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Comment on proposed Fed. R. Bankr. P. 8019(f) and accompanying proposed Committee Note

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Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Sutton:

The undersigned submits comment on the proposed Committee Note for the proposed Fed. R. Bankr. P. 8019(f) "Nonappearance of a party."

FED. R. BANKR. P. 8019(f) AS PROPOSED BY THE STANDING COMMITTEE ON BANKRUPTCY RULES:

(f) NONAPPEARANCE OF A PARTY.

If the appellee fails to appear for argument, the district court or BAP may hear the appellant's argument. If the appellant fails to appear for argument, the district court or BAP may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the district court or BAP orders otherwise.

PROPOSED COMMITTEE NOTE ON PROPOSED FED. R. BANKR. P. 8019:

....

The remainder of this rule adopts the provisions of F.R.App.P. [sic]34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the

appellee does not appear, subdivision (e) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

COMMENT:

It seems that the proposed Committee Note interprets the proposed rule as empowering a district court or bankruptcy appellate panel to postpone oral argument in the event an appellee fails to appear: "[I]f the appellee does not appear, subdivision (e) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument *in that situation*, it would be authorized to do so." This does not seem to be supported by the text of the proposed rule. While the proposed rule empowers district court or bankruptcy appellate panel to hear the argument of an appellant if the appellee fails to appear, and vice versa, the court may postpone argument *only* if *neither* party appears. Such postponement power presumably lies in the language "unless the district court or BAP orders otherwise." Postponement is not an option if at least one party appears. In that event, the only option open to the court is whether or not to hear the appearing party. The Committee Note is an impermissible expansion of the text of the proposed rule.

The import of such a discrepancy is that a party may compliantly appear for oral argument, and be forced to reappear at a postponed hearing merely because the other party failed to appear and the appellate reviewer wishes to afford the non-appearing party an additional opportunity to argue, based on the erroneous language of the Committee Note. A party that properly appears for scheduled oral argument ought not, without compensation, be forced to reappear merely because the other party failed to appear. The proposed rule permits no such eventuality. The Committee Note erroneously does.

Thank you for the Committee's consideration of this comment on the proposed Fed. R. Bankr. P. 8019 (f) and its proposed Committee Note.

Regards,

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