

COMMENTS OF BANKRUPTCY JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. APP. P. 6(b)(2)(B)(iii)

13-AP-D

I suggest that proposed Fed. R. App. P. 6(b)(2)(B)(iii) be changed to read:

- (iii) The record on appeal consists of:
- the redesignated record as provided above;
 - the proceedings in the district court or bankruptcy appellate panel; and
 - ~~a certified copy of the docket entries prepared maintained by the clerk under Rule 3(d) of the district court or bankruptcy appellate panel.~~

[Deletions noted by strike-throughs; addition noted by highlighting.]

The requirement of a **certified** copy of the docket entries is unnecessary: the district court clerk's (or BAP clerk's) transmission of a copy of the docket entries or the docket entries' availability on the district court's (or BAP's) electronic docket is in itself a certification that it is a copy of the docket entries.¹ The district court clerk (or BAP clerk) does not **prepare** the docket entries, and instead **maintains** the docket entries.

Rule 3(d), referred to in the current proposal, does not refer to **certifying** the copy of the docket entries or **preparing** the docket entries. Rule 3(d) provides in relevant part:

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. **The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice.** The district clerk must note, on each

¹ I have made a similar recommendation that proposed Fed. R. Bankr. P. 8009(b)(4) be changed to add that the record on appeal includes "the docket entries maintained by the bankruptcy clerk."

copy, the date when the notice of appeal was filed.

[Emphasis added.] There is no reason to refer in 6(b)(2)(B)(iii) to Rule 3(d): upon complying with Rule 3(d), a copy of the docket entries will already be in the court of appeals. It suffices in Rule 6(b)(2)(B)(iii) to refer to the docket entries maintained by the clerk of the lower court.²

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

² Indeed, the docket entries are available electronically via PACER, it is questionable why the lower court needs to transmit to the court of appeals a copy of the docket entries with the notice of appeal: they will be part of the record under Rule Rule 6(b)(2)(B)(iii), and there is no apparent reason why they will be needed beforehand. This suggests that eventually the Advisory Committee should propose that Rule 3(d)(1) be amended to provide:

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal ~~and of the docket entries and any later docket entries~~ to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

At the same time, there is another questionable part of Rule 3(d)(1): in this day of electronic filing it makes little sense to require the clerk to serve the notice of appeal instead of requiring that the appellant to file a certificate of service of the notice of appeal, but that is another issue.