The most important proposed change is the last highlighted added language permitting the bankruptcy court to order additional items to be included in the record.

The bases for the foregoing recommended changes follow.

a. Including the Docket Entries Sheet. The first change (regarding including a copy of the docket entries) is copied from Fed. R. App. P. 10(a)(3) with two minor changes. Rule 10(a)(3) requires that the record include a "**certified** copy of the docket entries **prepared** by the district clerk" (emphasis added):

- The docket entries are already in existence, so "prepared" should be changed to "maintained."
- As to certification, I see no reason to require the clerk to certify the docket entries: the clerk's act of including the docket entries in the record is itself a certification. The docket entries sheet is useful to anyone who wants to track the chronology of what transpired in the proceeding:
 - ▶ As a practical matter, if the record is **not** transmitted in paper form and is reviewed by the appellate court electronically, that appellate court will have access to the docket entries. But the record should include the docket entries so that it is clear that the docket entries may be treated as part of the record.
 - ▶ If the record **is** transmitted in paper form, then it is critical that the record include a paper copy of the docket entries.

b. Striking the Words "from the record" from the Last Bullet Item. The last bullet item refers to including as part of the record "any additional items from the record" that the appellate court orders, but until an item is designated or ordered to be included, it is not part of the record.

c. Adding to the Last Bullet Item the Bankruptcy Court as a Court That May Order Additional Items to be Included as Part of the Record. The term "the court where the appeal is pending" means the District Court or the BAP (or the Court of Appeals if a direct appeal has been allowed). I suggest that the Bankruptcy Court should be allowed to designate additional items as well. That would be consistent with paragraph (e)(2) of this proposed Rule 8009, the paragraph permitting the bankruptcy court to supplement the record when "anything material to either party is omitted from or misstated in the record by error or accident." Sometimes only the appellant designates the record and omits some critical document that shows that the bankruptcy court ruled correctly. It makes sense that the bankruptcy court should be

allowed to order that the critical document be included as part of the record.

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013

Rule 8009. Record on Appeal; Sealed Documents

1 (a) DESIGNATING THE RECORD ON APPEAL;
2 STATEMENT OF THE ISSUES.

3 (1) *Appellant.*

4 (A) The appellant must file with the
5 bankruptcy clerk and serve on the appellee a
6 designation of the items to be included in the record
7 on appeal and a statement of the issues to be
8 presented.

9 (B) The appellant must file and serve the
10 designation and statement within 14 days after:

11 (i) the appellant's notice of appeal as
12 of right becomes effective under Rule 8002;

13 or

14 (ii) an order granting leave to appeal
15 is entered.

16 A designation and statement served prematurely
17 must be treated as served on the first day on which
18 filing is timely.

19 (2) *Appellee and Cross-Appellant.* Within 14 days
20 after being served, the appellee may file and serve on the
21 appellant a designation of additional items to be included in
22 the record. An appellee who files a cross-appeal must file

23 and serve a designation of additional items to be included
24 in the record and a statement of the issues to be presented
25 on the cross-appeal.

26 (3) *Cross-Appellee*. Within 14 days after service of
27 the cross-appellant's designation and statement, a cross-
28 appellee may file and serve on the cross-appellant a
29 designation of additional items to be included in the record.

30 (4) *Record on Appeal*. The record on appeal must
31 include the following:

- 32 • items designated by the parties;
- 33 • the notice of appeal;
- 34 • the judgment, order, or decree being
35 appealed;
- 36 • any order granting leave to appeal;
- 37 • any certification required for a direct appeal
38 to the court of appeals;
- 39 • any opinion, findings of fact, and
40 conclusions of law relating to the issues on appeal,
41 including transcripts of all oral rulings;
- 42 • any transcript ordered under subdivision (b);

This bullet list should include one other bullet item: "**• a copy of the docket entries maintained by the bankruptcy clerk;**". This is copied from Fed. R. App. P. 10(a)(3) with minor changes. Rule 10(a)(3) requires a "**certified** copy of the docket entries **prepared** by the district clerk" (emphasis added), but I see no reason to require the clerk to certify the docket entries: the clerk's act of including the docket entries in the record is itself a certification. The docket entries are already in existence, so they are "maintained," not "prepared"

This language ("from the record") should be stricken. Until an item is designated, it is not part of the record, so it makes no sense to refer to designating additional items "from the record."

The term "the court where the appeal is pending" means the District Court or the BAP (or the Court of Appeals if a direct appeal has been allowed). I suggest that the Bankruptcy Court should be allowed to designate additional items as well. That would be consistent with paragraph (e)(2) of this proposed rule, the paragraph permitting the bankruptcy court to supplement the record when "anything material to either party is omitted from or misstated in the record by error or accident." Accordingly, this bullet item should read:
"• any additional items that the bankruptcy court or the court where the appeal is pending orders."

- any statement required by subdivision (c);
- and
- any additional items from the record that the court where the appeal is pending orders.

45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65

(5) *Copies for the Bankruptcy Clerk.* If paper copies are needed, a party filing a designation of items must provide a copy of any of those items that the bankruptcy clerk requests. If the party fails to do so, the bankruptcy clerk must prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty to Order.* Within the time period prescribed by subdivision (a)(1), the appellant must:

- (A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk;
- or
- (B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty to Order.* Within 14

66 days after the appellant files a copy of the transcript order
67 or a certificate of not ordering a transcript, the appellee as
68 cross-appellant must:

69 (A) order in writing from the reporter, as
70 defined in Rule 8010(a)(1), a transcript of such
71 additional parts of the proceedings as the cross-
72 appellant considers necessary for the appeal, and
73 file a copy of the order with the bankruptcy clerk;
74 or

75 (B) file with the bankruptcy clerk a
76 certificate stating that the cross-appellant is not
77 ordering a transcript.

78 (3) *Appellee's or Cross-Appellee's Right to Order.*

79 Within 14 days after the appellant or cross-appellant files a
80 copy of a transcript order or certificate of not ordering a
81 transcript, the appellee or cross-appellee may order in
82 writing from the reporter a transcript of such additional
83 parts of the proceedings as the appellee or cross-appellee
84 considers necessary for the appeal. A copy of the order
85 must be filed with the bankruptcy clerk.

86 (4) *Payment.* At the time of ordering, a party must
87 make satisfactory arrangements with the reporter for paying
88 the cost of the transcript.

89 (5) *Unsupported Finding or Conclusion.* If the
90 appellant intends to argue on appeal that a finding or
91 conclusion is unsupported by the evidence or is contrary to
92 the evidence, the appellant must include in the record a
93 transcript of all relevant testimony and copies of all
94 relevant exhibits.

95 (c) STATEMENT OF THE EVIDENCE WHEN A
96 TRANSCRIPT IS UNAVAILABLE. If a transcript of a hearing or
97 trial is unavailable, the appellant may prepare a statement of the
98 evidence or proceedings from the best available means, including
99 the appellant's recollection. The statement must be filed within
100 the time prescribed by subdivision (a)(1) and served on the
101 appellee, who may serve objections or proposed amendments
102 within 14 days after being served. The statement and any
103 objections or proposed amendments must then be submitted to the
104 bankruptcy court for settlement and approval. As settled and
105 approved, the statement must be included by the bankruptcy clerk
106 in the record on appeal.

107 (d) AGREED STATEMENT AS THE RECORD ON
108 APPEAL. Instead of the record on appeal as defined in
109 subdivision (a), the parties may prepare, sign, and submit to the
110 bankruptcy court a statement of the case showing how the issues
111 presented by the appeal arose and were decided in the bankruptcy

112 court. The statement must set forth only those facts alleged and
113 proved or sought to be proved that are essential to the court’s
114 resolution of the issues. If the statement is accurate, it—together
115 with any additions that the bankruptcy court may consider
116 necessary to a full presentation of the issues on appeal—must be
117 approved by the bankruptcy court and must then be certified to the
118 court where the appeal is pending as the record on appeal. The
119 bankruptcy clerk must then transmit it to the clerk of that court
120 within the time provided by Rule 8010. A copy of the agreed
121 statement may be filed in place of the appendix required by Rule
122 8018(b) or, in the case of a direct appeal to the court of appeals, by
123 F.R.App.P. 30.

124 (e) CORRECTING OR MODIFYING THE RECORD.

125 (1) *Submitting to the Bankruptcy Court.* If any
126 difference arises about whether the record accurately
127 discloses what occurred in the bankruptcy court, the
128 difference must be submitted to and settled by the
129 bankruptcy court and the record conformed accordingly. If
130 an item has been improperly designated as part of the
131 record on appeal, a party may move to strike that item.

132 (2) *Correcting in Other Ways.* If anything material
133 to either party is omitted from or misstated in the record by
134 error or accident, the omission or misstatement may be

135 corrected, and a supplemental record may be certified and
136 transmitted:

137 (A) on stipulation of the parties;

138 (B) by the bankruptcy court before or after
139 the record has been forwarded; or

140 (C) by the court where the appeal is
141 pending.

142 (3) *Remaining Questions.* All other questions as to
143 the form and content of the record must be presented to the
144 court where the appeal is pending.

145 (f) **SEALED DOCUMENTS.** A document placed under
146 seal by the bankruptcy court may be designated as part of the
147 record on appeal. In doing so, a party must identify it without
148 revealing confidential or secret information, but the bankruptcy
149 clerk must not transmit it to the clerk of the court where the appeal
150 is pending as part of the record. Instead, a party must file a motion
151 with the court where the appeal is pending to accept the document
152 under seal. If the motion is granted, the movant must notify the
153 bankruptcy court of the ruling, and the bankruptcy clerk must
154 promptly transmit the sealed document to the clerk of the court
155 where the appeal is pending.

156 (g) **OTHER NECESSARY ACTIONS.** All parties to an
157 appeal must take any other action necessary to enable the

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R.App.P. 10 and 11(a). The provisions of this rule and Rule 8010 are applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to appeals to a district court or BAP. See F.R.App.P. 6(c)(2)(A) and (B).

The rule retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect, the bankruptcy rule differs from the appellate rule. Among other things, F.R.App.P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for an appellant to file a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the party that designated the item to provide the necessary copies, and the party must comply with the request or bear the cost of the clerk's copying.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R.App.P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R.App.P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated,

omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the court where the appeal is pending to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the district, BAP, or circuit clerk.

Subdivision (g) requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record. It retains the requirement of former Rule 8006, which was adapted from F.R.App.P. 11(a).

COMMENT OF JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. BANKR. P. 8010

Attached is a self-explanatory marked-up copy of the first page of proposed Rule 8010, showing a suggested change to paragraph (a)(1) of that Rule.

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013

Rule 8010. Completing and Transmitting the Record

1 (a) REPORTER’S DUTIES.

2 (1) *Proceedings Recorded Without a Reporter*

3 *Present.* If proceedings were recorded without a reporter
4 being present, the person or service that the bankruptcy
5 court designates to transcribe the recording is the reporter
6 for purposes of this rule.

7 (2) *Preparing and Filing the Transcript.* The
8 reporter must prepare and file a transcript as follows:

9 (A) Upon receiving an order for a
10 transcript, the reporter must file in the bankruptcy
11 court an acknowledgment of the request that shows
12 when it was received, and when the reporter expects
13 to have the transcript completed.

14 (B) After completing the transcript, the
15 reporter must file it with the bankruptcy clerk, who
16 will notify the district, BAP, or circuit clerk of its
17 filing.

18 (C) If the transcript cannot be completed
19 within 30 days after receiving the order, the reporter
20 must request an extension of time from the
21 bankruptcy clerk. The clerk must enter on the

Instead of "bankruptcy court" this should be "bankruptcy clerk" as that clerk is the official who, subject to the control of the bankruptcy court, designates the person or service that may transcribe recordings. If that change is not made, appellants will potentially be bothering the court with motions to designate the person or service to transcribe the recording.

COMMENT OF JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. BANKR. P. 8011

Attached is a self-explanatory marked-up copy of the first two pages of proposed Rule 8011, showing suggested changes to paragraph (a)(2) of that Rule.

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013

Rule 8011. Filing and Service; Signature

I recommend that the changes appearing in red be made to this rule. It does not make sense to inject unnecessary complexity and uncertainty into ascertaining when a document was filed by altering the rule that filing occurs upon the clerk's receipt of the document. I recognize that Fed. R. App. P. 25(a)(2)(B) contains a similar provision, but I think that such rule was ill-advised. There is no need to make the mistake of adopting a similar ill-advised rule here.

(a) FILING.

(1) *With the Clerk.* A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) *Method and Timeliness.*

(A) *In general.* Filing may be accomplished by transmission to the clerk of the district court or BAP. ~~Except as provided in subdivision (a)(2)(B) and (C), filing is timely only if the clerk receives the document within the time fixed for filing.~~

Filing

~~(B) *Brief or Appendix.* A brief or appendix is also timely filed if, on or before the last day for filing, it is:~~

14

15

16

17

18

19

20

21

22

~~(i) mailed to the clerk by first class~~

~~mail or other class of mail that is at least~~

~~as expeditious postage prepaid, if the~~

~~district court's or BAP's procedures permit~~

~~or require a brief or appendix to be filed by~~

~~mailing; or~~

~~(ii) dispatched to a third party~~

~~commercial carrier for delivery within 3~~

23 ~~days to the clerk, if the court's procedures so~~

24 ~~permit or require.~~

25 ~~(C)~~ *Inmate Filing*. A document filed by an

26 inmate confined in an institution is timely if

27 deposited in the institution's internal mailing

28 system on or before the last day for filing. If the

29 institution has a system designed for legal mail, the

30 inmate must use that system to receive the benefit

31 of this rule. Timely filing may be shown by a

32 declaration in compliance with 28 U.S.C. § 1746 or

33 by a notarized statement, either of which must set

34 forth the date of deposit and state that first-class

35 postage has been prepaid.

36 ~~(D)~~ *Copies*. If a document is filed

37 electronically, no paper copy is required. If a

38 document is filed by mail or delivery to the district

39 court or BAP, no additional copies are required.

40 But the district court or BAP may require by local

41 rule or by order in a particular case the filing or

42 furnishing of a specified number of paper copies.

43 (3) *Clerk's Refusal of Documents*. The court's

44 clerk must not refuse to accept for filing any document

45 transmitted for that purpose solely because it is not

COMMENT OF JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. BANKR. P. 8013

Attached is a self-explanatory marked-up copy of proposed Rule 8013, showing suggested changes to that Rule.

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013

Rule 8013. Motions; Intervention

1 (a) CONTENTS OF A MOTION; RESPONSE; REPLY.

2 (1) *Request for Relief.* A request for an order or
3 other relief is made by filing a motion with the district or
4 BAP clerk, with proof of service on the other parties to the
5 appeal.

6 (2) *Contents of a Motion.*

7 (A) *Grounds and the Relief Sought.* A
8 motion must state with particularity the grounds for
9 the motion, the relief sought, and the legal argument
10 necessary to support it.

11 (B) *Motion to Expedite an Appeal.* A
12 motion to expedite an appeal must explain what
13 justifies considering the appeal ahead of other
14 matters. If the district court or BAP grants the
15 motion, it may accelerate the time to transmit the
16 record, the deadline for filing briefs and other
17 documents, oral argument, and the resolution of the
18 appeal. A motion to expedite an appeal may be
19 filed as an emergency motion under subdivision (d).

20 (C) *Accompanying Documents.*

21 (i) Any affidavit or other document
22 necessary to support a motion must be

I suggest that you add the clause "to the district court or the BAP" here. Sometimes it is appropriate for a motion relating to an appeal to be filed with the bankruptcy court (e.g., a motion to extend the time to file a designation of the record, or a motion for a stay pending appeal).

23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the bankruptcy court’s judgment, order, or decree, and any accompanying opinion as a separate exhibit.

(D) *Documents Barred or Not Required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response and Reply; Time to File.* Unless the district court or BAP orders otherwise,

(A) any party to the appeal may file a response to the motion within 7 days after service of the motion; and

(B) the movant may file a reply to a response within 7 days after service of the response, but may only address matters raised in the response.

(b) DISPOSITION OF A MOTION FOR A

I would change this to “**A proposed order is not required unless required by local rule or order of the court in which the appeal is pending.**”
[Emphasis added.]
A district judge (or BAP) should have the discretion to order that proposed orders be filed with motions; similarly, a district court (or BAP) should have discretion by local rule to require proposed orders.

46 PROCEDURAL ORDER. The district court or BAP may rule on a
47 motion for a procedural order—including a motion under Rule
48 9006(b) or (c)—at any time without awaiting a response. A party
49 adversely affected by the ruling may move to reconsider, vacate, or
50 modify it within 7 days after the procedural order is served.

51 (c) ORAL ARGUMENT. A motion will be decided
52 without oral argument unless the district court or BAP orders
53 otherwise.

54 (d) EMERGENCY MOTION.

55 (1) *Noting the Emergency.* When a movant
56 requests expedited action on a motion because irreparable
57 harm would occur during the time needed to consider a
58 response, the movant must insert the word “Emergency”
59 before the title of the motion.

60 (2) *Contents of the Motion.* The emergency motion
61 must

62 (A) be accompanied by an affidavit setting
63 out the nature of the emergency;

64 (B) state whether all grounds for it were
65 submitted to the bankruptcy court and, if not, why
66 the motion should not be remanded for the
67 bankruptcy court to reconsider;

68 (C) include the e-mail addresses, office

I suggest that you change this to “state whether the request was pursued via a motion to the bankruptcy court, and, if it was, state whether all grounds for it were submitted to the bankruptcy court, and, if they were not, state why the motion should not be remanded for the bankruptcy court to reconsider.”

(emphasis added). Sometimes it would be inappropriate for a motion relating to an appeal to be filed with the bankruptcy court (e.g., a motion to extend the time to file a brief).

69 addresses, and telephone numbers of moving
70 counsel and, when known, of opposing counsel and
71 any unrepresented parties to the appeal; and

72 (D) be served as prescribed by Rule 8011.

73 (3) *Notifying Opposing Parties.* Before filing an
74 emergency motion, the movant must make every
75 practicable effort to notify opposing counsel and any
76 unrepresented parties in time for them to respond. The
77 affidavit accompanying the emergency motion must state
78 when and how notice was given or state why giving it was
79 impracticable.

80 (e) POWER OF A SINGLE BAP JUDGE TO
81 ENTERTAIN A MOTION.

82 (1) *Single Judge's Authority.* A BAP judge may
83 act alone on any motion, but may not dismiss or otherwise
84 determine an appeal, deny a motion for leave to appeal, or
85 deny a motion for a stay pending appeal if denial would
86 make the appeal moot.

87 (2) *Reviewing a Single Judge's Action.* The BAP
88 may review a single judge's action, either on its own
89 motion or on a party's motion.

90 (f) FORM OF DOCUMENTS; PAGE LIMITS; NUMBER
91 OF COPIES.

92 (1) *Format of a Paper Document.* Rule 27(d)(1)
93 F.R.App.P. applies in the district court or BAP to a paper
94 version of a motion, response, or reply.

95 (2) *Format of an Electronically Filed Document.*
96 A motion, response, or reply filed electronically must
97 comply with the requirements for a paper version regarding
98 covers, line spacing, margins, typeface, and type style. It
99 must also comply with the page limits under paragraph (3).

100 (3) *Page Limits.* Unless the district court or BAP
101 orders otherwise:

102 (A) a motion or a response to a motion must
103 not exceed 20 pages, exclusive of the corporate
104 disclosure statement and accompanying documents
105 authorized by subdivision (a)(2)(C); and

106 (B) a reply to a response must not exceed
107 10 pages.

108 (4) *Paper Copies.* Paper copies must be provided
109 only if required by local rule or by an order in a particular
110 case.

111 (g) INTERVENING IN AN APPEAL. Unless a statute
112 provides otherwise, an entity that seeks to intervene in an appeal
113 pending in the district court or BAP must move for leave to
114 intervene and serve a copy of the motion on the parties to the

115 appeal. The motion or other notice of intervention authorized by
116 statute must be filed within 30 days after the appeal is docketed. It
117 must concisely state the movant’s interest, the grounds for
118 intervention, whether intervention was sought in the bankruptcy
119 court, why intervention is being sought at this stage of the
120 proceeding, and why participating as an amicus curiae would not
121 be adequate.

COMMITTEE NOTE

This rule is derived from former Rule 8011 and F.R.App.P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adjusting those requirements for electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R.App.P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party’s legal arguments.

Subdivision (a)(2)(B) clarifies the procedure for seeking to expedite an appeal. A motion under this provision seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion—which is addressed by subdivision (d)—typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases—such as when there is an urgent need to resolve the appeal quickly to prevent harm—a party may file a motion to expedite the appeal as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within 7 days after service of the order.

Add here: "and state, if the motion was one that was presented first to the bankruptcy court,"

Subdivision (c) continues the practice of former Rule 8011(c) and F.R.App.P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving party must also explain the steps taken to notify opposing counsel and any unrepresented parties in advance of filing the emergency motion and, if they were not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R.App.P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason, the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R.App.P. 27(d)(1). When paper versions of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the specified rules regarding covers and format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedure for seeking to intervene in a proceeding that has been appealed. It is based on F.R.App.P. 15(d), but it also requires the moving party to explain why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

COMMENTS OF JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. BANKR. P. 8016 and 8018

1. Rule 8016(f). I recommend that Rule 8016(f) be changed to read:

FAILURE TO FILE ON TIME. If an appellant or appellee fails to file a principal brief on time, or within an extended time authorized by the district court or BAP, the appeal or cross-appeal may be dismissed after notice and opportunity to show cause why dismissal ought not be ordered. Unless the district court or BAP orders otherwise, an appellee who fails to file a responsive brief will not be heard at oral argument on the appeal, and an appellant who fails to file a responsive brief will not be heard at oral argument on the cross-appeal.

See Serra Builders, Inc. v. John Hanson Savings Bank FSB (In re Serra Builders, Inc.), 970 F.2d 1309, 1311 (4th Cir. 1992) (dismissal for failure to designate record requires notice and opportunity for appellant to explain the delay). Without the change being made, a district judge or BAP might read the rule as permitting dismissal immediately upon the principal brief not being filed on time.

2. Rule 8018. I recommend that Rule 8018 include a concluding paragraph (f):

(f) FAILURE TO FILE ON TIME. Rule 8016(f) addresses the failure of an appellant (or of an appellee on a cross appeal) timely to file a principal brief.

Rule 8018, dealing with the time to file a brief, is the logical place for a rule regarding failure to file an opening brief ("principal brief") on time. Instead, it appears in Rule 8016 whose title "Rule 8016. Cross-Appeals" gives no hint that it contains the rule regarding failure timely to file a brief. Although I understand why it appears in Rule 8016, there should be a cross-reference to it in Rule 8018.

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013