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BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

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Memorandum

To: Committee on Rules of Practice and Procedure

From: Mary P. Sharon, Clerk, U.S. Bankruptcy Appellate Panel for the First Circuit

Date: February 15, 2012

RE: **Comments on Proposed Amendments to the Federal Rules of Bankruptcy Procedure Part VIII**

In offering the following comments to the proposed amendments to Part VIII of the Federal Rules of Bankruptcy Procedure, please note that "order" is shorthand for "judgment, order, or decree."

Rule 8001.

Subsection (c): As proposed, the rule provides that a "document must be sent electronically under these Part VIII rules, . . . " Courts typically only address documents that are filed or docketed, not sent. It would be clearer to use language such as that found in F.R.A.P 1(a)(2)("When these rules provide for filing a document in the district court, . . ."). Given the different local treatment of pro se filers, an adoption of F.R.A.P. 1(a)(2) would be preferable.

Rule 8002.

Subsection (a)(2): It appears that "of the judgment, order, or decree" was cut off from the end of the sentence.

Subsection (b)(3): The rule addresses appealing the order disposing of one of the listed motions. The title of the subsection should reflect that the rule addresses appealing the order rather than the motion.

Rule 8003.

Subsection (a)(3). The subsection addresses the contents of the notice of appeal. Presently, a notice of appeal must conform to the Official Form, contain the names and addresses of parties and their attorneys, and be accompanied by the fee. Under some local rules, the appellant must

file a copy of the order. The proposed rule would require the conforming notice, a copy of the order, and the fee. Under F.R.A.P. 3(c), a notice of appeal must specify the parties, designate the order, and name the appellate court. We would suggest that the rule require the conforming notice, a copy of the order, the names and addresses of the parties and their attorneys, and the fee.

Subsection (c): The subsection addresses the transmittal of the appeal. The title of the subsection and subsection (c)(3) should reflect the same by substituting "transmittal" for "service."

Subsection (d)(2): The proposed language provides that the clerk must docket the appeal under the title of the bankruptcy court action and must identify the appellant. While F.R.A.P. 12(a) has the same provision, in bankruptcy context the reference to the action is not as clear. At the bankruptcy court, a debtor files a petition which results in what is commonly referred to as the "main case." Disputed matters either arise via a "contested matter" or via an adversary proceeding. See Fed. R. Bankr. P. 9014 and 7001. An adversary proceeding is given a separate case number and will have a plaintiff and defendant. Accordingly, when we docket an appeal, we create a caption that has the main case information at the top (In re [debtor]), and the information about the appellant and appellee below. The appellant and appellee will also be identified as plaintiff and defendant where applicable. We will give adversary proceeding information where applicable. It would be difficult to capture these permutations in a rule. Accordingly, we would suggest that the rule provide that "the clerk must docket the appeal and identify the appellant." This comment also applies to proposed Rule 8004(c)(2).

Rule 8004.

Subsection(a): We would ask that the rule refer to an "appeal from an interlocutory order, decree, or judgment" instead of just order or decree. We frequently see attempts to appeal a partial judgment which can be interlocutory.

Subsection (a)(3): The appellant appealing from an interlocutory order would be required to file a proof of service. There is no such requirement in Proposed Rule 8003 for an appellant filing a notice of appeal from a final order. Moreover, the proof of service applies only to the notice of appeal and not to the corresponding motion for leave to appeal (which would be presumed under Proposed Rule 8013(a)). It would be clearer and more uniform if this rule adopted the transmittal language found in Proposed Rule 8003(c).

Subsection(c)(3): The last sentence provides that if the motion for leave to appeal is denied, the appellate court "must" dismiss the appeal. We would prefer to substitute "may" for "must" as upon occasion, we deny motions for leave as moot because the order was, in fact, a final order.

Rule 8005.

Subsection (a)(1): The proposed language does not specify whether the statement needs to be a separate document. Given that the language of any Official Form (presently there is no Official

Form for elections) would likely be brief, an appellant could comply by pasting the language of the form in the notice of appeal. It is much clearer for the courts and the parties and when reading the docket if the election is a separate form.

Subsection (c): The rule proposes that a motion to determine the validity of an election be filed where the case is "pending." "Pending" will be a reference used for direct appeals only. To use "pending" here suggests that the bankruptcy court would consider the matter. Under the proposed rule, a party has 14 days after the election filing to file such a motion. At that point, however, the case will have been transmitted to the BAP or the district court. Those courts should decide the matter. We would suggest substituting "docketed" for "pending." We also notice that in the comments to this section, there is a statement that nothing would prevent "a court" from determining the validity of the election. This suggests that even after an appeal is docketed at the BAP, a bankruptcy court could sua sponte rule on the validity of an election.

Rule 8006.

Subsection (b) and (d): Proposed subsection (b) provides that a matter is pending at the bankruptcy court for 30 days after the notice of appeal and thereafter at the BAP or district court. Subsection (d) provides that only the court where the matter is pending may certify a direct review. As written, if the certification is filed with the bankruptcy court within the 30 days but that court fails to rule within that time, it no longer has jurisdiction. It is unclear how the bankruptcy court would transmit the motion to the court with jurisdiction.

Subsection (g): It would be clearer if the rule referenced F.R.A.P. 5.

Rule 8008.

Subsection (a), (b), and (c): The proposed rules provide for actions that may or may not be in writing and reflected on the docket. In (a)(3) and (c), the bankruptcy judge can "state" what it would do. It is unclear how this would be memorialized. In (b), a movant can provide the appellate court with "notice." As the movant is requesting relief, the movant should file a motion. See Proposed Rule 8013(a).

Rule 8009.

Subsection (a): Subsection (a)(1)(A) provides that the appellant should file the designation at the bankruptcy court. The directions for the [cross] appellee in (a)(2) and (3) do not specify the court.

Subsection (c): The proposed rule does not specify what constitutes "unavailable." We can foresee appellants claiming a transcript is unavailable based on their inability to pay.

Rule 8011.

Subsection (a)(2)(D): The subsection would be simpler if it read: Unless the BAP or district court orders otherwise, no paper copy is required.

Rule 8013.

Subsection (g): It is unclear if this is necessary or whether the moving party would have standing.

Rule 8014.

Subsection (f): The subsection refers to filing a supplement via a "signed submission." We would prefer to see this via a motion.

Rule 8016.

Subsection (f): It is unclear why this is tucked in here when it refers to all briefs and not just cross-appeals. Also, this appears to duplicate Proposed Rule 8018(a)(4).

Rule 8017.

Subsection (g): We prefer the presumption of no oral argument. As such, we would suggest that the rule provide: Unless the BAP or district court orders otherwise, an amicus curiae may not participate in oral argument.

Rule 8019.

Subsection (d): We believe this rule is unnecessary.
Subsection (g): This has no mechanism to inform the court of the agreement.

Rule 8022.

Subsection (a)(2): It would give the courts more flexibility to say that there is no oral argument unless the court orders otherwise. An outright ban seems unnecessary.

Rule 8023.

The rule provides that the appellate court must dismiss if the parties file an agreement. As parties are requesting relief, they should file a motion. See Proposed Rule 8013(a).
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