

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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May 10, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Rules 8002(b) and 8006 of the
Federal Rules of Bankruptcy Procedure

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to transmit proposed amendments to Bankruptcy Rules 8002(b) and 8006 for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in December, 1992. Comments were received from three respondents after publication of the preliminary draft. A summary of the comments received after publication of the preliminary draft is enclosed. A public hearing was scheduled to be held in Washington, D.C. on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify. The proposed amendments to Rules 8002(b) and 8006 are not the subject of substantial controversy.

The Advisory Committee considered the three written comments received from the bench and bar, as well as the recommendations of the Style Subcommittee. Except for several stylistic changes, and the deletion of a sentence in the committee note to Rule 8002, the Advisory Committee has not made any changes to the proposed amendments subsequent to publication of the preliminary draft. The change to the committee note is explained below.

A summary of the proposed amendments to Rules 8002(b) and 8006 is provided for your convenience:

(1) Rule 8002(b). Time for Filing Notice of Appeal.

This rule is amended to conform to the proposed amendments to F.R.App.P. 4(a)(4) in two respects: (1) to add a motion for relief from a judgment or order pursuant to F.R.Civ.P. 60 (made applicable by Bankruptcy Rule 9024) to the list of postjudgment motions that toll the time for filing a notice of appeal, and (2) to provide that a notice of appeal filed prior to disposition of a postjudgment motion does not become a nullity, but is suspended until such disposition.

The proposed amendments to Rule 8002(b) differ from the proposed amendments to F.R.App.P. 4(a)(4) in one respect. Instead of requiring that the motion for relief from a judgment under Rule 9024 be "served" within 10 days after entry of the judgment in order to toll the appeal time, the proposed amendment to Rule 8002(b) requires that the motion be "filed" within that 10-day period. The reason for recommending that filing be required within the 10-day period is to achieve greater certainty for parties in interest who want to determine whether the motion has been made. Greater certainty is more important in bankruptcy cases, in which there is only a 10-day appeal period and parties often rely on finality of orders before closing transactions, then it is in district court civil actions where the time to appeal is 30 days.

In response to the public comment, the Advisory Committee deleted the following sentence that appeared in the published version of the committee note to Rule 8002: "This amendment eliminates the difficulty of determining whether a postjudgment motion made within 10 days after entry of the judgment is a Rule 9023 motion, which tolls the time for filing an appeal, or a Rule 9024 motion, which historically has not tolled the time." The Committee believes that this sentence is not entirely accurate in that, under the present rules, a Rule 9023 (Civil Rule 59) motion only has to be served within the 10-day period to toll the appeal time. If the motion is both served and filed within the 10-day period, under the amended rule there will be no need for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. However, if a motion is served within the 10-day period, but not filed until after the 10-day period, it may be necessary for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. The Advisory Committee understands that the need for the court to distinguish between Rule 9023 and Rule 9024 motions may be temporary in that the Civil Rules Committee is considering changes to require that Rule 59 motions be filed within the 10-day period.

(2) Rule 8006. Record and Issues on Appeal.

The proposed amendment to this rule is related to the proposed amendment to Rule 8002(b). The purpose of the amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made that suspends the time for filing a notice of appeal under Rule 8002(b). The only changes that have been made subsequent to the publication of the proposed amendments to Rule 8006 are stylistic.

PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF BANKRUPTCY PROCEDURE

Rule 8002. Time For Filing Notice of Appeal

* * * * *

1 (b) EFFECT OF MOTION ON TIME FOR APPEAL. If any party makes
2 a timely motion of a type specified immediately below, the time
3 for appeal for all parties runs from the entry of the order
4 disposing of the last such motion outstanding. This provision
5 applies to a timely motion: is filed by any party:

6 (1) ~~under Rule 7052(b) to amend or make additional findings of~~
7 ~~fact under Rule 7052, whether or not an alteration of granting~~
8 ~~the motion would alter the judgment would be required if the~~
9 ~~motion is granted;~~

10 (2) ~~under Rule 9023 to alter or amend the judgment under Rule~~
11 ~~9023; or~~

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

13 (4) for relief under Rule 9024 if the motion is filed within 10
14 days after the entry of judgment. ~~the time for appeal for all~~
15 ~~parties shall run from the entry of the order denying a new trial~~
16 ~~or granting or denying any other such motion. A notice of appeal~~
17 ~~filed before the disposition of any of the above motions shall~~
18 ~~have no effect; a new notice of appeal must be filed.~~

19 A notice of appeal filed after announcement or entry of the
20 judgment, order, or decree but before disposition of any of the
21 above motions is ineffective to appeal from the judgment, order,
22 or decree, or part thereof, specified in the notice of appeal,
23 until the date of the entry of the order disposing of the last

24 such motion outstanding. Appellate review of an order disposing
25 of any of the above motions requires the party, in compliance
26 with Rule 8001, to amend a previously filed notice of appeal. A
27 party intending to challenge an alteration or amendment of the
28 judgment, order, or decree shall file an amended notice of appeal
29 within the time prescribed by this Rule 8002 measured from the
30 entry of the order disposing of the last such motion outstanding.
31 No additional fees ~~shall~~ will be required for ~~such~~ filing an
32 amended notice.

* * * * *

COMMITTEE NOTE

1 These amendments are intended to conform to the 1993
2 amendments to F.R.App.P. 4(a)(4) and 6(b)(2)(i).
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4 This rule as amended provides that a notice of appeal
5 filed before the disposition of a specified postjudgment
6 motion will become effective upon disposition of the motion.
7 A notice filed before the filing of one of the specified
8 motions or after the filing of a motion but before
9 disposition of the motion is, in effect, suspended until the
10 motion is disposed of, whereupon, the previously filed
11 notice effectively places jurisdiction in the district court
12 or bankruptcy appellate panel.
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14 Because a notice of appeal will ripen into an effective
15 appeal upon disposition of a postjudgment motion, in some
16 instances there will be an appeal from a judgment that has
17 been altered substantially because the motion was granted in
18 whole or in part. The appeal may be dismissed for want of
19 prosecution when the appellant fails to meet the briefing
20 schedule. But, the appellee may also move to strike the
21 appeal. When responding to such a motion, the appellant
22 would have an opportunity to state that, even though some
23 relief sought in a postjudgment motion was granted, the
24 appellant still plans to pursue the appeal. Because the
25 appellant's response would provide the appellee with
26 sufficient notice of the appellant's intentions, the rule
27 does not require an additional notice of appeal in that
28 situation.

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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 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.R. 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 ten-day period.

Rule 8006. Record and Issues on Appeal

1 Within 10 days after filing the notice of appeal as provided
2 in Rule 8001(a), ~~or~~ entry of an order granting leave to appeal,
3 or entry of an order disposing of the last timely motion
4 outstanding of a type specified in Rule 8002(b), whichever is
5 later, the appellant shall file with the clerk and serve on the
6 appellee a designation of the items to be included in the record
7 on appeal and a statement of the issues to be presented. Within
8 10 days after the service of the appellant's statement ~~of the~~
9 ~~appellant~~ the appellee may file and serve on the appellant a
10 designation of additional items to be included in the record on
11 appeal and, if the appellee has filed a cross appeal, the
12 appellee as cross appellant shall file and serve a statement of
13 the issues to be presented on the cross appeal and a designation
14 of additional items to be included in the record. A cross
15 appellee may, within 10 days of service of the cross appellant's
16 ~~statement of the cross appellant~~, file and serve on the cross
17 appellant a designation of additional items to be included in the
18 record. The record on appeal shall include the items so
19 designated by the parties, the notice of appeal, the judgment,
20 order, or decree appealed from, and any opinion, findings of
21 fact, and conclusions of law of the court. Any party filing a
22 designation of the items to be included in the record shall
23 provide to the clerk a copy of the items designated or, if the
24 party fails to provide the copy, the clerk shall prepare the copy
25 at the party's expense ~~of the party~~. If the record designated by

26 any party includes a transcript of any proceeding or a part
27 thereof, the party shall, immediately after filing the
28 designation, deliver to the reporter and file with the clerk a
29 written request for the transcript and make satisfactory
30 arrangements for payment of its cost. All parties shall take any
31 other action necessary to enable the clerk to assemble and
32 transmit the record.

COMMITTEE NOTE

1 The amendment to the first sentence of this rule is
2 made together with the amendment to Rule 8002(b), which
3 provides, in essence, that certain specified postjudgment
4 motions suspend a filed notice of appeal until the
5 disposition of the last of such motions. The purpose of
6 this amendment is to suspend the 10-day period for filing
7 and serving a designation of the record and statement of the
8 issues if a timely postjudgment motion is made and a notice
9 of appeal is suspended under Rule 8002(b). The 10-day
10 period set forth in the first sentence of this rule begins
11 to run when the order disposing of the last of such
12 postjudgment motions outstanding is entered. The other
amendments to this rule are stylistic.

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May 10, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Comments Received Subsequent to the
Publication of the Preliminary Draft of Proposed
Amendments to Bankruptcy Rules 8002(b) and 8006

A preliminary draft of the proposed amendments to Bankruptcy Rules 8002(b) and 8006 was circulated to members of the bench and bar in December 1992. A public hearing was scheduled to be held in Washington, DC, on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify.

The Advisory Committee on Bankruptcy Rules received letters from three commentators. Listed below are the names and addresses of the commentators and a summary of each comment.

- (1) Arnold P. Peter, Esq.
Chair, Committee on Federal Courts
of the State Bar of California
555 Franklin Street
San Francisco, CA 94102-4498
(April 13, 1993)

Mr. Peter reports that the California State Bar Committee on Federal Courts enthusiastically supports the proposed revisions to Rules 8002(b) and 8006. His letter does not contain any suggestions for further modifications.

(2) Hon. S. Martin Teel, Jr.
United States Bankruptcy Court for the
District of Columbia
United States Courthouse
Washington, DC 20001
(January 25, 1993)

Judge Teel suggests that the amendment to Rule 8002(b) provide that a Rule 9024 motion tolls the time to file an appeal if "made within the time for filing and serving a motion under Rule 9023" (instead of the proposed language: "if the motion is filed within 10 days after the entry of judgment"). Judge Teel suggests that linking the time for the Rule 9024 motion to the time for a Rule 9023 motion would be preferable for two reasons. First, the Advisory Committee's language will create only an illusion of certainty. Although there will be greater certainty regarding the making of a Rule 9024 motion, there will remain uncertainty because a Rule 9023 motion may toll the appeal time even if it is not filed within the ten day period. Second, Judge Teel comments that the Advisory Committee proposal will continue to require courts to determine whether a motion to reconsider a judgment is a Rule 9023 or a Rule 9024 motion if the motion is served but not filed within the 10-day period.

Judge Teel states that "[t]he obvious way to achieve the goal of certainty desired would be to amend Rules 7005, 7052 and 9023 to require that motions under Rules 7052 and 9023 be served and filed on the tenth day."

(3) Honorable Robert J. Kressel
Chief Judge
United States Bankruptcy Court for the
District of Minnesota
600 Towle Building
330 Second Avenue South
Minneapolis, Minnesota 55401
(April 9, 1993)

Judge Kressel apparently agrees with the requirement that a Rule 9024 motion be filed in order to toll the time to appeal, but suggests that the amendment go further to also require that a Rule 7052 motion or Rule 9023 motion be filed within ten days.

Judge Kressel also suggests that Rule 8002(c) be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment in order to toll the appeal period. Judge Kressel recognizes that this change to Rule 8002(c) may be outside the scope of the pending amendments, and has asked that the Advisory Committee consider it at its next opportunity.

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EVIDENCE RULES

May 7, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Amendments Regarding Uniform Local Rule Numbering,
Technical Amendments and Standing Orders

At the request of the Standing Committee, the Advisory Committee on Bankruptcy Rules, at its meeting on February 18, 1993, considered several proposals for rule amendments dealing with uniform local rule numbering, standing orders, and technical amendments. The proposed amendments to the Bankruptcy Rules that were reviewed by the Advisory Committee were based on language that was drafted in Asheville on December 18, 1992, by the reporter to the Standing Committee and the chairs and reporters of four advisory committees (the "Asheville draft"). After the Asheville meeting, the language was amended pursuant to several style recommendations of Bryan Garner.

The Advisory Committee on Bankruptcy Rules makes the following recommendations:

I. Bankruptcy Rule 9029 should be amended as follows:

**Rule 9029. Local Bankruptcy Rules;
Procedure When There is No Controlling Law**

- 1 (a) Local Bankruptcy Rules. Each district
- 2 court by action of a majority of the judges

3 thereof may make and amend rules governing
4 practice and procedure in all cases and
5 proceedings within the district court's bankruptcy
6 jurisdiction which are ~~not inconsistent~~ consistent
7 with, but not duplicative of, these rules and
8 which do not prohibit or limit the use of the
9 Official Forms. Rule 83 F.R.Civ.P. governs the
10 procedure for making local rules. A district
11 court may authorize the bankruptcy judges of the
12 district, subject to any limitation or condition
13 it may prescribe and the requirements of 83
14 F.R.Civ.P., to make and amend rules of practice
15 and procedure which are ~~not inconsistent~~
16 consistent with, but not duplicative of, these
17 rules and which do not prohibit or limit the use
18 of the Official Forms. Local rules must conform
19 to any uniform numbering system prescribed by the
20 Judicial Conference of the United States. ~~In all~~
21 ~~cases not provided for by rule, the court may~~
22 ~~regulate its practice in any manner not~~
23 ~~inconsistent with the Official Forms or with these~~
24 ~~rules or those of the district in which the court~~
25 ~~acts.~~

26 (b) Procedure When There is No Controlling
27 Law. A judge may regulate practice in any manner
28 consistent with federal laws, these rules,

29 Official Forms, and local rules of the district.
30 No sanction or other disadvantage may be imposed
31 for noncompliance with any requirement not in
32 federal laws, rules, Official Forms, or the local
33 rules of the district unless the alleged violator
34 has actual notice of the requirement.

COMMITTEE NOTE

1 This rule is amended to require [requires] that the
2 numbering of local rules conform with any uniform numbering
3 system that may be prescribed by the Judicial Conference.
4 Lack of uniform numbering might create unnecessary traps for
5 counsel and litigants. A uniform numbering system would
6 make it easier for an increasingly national bar and for
7 litigants to locate a local rule that applies to a
8 particular procedural issue.

9 This rule provides flexibility to the court in
10 regulating practice when there is no controlling law.
11 Specifically, it permits the court to regulate practice in
12 any manner consistent with federal laws [Acts of Congress],
13 with rules adopted under 28 U.S.C. § 2075, with Official
14 Forms, and with the district's local rules.

15 This rule recognizes that courts rely on multiple
16 directives to control practice. Some courts regulate
17 practice through the published Federal Rules and the local
18 rules of the court. In the past, some courts have also used
19 internal operating procedures, standing orders, and other
20 internal directives. This can lead to problems. Counsel or
21 litigants may be unaware of various directives. In
22 addition, the sheer volume of directives may impose an
23 unreasonable barrier. For example, it may be difficult to
24 obtain copies of the directives. Finally, counsel or
25 litigants may be unfairly sanctioned for failing to comply
26 with a directive. For these reasons, the amendment to this
27 rule disapproves imposing any sanction or other disadvantage
28 on a person for noncompliance with such an internal
29 directive, unless the alleged violator has actual notice of
30 the requirement.

31 There should be no adverse consequence to a party or
32 attorney for violating special requirements relating to
33 practice before a particular judge unless the party or

34 attorney has actual notice of those requirements.
35 Furnishing litigants with a copy outlining the judge's
36 practices -- or attaching instructions to a notice setting a
37 case for conference or trial -- would suffice to give actual
38 notice, as would an order in a case specifically adopting by
39 reference a judge's standing order and indicating how copies
40 can be obtained.

Discussion

The above draft differs from the "Asheville draft" in the following respects:

(1) The words "Acts of Congress" in subdivision (b) were used in the Asheville drafts. On Mr. Garner's recommendation, this phrase was changed to "federal statutes." The Advisory Committee on Bankruptcy Rules believes that "federal laws" is better so that case law is also included.

(2) The Asheville draft included the words "with Acts of Congress, with these rules, with Official Forms, and with local rules." Upon Mr. Garner's recommendation, the word "with" before "these rules" and "Official Forms" were deleted, but the word "with" was left before the words "local rules." The Advisory Committee believes that the word "with" also should be deleted before the words "local rules."

(3) In the last sentence of subdivision (b), the Asheville draft used the words "local rule," but that was subsequently changed to "local district rules." That change may work well for the Civil Rules, but could cause confusion in the Bankruptcy Rules. "Local district rules" could give the impression that it includes only local rules made by the district court, not the bankruptcy court. Therefore, the Advisory Committee recommends that the words "local rules of the district" be used.

(4) The words underlined in the Committee Note were added by the Advisory Committee to the text of the Committee Note drafted by Dean Coquillette. The bracketed words were deleted.

II. Bankruptcy Rule 8018 Should be Amended as Follows:

Rule 8018. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

- 1 (a) Local Rules by Circuit Councils and
2 District Courts. Circuit councils which have

3 authorized bankruptcy appellate panels pursuant to
4 28 U.S.C. § 158(b) and the district courts may by
5 action of a majority of the judges of the council
6 or district court make and amend rules governing
7 practice and procedure for appeals from orders or
8 judgments of bankruptcy judges to the respective
9 bankruptcy appellate panel or district court, ~~not~~
10 ~~inconsistent~~ consistent with, but not duplicative
11 of, the rules of this Part VIII. Local rules must
12 conform to any uniform numbering system prescribed
13 by the Judicial Conference of the United States.
14 Rule 83 F.R.Civ.P. governs the procedure for
15 making and amending rules to govern appeals. In
16 ~~all cases not provided for by rule, the district~~
17 ~~court or the bankruptcy appellate panel may~~
18 ~~regulate its practice in any manner not~~
19 ~~inconsistent with these rules.~~

20 (b) Procedure When There is No Controlling
21 Law. A bankruptcy appellate panel or district
22 judge may regulate practice in any manner
23 consistent with federal laws, these rules,
24 Official Forms, and local rules of the circuit
25 council or district court. No sanction or other
26 disadvantage may be imposed for noncompliance with
27 any requirement not in federal laws, rules,
28 Official Forms, or the local rules of the circuit

29 counsel or district court unless the alleged
30 violator has actual notice of the requirement.

COMMITTEE NOTE

1 The amendments to this rule conform to the
2 amendments to Rule 9029. See Committee Note to the
3 amendments to Rule 9029.

Discussion

The language of the proposed amendments to Rule 8018 set forth above contains the same variations from the "Asheville draft" that are contained in the proposed amendments to Rule 9029.

III. The Proposed Addition of a Rule on Technical Amendments Should Not be Adopted.

The Advisory Committee considered the following draft of a new rule on technical amendments:

Rule 9037. Technical and Conforming Amendments

1 The Judicial Conference of the United States
2 may amend these rules to correct errors in
3 spelling, cross-references, or typography, or to
4 make technical changes needed to conform these
5 rules to statutory changes.

COMMITTEE NOTE

1 This rule is added to enable the Judicial
2 Conference to make minor technical amendments to these
3 rules without having to burden the Supreme Court and
4 Congress with reviewing such changes. This delegation
5 of authority will relate only to uncontroversial,
6 nonsubstantive matters.

Recommendation

The Advisory Committee, by a unanimous vote, strongly urges that this rule, or any similar rule that would permit the promulgation of "technical amendments" without following the usual procedures under the Rules Enabling Act, not be adopted. Several reasons for this decision were expressed. Members are of the view that this rule is not necessary. True technical amendments (such as changing "magistrate" to "magistrate judge") are not urgent, could await the sending of a larger and more substantive package, and do not require any significant attention by the Supreme Court or Congress. For example, when the Bankruptcy Rules were amended to change "magistrate" to "magistrate judge," such changes were a very minor part of a large package of substantive changes. To use the words of the Committee Note, these technical amendments that are sent together with packages of substantive changes do not "burden the Supreme Court and Congress" in any significant way.

The Advisory Committee also is concerned that it is not always clear as to whether a certain change is "technical" or not. The Advisory Committee does not think that there is sufficient reason to depart from the usual rule-making procedures under the Rules Enabling Act, or for a delegation of rule-making power by the Supreme Court and Congress, merely because a proposed change may be viewed as "technical."

In the event that the Standing Committee does not adopt the recommendation of the Advisory Committee on Bankruptcy Rules, the alternative recommendation of the Advisory Committee is that the rule stop after the word "typography" so that it will state only the following: "The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography."