

missed and, if the first appeal is to the district court or bankruptcy appellate panel, the first appeal shall be dismissed. Paragraph (3) gives an appellant or cross appellant an opportunity to file an appeal to the district court or bankruptcy appellate panel if the court of appeals dismisses the direct appeal because the judgment, order, or decree appealed from is not final. Since the court of appeals has determined the judgment, order, or decree is not final, the new appeal is an appeal for which leave is necessary.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

Subdivisions (a) and (b) are amended to conform to the 1984 amendments.

Subdivision (d) is abrogated because there is no direct appeal to the court of appeals under 28 U.S.C. §158, as enacted by the 1984 amendments.

Subdivision (e) is new. Section 158(b)(1) of title 28 authorizes the circuit councils to establish bankruptcy appellate panels. Appeals may not be heard by these panels unless the district court authorizes the referral and all parties to the appeal consent. This rule requires that the parties consent to such an appeal; however, the method of consenting to an appeal may be the subject of a rule promulgated by a circuit council under Rule 8018.

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

Reference to the Official Form number is deleted in anticipation of future revision and renumbering of the Official Forms.

NOTES OF ADVISORY COMMITTEE ON RULES—1997
AMENDMENT

This rule is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. §158. As amended, a party may—without obtaining leave of the court—appeal from an interlocutory order or decree of the bankruptcy court issued under §1121(d) of the Code increasing or reducing the time periods referred to in §1121.

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. §158(c)(1) to have an appeal heard by the district court instead of the bankruptcy appellate panel service. This subdivision is applicable only if a bankruptcy appellate panel service is authorized under 28 U.S.C. §158(b) to hear the appeal.

GAP Report on Rule 8001. The heading of subdivision (e) is amended to clarify that it applies to the election to have an appeal heard by the district court instead of the BAP. The final paragraph of the Committee Note is revised to clarify that subdivision (e) is applicable only if a BAP is authorized to hear the appeal.

COMMITTEE NOTES ON RULES—2008 AMENDMENT

Subdivision (e) is amended by redesignating the subdivision as (e)(1) and adding new subdivision (e)(2). Subdivision (e)(2) explicitly recognizes the district court's authority to transfer an appeal to the bankruptcy appellate panel on two conditions: first, all of the parties to the appeal must have agreed to request the withdrawal of the election to have the district court hear the appeal; and, second, the district court must decide whether to grant the request for withdrawal. The district court has discretion either to keep the case or transfer it to the bankruptcy appellate panel, which will prevent strategic behavior by parties and avoid the wasting of judicial resources.

Subdivision (f) is added to the rule to implement the 2005 amendments to 28 U.S.C. §158(d). That section authorizes appeals directly to the court of appeals, with that court's consent, upon certification that a ground for the appeal exists under §158(d)(2)(A)(i)–(iii). Certification can be made by the court on its own initiative under subdivision (f)(4), or in response to a request of a party or a majority of the appellants and appellees (if any) under subdivision (f)(3). Certification also can be

made by all of the appellants and appellees under subdivision (f)(2)(B). Under subdivision (f)(1), certification is effective only when a timely appeal is commenced under subdivision (a) or (b), and a notice of appeal has been timely filed under Rule 8002. These actions will provide sufficient notice of the appeal to the circuit clerk, so the rule dispenses with the uncodified temporary procedural requirements set out in §1233(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8.

The rule adopts a bright-line test for identifying the court in which a matter is pending. Under subdivision (f)(2), the bright-line chosen is the “docketing” under Rule 8007(b) of an appeal of an interlocutory order or decree under 28 U.S.C. §158(a)(2) or a final judgment, order or decree under 28 U.S.C. §158(a)(1), or the granting of leave to appeal any other interlocutory judgment, order or decree under 28 U.S.C. §158(a)(3), whichever is earlier.

To ensure that parties are aware of a certification, the rule requires either that it be made on the Official Form (if being made by all of the parties to the appeal) or on a separate document (whether the certification is made on the court's own initiative or in response to a request by a party). This is particularly important because the rule adopts the bankruptcy practice established by Rule 8001(a) and (b) of requiring a notice of appeal in every instance, including interlocutory orders, of appeals from bankruptcy court orders, judgments, and decrees. Because this requirement is satisfied by filing the notice of appeal that takes the appeal to the district court or bankruptcy appellate panel in the first instance, the rule does not require a separate notice of appeal if a certification occurs after a district court or bankruptcy appellate panel decision.

A certification under subdivision (f)(1) does not place the appeal in the circuit court. Rather, the court of appeals must first authorize the direct appeal. Subdivision (f)(5) therefore provides that any party intending to pursue the appeal in the court of appeals must seek that permission under Rule 5 of the Federal Rules of Appellate Procedure. Subdivision (f)(5) requires that the petition for permission to appeal be filed within 30 days after an effective certification.

Changes Made After Publication. The second paragraph of the Committee Note was amended to identify more specifically the different ways in which the certification of a direct appeal to the court of appeals.

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in subd. (f)(5), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Rule 8002. Time for Filing Notice of Appeal

(a) **TEN-DAY PERIOD.** The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) **EFFECT OF MOTION ON TIME FOR APPEAL.** If any party makes a timely motion of a type spec-

ified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

(1) to amend or make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;

(2) to alter or amend the judgment under Rule 9023;

(3) for a new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(c) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 29, 1994, eff. Aug. 1, 1994; Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON RULES—1983

This rule is an adaptation of Rule 4(a) F.R.App.P. The time to appeal from a judgment, order, or decree of a bankruptcy judge is 10 days, rather than the 30 days

provided for in the civil practice. The shortened time is specified in order to obtain prompt appellate review, often important to the administration of a case under the Code. If a timely notice of appeal is filed, other parties have an additional 10 days within which to file a notice of appeal. A notice of appeal filed within the additional 10 day period by an appellee is a cross appeal, but there is a separate appeal if a non-appellee files a notice of appeal within that 10 day period. The district courts and bankruptcy appellate panels have inherent authority to consolidate appeals.

Subdivision (b) is essentially the same as Rule 4(a)(4) of the F.R.App.P.

Subdivision (c) is similar to former Bankruptcy Rule 802(c). To expedite the disposition of appeals the maximum extension of time is 20 days instead of the 30 days provided by Rule 4(a)(5) of the F.R.App.P. Subject to the exceptions set forth in subdivision (c), the court may extend the time for taking an appeal when a motion for extension is filed after the expiration of the original 10 day period but no later than 20 days after the expiration of the original 10 day period. Orders of the bankruptcy court relating to the sale of property, extension of credit, confirmation of a plan, dismissal or conversion of the case, and approval of the disclosure statement are of such significance to the administration of the case, the parties in interest, and third parties that this subdivision requires that either an appeal or a motion for extension be filed within the original 10 day period.

If a timely notice of appeal is not filed, no appeal may be taken later. Former Bankruptcy Rule 803, which provided that a referee's judgment became final when the appeal period expired, has been omitted as unnecessary.

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

Subdivision (a) is amended to conform to F.R.App.P. 4(a)(2) which is designed to avoid the loss of the right to appeal when a notice of appeal is filed prematurely.

Subdivision (b)(1) is deleted because Rule 9015 was abrogated in 1987.

NOTES OF ADVISORY COMMITTEE ON RULES—1994
AMENDMENT

These amendments are intended to conform to the 1993 amendments to F.R.App.P. 4(a)(4) and 6(b)(2)(i).

This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.

Because a notice of appeal will ripen into an effective appeal upon disposition of a postjudgment motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. The appeal may be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a postjudgment motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the rule does not require an additional notice of appeal in that situation.

The amendment provides that a notice of appeal filed before the disposition of a postjudgment tolling motion is sufficient to bring the judgment, order, or decree specified in the original notice of appeal to the district court or bankruptcy appellate panel. If the judgment is altered upon disposition of a postjudgment motion, however, and if a party who has previously filed a no-

tice of appeal wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Subdivision (b) is also amended to include, among motions that extend the time for filing a notice of appeal, a motion under Rule 9024 that is filed within 10 days after entry of judgment. The addition of this motion conforms to a similar amendment to F.R.App.P. 4(a)(4) made in 1993, except that a Rule 9024 motion does not toll the time to appeal unless it is filed within the 10-day period. The reason for providing that the motion extends the time to appeal only if it is *filed* within the 10-day period is to enable the court and the parties in interest to determine solely from the court records whether the time to appeal has been extended by a motion for relief under Rule 9024.

NOTES OF ADVISORY COMMITTEE ON RULES—1997
AMENDMENT

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be *filed* within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to protect parties that file timely motions to extend the time to appeal from the harshness of the present rule as demonstrated in *In re Mouradick*, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

The subdivision is amended further to prohibit any extension of time to file a notice of appeal—even if the motion for an extension is filed before the expiration of the original time to appeal—if the order appealed from grants relief from the automatic stay, authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under §365, or approves a disclosure statement or confirms a plan. These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b).

GAP Report on Rule 8002. No changes to the published draft.

Rule 8003. Leave to Appeal

(a) **CONTENT OF MOTION; ANSWER.** A motion for leave to appeal under 28 U.S.C. §158(a) shall contain: (1) a statement of the facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of those questions and of the relief sought; (3) a statement of the reasons why an appeal should be granted; and (4) a copy of the judgment, order, or decree complained of and of any opinion or memorandum relating thereto. Within 10 days after service of the motion an adverse party may file with the clerk an answer in opposition.

(b) **TRANSMITTAL; DETERMINATION OF MOTION.** The clerk shall transmit the notice of appeal,

the motion for leave to appeal and any answer thereto to the clerk of the district court or the clerk of the bankruptcy appellate panel as soon as all parties have filed answers or the time for filing an answer has expired. The motion and answer shall be submitted without oral argument unless otherwise ordered.

(c) **APPEAL IMPROPERLY TAKEN REGARDED AS A MOTION FOR LEAVE TO APPEAL.** If a required motion for leave to appeal is not filed, but a notice of appeal is timely filed, the district court or bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing shall consider the notice of appeal as a motion for leave to appeal. Unless an order directing that a motion for leave to appeal be filed provides otherwise, the motion shall be filed within 10 days of entry of the order.

(d) **REQUIREMENT OF LEAVE TO APPEAL.** If leave to appeal is required by 28 U.S.C. §158(a) and has not earlier been granted, the authorization of a direct appeal by a court of appeals under 28 U.S.C. §158(d)(2) shall be deemed to satisfy the requirement for leave to appeal.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 23, 2008, eff. Dec. 1, 2008.)

NOTES OF ADVISORY COMMITTEE ON RULES—1983

Subdivisions (a) and (b) of this rule are derived from Rules 5 and 6 F.R.App.P. The motion for leave to appeal is addressed to the district court or the bankruptcy appellate panel, although filed with the clerk of the bankruptcy court.

Subdivision (c) provides that if a party mistakenly believes the order appealed from is final and files only a notice of appeal, the appeal is not automatically dismissed. The district court or bankruptcy appellate panel has the options to direct that a motion be filed, to decide exclusively on the papers already filed to grant leave to appeal, or to deny leave to appeal. Cf. 28 U.S.C. §2103.

COMMITTEE NOTES ON RULES—2008 AMENDMENT

The rule is amended to add subdivision (d) to solve the jurisdictional problem that could otherwise ensue when a district court or bankruptcy appellate panel has not granted leave to appeal under 28 U.S.C. §158(a)(3). If the court of appeals accepts the appeal, the requirement of leave to appeal is deemed satisfied. However, if the court of appeals does not authorize a direct appeal, the question of whether to grant leave to appeal remains a matter to be resolved by the district court or the bankruptcy appellate panel.

Changes Made After Publication. No changes were made after publication.

Rule 8004. Service of the Notice of Appeal

The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant or, if a party is not represented by counsel, to the party's last known address. Failure to serve notice shall not affect the validity of the appeal. The clerk shall note on each copy served the date of the filing of the notice of appeal and shall note in the docket the names of the parties to whom copies are mailed and the date of the mailing. The clerk shall forthwith transmit to the United States trustee a copy of the notice of appeal, but failure to transmit