

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: JEFF MORRIS, REPORTER
RE: APPEAL RULES AMENDMENTS
DATE: JULY 23, 2005

The 2005 bankruptcy reform legislation included an amendment to 28 U.S.C. § 158 governing appeals. The new provision authorizes appeals directly to the courts of appeals from the bankruptcy court, the district court, or the bankruptcy appellate panel if there is a certification that the judgment, order, or decree being appealed fits the stated certification criteria set out in § 158(d)(2)(A)(i)-(iii). The court (bankruptcy, district, or BAP) can certify the matter either on its own motion, or on the motion of fewer than all of the parties to the appeal. If all of the parties to the appeal, including appellees, agree, they can make their own certification without the need to obtain court approval of the certification. Still another possibility exists. If a majority of the appellants and a majority of the appellees request certification, the court must make the certification.

This variety of ways in which certification might arise posed a number of difficult problems for the Subcommittee. The statute does not provide any guidance as to how to identify the proper court to issue a certification, so the Subcommittee concluded that the rules should adopt the convention that docketing of the appeal as set out in Rule 8007(b) should be the bright line for determining whether the matter is pending in a particular court. The rule also provides that the granting of leave to appeal a particular judgment, order, or decree has the same effect. This determination set the foundation for the way in which the rule has been drafted as will be

described below.

Another of the Subcommittee's fundamental decisions was to require a notice of appeal in each case in which there is a certification. This serves to place the certification process squarely within Part VIII of the Bankruptcy Rules and provides a number of procedural and mechanical benefits as a result. Requiring a notice of appeal in turn requires that the parties be aware that a certification determination or request has been made, and the Subcommittee determined that the rules should require that certifications be made on separate documents (or by an Official Form) similar to the separate document rule of Bankruptcy Rule 9021.

Finally, the variety of ways in which the certification can arise also drove the Subcommittee's decisions regarding the rules amendments. The certification can occur in the bankruptcy court in after it has already been appealed either to the district court or the bankruptcy appellate panel. The certification can come from the court itself, or from one, some, or all of the parties to the proceeding. Each of these routes to certification essentially require a somewhat different process, and the rule attempts to accommodate each of these possibilities.

Only two rules are amended. The Subcommittee on Privacy, Public Access, and Appeals recommends that the Advisory Committee approve the amendments to Rules 8001 and 8003.

Rule 8001 – Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals

The rule is amended by adding a new subdivision (d) to govern the certification of a judgment, order, or decree to the court of appeals. Subdivision (d)(1) requires that a notice of appeal be filed, and (d)(2) identifies the court in which the certification must be made. The identification of the court is based on whether an appeal of the matter has been docketed or leave

has been granted to appeal. It also includes the directive that if all of the appellants and appellees have joined to certify the matter, they must use an Official Form for the certification. That ensures that the proper information will be included and meets the “separate document” requirement. The rule also sets out the contents and service requirements for a certification request.

RULE 8003 – Leave to Appeal

The Subcommittee proposes a minor addition to Rule 8003. It provides that if the court of appeals authorizes a direct appeal, that authorization is deemed to satisfy the requirement for leave to appeal. This resolves any jurisdictional question that could arise if the lower court had not granted leave to appeal when the court of appeals authorized the direct appeal.