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BANKRUPTCY APPEALS - USEFUL REMINDERS AND CURRENT DEVELOPMENTS

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I. Introduction

This program addresses appellate practice issues for bankruptcy lawyers, both consumer and business practitioners, including recent decisions on finality of bankruptcy decisions for purposes of appeals, the ability to bypass intermediary appellate courts and take appeals directly to the circuit courts, equitable mootness and stays, and practical pointers for briefing and arguments.

II. Finality

Final as well as some interlocutory decisions of the bankruptcy court can be appealed. 28 U.S.C. § 158. Unlike the bankruptcy appellate panel or the district court, the court of appeals may only exercise jurisdiction over appeals that are final under 28 U.S.C. § 158(d)(1), with limited exceptions, as noted below.

A final order is one that "ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment." *In re Bender*, 586 F.3d 1159, 1163 (9th Cir. 2009) (citations omitted); *see also In re SK Foods, L.P.*, 676 F.3d 798 (9th Cir. 2012) ("A bankruptcy court order is considered final 'where it (1) resolves and seriously affects substantive rights and (2) finally determines the discrete issue to which it is addressed.'") (citations omitted)).

Bankruptcy cases involve litigation and resolution of many disputes; they are not simple two-party plaintiff-defendant lawsuits. The conclusion of bankruptcy cases depends on decisions on interim issues becoming final. Most circuits accordingly follow a flexible approach in determining whether an order is final for purposes of appeal in bankruptcy cases. *See e.g. In re Quigley Co.*, 676 F.3d 45, 51 (2d Cir. 2012) (bankruptcy orders are final if they "finally dispose of discrete disputes within the larger case"); *In re Bonner Mall Partnership*, 2 F.3d 899, 903-05 (9th Cir. 1993), *motion to vacate denied and cert. dismissed*, 513 U.S. 18 (1994); *In re Palm Coast*, 101 F.3d 253, 256 (2d Cir. 1996); *In re Blue Coal Corp.*, 986 F.2d 687, 689 (3rd Cir. 1993); *Brandt v. Ward Partners*, 242 F.3d 6, 13 (1st Cir. 2001). "[T]he concept of finality in bankruptcy cases, has traditionally been applied in a more pragmatic and less technical way . . . than in other situations." *McDow v. Dudley*, 662 F.3d 284, 287 (4th Cir. 2011). Under the flexible standard for determining whether an order is final, the circuit must determine "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm." *Bonner Mall*, 586 F.3d at 1164 (citations omitted).

In *Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809 (9th Cir. 2012), the Ninth Circuit acknowledged that "more flexible jurisdictional principles" apply in bankruptcy, but added that

the more flexible standard "applies only to appeals from orders issued by a bankruptcy appellate panel or by a district court hearing an appeal from a bankruptcy court." The court then explained that "these flexible jurisdictional principles 'do not apply to [section 1291] appeals from district judges sitting in bankruptcy.'" (*i.e*. when the reference has been withdrawn). 672 F.3d at 813-14.

Where an appeal is interlocutory, the appellant should seek leave to appeal. See 28 U.S.C. § 158(a), Bankruptcy Rule 8003. A notice of appeal from a non-final interlocutory order is treated as a motion for leave to appeal. Bankruptcy Rule 8003(c). *See In re Hallwood Energy, L.P.*, 2013 WL 524418 (N.D.Tex.) for a good discussion of the standards for appellate acceptance of interlocutory appeals.

Case law on finality in particular fact situations in bankruptcy cases is extensive. It matters. Parties have a right to appeal final orders; interlocutory appeals are discretionary. If a ruling on a subject such as qualification to serve as an estate professional is not decided until the end of the bankruptcy case, the practical consequences may be extremely onerous. *See, e.g. In re Federated Department Stores*, 44 F.3d 1310 (6th Cir. 1995), where Lehman Brothers was held not disinterested as a financial advisor years after the plan was confirmed, and long after providing services throughout the bankruptcy case at a rate of $250,000/month, a substantial portion of which was ordered to be disgorged.

III. BAP or District Court as the Initial Appellate Court

Bankruptcy appeals generally entail a two-step process. The initial appeal is to the district court or bankruptcy appellate panel (in those circuits where BAPs have been created). 28 U.S.C. § 158. In the most circuits, the circuit judicial councils have not made the determinations required to proceed with appeals without a BAP. 28 U.S.C. § 158(b)(1). Each BAP panel consists of three bankruptcy judges from the circuit who hear appeals decided outside of their districts. Under the 1994 Reform Act, appeals are heard by the BAP unless the appellant, at the time of filing the appeal, or the appellee, within 30 days after service of the notice of the appeal, elects to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1). *See also* Amended Order Continuing The Bankruptcy Appellate Panel of the Ninth Circuit, as amended through May 9, 1992 (setting 30-day deadline for objecting to reference in cases filed before effective date of 1994 Reform Act); Bankruptcy Rule 8001(e); *In re Hupp*, 383 B.R. 476 (9th Cir. BAP 2008) (election to district court must be in a separate writing without anything extraneous). The election must be accomplished according to the rules, and cannot be circumvented by a second appeal of the same order to the district court. In re Woodman, 686 F.3d 1263 (10th Cir. 2012). If all parties to the appeal and the district court agree, the election to the BAP may be withdrawn. Bankruptcy Rule 8001(e)(2).

The precedential effect of BAP decisions is problematic. The BAP has held that its decisions are binding upon all of the bankruptcy judges of the Ninth Circuit. *In re Ball,* 185 B.R. 595, 597 (9th Cir. BAP 1995); *In re Sierra Pacific Broadcasters,* 185 B.R. 575, 578 n.7 (9th Cir. BAP 1995). *Accord In re General Associated Investors Ltd. Partnership,* 159 B.R. 756, 760-61 (Bankr. D. Ariz. 1993); *contra In re Junes,* 76 B.R. 795, 797 (Bankr. D. Or. 1987), *aff'd on other grounds,* 99 B.R. 978 (9th Cir. BAP 1989); *In re Kao,* 52 B.R. 452, 453 (Bankr. D. Or. 1985). The Ninth Circuit has not ruled on the issue, but has held that district courts, by virtue of their status as Article III courts, are not bound by the decisions of bankruptcy judges, even when the

bankruptcy judges are sitting on the BAP as an appellate court. *Zimmer v. PBS Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1225 n. 3 (9th Cir. 2002) (noting that the binding nature of BAP decisions is still an open issue in the Ninth Circuit); *Bank of Maui v. Estate Analysis, Inc.,* 904 F.2d 470, 472 (9th Cir. 1990) (same). In 2010, the Ninth Circuit ruled that Bankruptcy Courts are not bound by District Court decisions from other districts within the Circuit, just as District Courts are not bound by other District Courts' decisions. *In re Silverman*, 616 F.3d 1001, 1005 (9th Cir. 2010). A California Bankruptcy Court recently reasoned that Congress' determination in BAPCPA that BAPs along with Bankruptcy Courts and District Courts can certify direct appeals to Circuit Courts under 18 U.S.C. § 158(d)(2) implies that none of their decisions are authoritative or precedential, and that only Courts of Appeals perform that role. *In re Rinard*, 451 B.R. 12, 21 (Bankr. C.D. Cal. 2011).

Considerations in determining whether to have the appeal heard by the BAP or the district court include:

- Bankruptcy judges constituting BAPs are more knowledgeable on Bankruptcy Code issues than district judges; district judges are likely to be more knowledgeable on state law issues (since all BAP judges will be chosen outside the district from which the appeal is taken)

- Local district court judges tend to know local bankruptcy judges better than other bankruptcy judges from outside the district

- BAPs may be faster than district courts at rendering decisions, since BAPs are not burdened by, *e.g.* criminal and immigration appeals; some district judges are quite prompt, but the likelihood of drawing a particular district judge is generally uncertain

- The BAP or the district court may have applicable precedent on point

- Circuit courts lack jurisdiction to hear appeals from BAPs and district courts over interlocutory orders under 28 U.S.C. § 158(d), but they can consider an interlocutory appeal from a district court's ruling on such an appeal under 28 U.S.C. § 1292(b)

IV. Direct Appeals to the Circuit Court

Appeals of final orders by district courts and BAPs may be taken to the court of appeals pursuant to 28 U.S.C. §§ 158(d)(1) and 1291. The court of appeals may exercise jurisdiction in interlocutory appeals from district court decisions under only 28 U.S.C. § 1292(b). *Connecticut National Bank v. Germain,* 503 U.S. 249 (1992). The court of appeals may not hear interlocutory appeals from BAP decisions. *In re Lievsay,* 118 F.3d 661, 662-63 (9th Cir. 1997).

Direct appeal from a bankruptcy court decision to a circuit court was authorized by BAPCPA upon certification and in the court of appeals' discretion. 28 U.S.C. § 158(d)(2). The statutory requirements grant discretion, if the bankruptcy court certifies that: (1) the order involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court, or if it involves a matter of public importance; (2) the order involves a question of law that requires resolution of conflicting decisions; or (3) an immediate appeal from

the appeal may materially advance the progress of the case or proceeding. 28 U.S.C. § 158(d)(2)(A). There is a time limit of 60 days after the entry of the judgment, order, or decree for the parties to request certification. 28 U.S.C. § 158(d)(2)(E). If the certification is timely requested and then made, the court of appeals has discretion to authorize the direct appeal. 28 U.S.C. § 158(d)(2)(A). There are two separate filings required by the appellant, the notice of appeal and the petition for permission to appeal. If the latter is untimely, the circuit court has discretion to nevertheless accept the appeal. *Blausey v. U.S. Trustee*, 552 F.3d 1124, 1130-31 (9th Cir. 2009).

Applying the statutory standards, circuit courts accepting direct review have emphasized that an important issue of law that would materially advance the disposition of the case or clear up confusion in the bankruptcy courts. *See In re Davis*, 512 F.3d 856 (6th Cir. 2008); *Weber v. United States*, 484 F.3d 154 (2d Cir. 2007); *Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009); *In re Ennis*, 558 F.3d 343 (4th Cir. 2009). When that is not the case, or the circuit court wants to see the issue percolate through the district courts for analysis in various factual contexts, review may be denied. *In re Silver State Helicopters, LLC*, 566 F.3d 1177 (9th Cir. 2009); *In re Davis*, 512 F.3d 856 (6th Cir. 2008); *Weber v. United States*, 484 F.3d 154 (2d Cir. 2007).

A direct appeal may be barred by jurisdictional issues. The Seventh Circuit held in *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011) that because the bankruptcy court lacked constitutional authority to adjudicate the debtor's claim under *Stern v. Marshall,* and with a direct appeal there had been no district court final order, the circuit court lacked a statutory basis for appellate jurisdiction. If jurisdiction is questionable, direct review also may be denied as a matter of discretion. *In re Weaver*, 542 F.3d 257 (1st Cir. 2008) ("The existence of this serious jurisdictional question, and the substantial possibility that jurisdiction would ultimately be found lacking, means that allowing the appeal to proceed may not serve the purposes of section 158(d)(2), *i.e.*, a rapid and definitive resolution of the underlying legal question by this court. Rather, if, as the bankruptcy court found in certifying this appeal, there are hundreds of cases pending in the Bankruptcy Court for the District of Massachusetts raising the same issue certified here, it would be preferable to resolve that issue in a case not raising the potentially fatal procedural problems presented here.").

V. Stay Pending Appeal and Mootness

A. Stays Generally, and Interim Stays to Seek a Stay Pending Appeal

The order being appealed may be immediately effective or may be subject to a brief stay. See Bankruptcy Rule 3020(e) (14 day stay of plan confirmation order); 4001(a)(3) (14 day stay of order granting stay relief); 6004(h) (14 day stay of sale order); and 7062; Fed. R. Civ. P. 62. Note that Rule 7062 is not automatically applicable in contested matters. Bankruptcy Rule 9014(c).

After any stay imposed by the rules, a party taking an appeal may need to seek a stay pending appeal in order to preserve appellate review and avoid mootness. See Bankruptcy Rule 8005. It is often difficult to obtain, and a required bond may also be expensive. For an excellent case explaining stays pending appeal, the types of stays, standards for approving and review of stay decisions, see *In re Wymer*, 5 B.R. 802, 805-07 (9th Cir. BAP 1980) (four part test); *In re*

Regatta Bay, LLC, 406 B.R. 875, 877 (Bankr. D. Ariz. 2009) (denying stay in lengthy analysis), *rev'd*, *In re Regatta Bay, LLC*, 2009 WL 5730501 (D. Ariz. 2009) (reversed on the merits; stay denied as moot); *see also In re Rhoten*, 31 B.R. 572, 577 (M.D. Tenn. 1982) (bankruptcy court decision to deny stay reviewed for abuse of discretion).

B. Statutory Mootness

When the appeal at issue concerns an asset sale, an "absolute mootness rule" by virtue of the statutory provisions in Bankruptcy Code § 363(m) has been applied. *In re Filtercorp, Inc.*, 163 F.3d 560, 576-77 (9th Cir. 1998) ("When a sale of assets is made to a good faith purchaser, it may not be modified or set aside unless the sale was stayed pending appeal," such that the question of whether the court can fashion effective relief under the constitutional mootness doctrine is immaterial.); *Onouli-Kona Land Co. v. Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1172 (9th Cir.1988) ("[T]he trend is towards an absolute rule that requires appellants to obtain a stay before appealing a sale of assets."); *see* 11 U.S.C. § 363(m); cf. 11 U.S.C. § 364(e) (mootness from an order authorizing credit).

In the *Clear Channel* case, the Ninth Circuit BAP held that 11 U.S.C. § 363(m) moots only appeals challenging transfers of title, not other aspects of court-approved asset sales. *Clear Channel Outdoor, Inc. v. Knupfer* (*In re PW, LLC*), 391 B.R. 25 (9th Cir. BAP 2008). Subsequent decisions in other jurisdictions have rejected the BAP's mootness interpretation. *See, e.g. U.S. v. Asset Based Resource Group*, 612 F.3d 1017, 1019 n. 2 (8th Cir. 2010), finding *Clear Channel* "not persuasive" and citing *Official Comm. of Unsecured Creditors v. Anderson Senior Living Prop., LLC* (*In re Nashville Senior Living, LLC*), 407 B.R. 222, 231 (6th Cir. BAP 2009) ("*Clear Channel* appears to be an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the 'free and clear' aspect of a sale under § 363(f)"). In *In re Polaroid Corp.*, 611 F.3d 438, 441 (8th Cir. 2010), the circuit held that reversal of a sale order to preserve liens against the transferred assets, as the BAP allowed in *Clear Channel*, would in effect unwind the sale. It reasoned that "[a] provision is integral if the provision is so closely linked to the agreement governing the sale that modifying or reversing the provision would adversely alter the parties' bargained-for exchange." quoting *Official Comm. of Unsecured Creditors v. Trism, Inc. (In re Trism, Inc.)*, 328 F.3d 1003, 1007 (8th Cir. 2003)

C. Constitutional Mootness

An appeal is constitutionally moot when effective requested relief would be impossible. The court has no jurisdiction when there is no longer a case or controversy. *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034 (5th Cir. 1994) ("Generally, the mootness inquiry centers upon the concern that only live cases or controversies be decided by our courts. A controversy becomes moot in the traditional sense when, as a result of intervening circumstances, there are no longer adverse parties with sufficient interests to maintain the litigation."); *Richman v. Northeast Utils. Serv. Grp. (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469 (1st Cir. 1992) ("Jurisdictional concerns may arise from the constitutional limitations imposed on the exercise of Article III judicial power in circumstances where no effective remedy can be provided, or from a loss of jurisdiction over the res or the parties, before or during the appeal, which renders the appellate court powerless to grant the requested relief.")

D. Equitable Mootness

Equitable mootness is used to dismiss appeals when granting the requested relief would be possible but inequitable. *In re USA Commercial Mortgage Co.*, 2007 U.S. Dist. LEXIS 65264, *17-18 (D. Nev. 2007) (citing *Ewell v. Diebert*, 958 F.2d 276, 280 (9th Cir. 1992)). *See generally* Moore, *Federal Practice* at §§ 101.90 *et seq*., particularly § 101.95. Courts applying the equitable mootness doctrine to bankruptcy cases apply a multi-factor test, with minor variations among the circuits. The principal focus is on: (i) whether a stay has been obtained, or at least sought, (ii) whether there has been a comprehensive change of circumstances, such as substantial consummation of the reorganization plan in an appeal of a confirmation order, rendering effective relief impractical, imprudent, and/or otherwise inequitable, and (iii) whether the relief would affect the rights of third parties not before the court. *See, e.g., In re Focus Media, Inc.)*, 378 F.3d 916 (9th Cir. 2004); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981); *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996); *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994); *In re Paige*, 584 F.3d 1327 (10th Cir. 2009) (six factor test).

The Ninth Circuit recently appeared to impose a threshold requirement of seeking a stay pending appeal. *In re Thorpe Insulation Co.,* 677 F.3d 869 (9th Cir. 2012):

> We have not yet expressly articulated a comprehensive test, but our precedents have looked at whether a stay was sought, whether the plan has been substantially consummated, whether third party rights have intervened, and, if so, whether any relief can be provided practically and equitably. We endorse a test similar to those framed by the circuits that have expressed a standard: We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.

677 F.3d at 881 (emphasis added). However, in the Tenth Circuit, the Court expressly declined to find a stay request to be critical. *In re Stephens*, 2013 WL 151193 (10th Cir. (Okla.)) Rather, the court said that the effect that reversal would have on non-party creditors is the foremost concern to the court. There, in a case about the absolute priority rule in individual chapter 11 cases, reversal would likely result in conversion to chapter 7, under which either the appellant secured creditors would receive their property or the debtors would reaffirm the secured debts and retain the property, and non-party creditors would not be adversely affected either way. Notably, the court acknowledged that the debtors had devoted time and resources toward plan implementation, and reversing the confirmation order would likely preclude a successful reorganization. But the court was convinced that the case concerned a matter of public importance on which there was no controlling decision, and the appellants' argument was legally meritorious.

It is important to address whether some relief by the appellate court is possible, despite the absence of a stay, in considering equitable mootness. *See, e.g., In re Lett, Sr.*, 632 F.3d 1216

(11th Cir 2011) (plan not substantially consummated and requested relief would not prejudice other parties, who would continue to receive their plan distributions); *Baker and Drake, Inc. v. Public Serv. Comm'n*, 35 F.3d 1348, 1351-52 (9th Cir. 1994) (appeal of consummated plan providing for debtor taxi company's drivers to become independent contractors not moot, because still "practical and equitable for [the debtor's] drivers to reassume employee status"); *In re Spirtos*, 992 F.2d 1004 (9th Cir. 1994) (holding that despite the appellant's failure to obtain a stay, the court could still fashion effective relief by ordering the debtor to disburse money which had been withheld as exempt from creditors because the case did not involve the rights of third parties not before the court).

In *In re SW Boston Hotel Venture, LLC,* 479 B.R. 210 (1st Cir. 2012), the Panel concluded that an appeal concerning the amount of a secured claim was not equitably moot, reasoning that although the Plan has been substantially consummated, the appellant was willing to accept alternative forms of relief that would not require an unraveling of the reorganization, and reversal of the plan confirmation order would not adversely affect any innocent third parties. See also *In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3rd Cir. 2010) where the Third Circuit said the appellate court must examine whether the foundation of the plan would be undermined by the appeal, and not merely whether a plan has been substantially consummated under the Bankruptcy Code definition.

A recent Second Circuit decision shows the importance of evidence on the possibility of effective relief despite plan consummation. *In re Charter Communications, Inc.,* 691 F.3d 476 (2nd Cir. 2012). The court said it would not rely solely on the debtor's conclusory predictions or opinions that the requested relief would doom the reorganized company. The appellants wanted to have the court order the debtor's principal shareholder to return certain settlement consideration and unwind third-party releases in that shareholder's favor. They argued that the court could order a prospective monetary award, without undoing the settlement, either payable by the insider or by the debtor. The court relied on evidence from "multiple witnesses" in concluding that these were essential to the settlement and formed the cornerstone of the plan. Thus, it could not achieve relief by a quick, surgical change to the confirmation order, and instead would cut the heart out of the reorganization.

E. Appellate Review of Bankruptcy and District Court Stay Rulings

There is a split among the circuits on the standard of review by an appellate court of a decision by the bankruptcy court or BAP or district court of an equitable mootness decision. In *In re United Prods., Inc.*, 526 F.3d 942 (6th Cir. 2008) the court stated:

> Although only clearly setting forth a *de novo* standard of review for equitable mootness determinations in an unpublished case, this Court has reviewed determinations of equitable mootness *de novo*. Such a standard of review is consistent with this Court's plenary review of the decisions of a lower court exercising its appellate jurisdiction. As a result, we review the Bankruptcy Appellate Panel's equitable mootness determination *de novo*.

However, *In re Charter Communications, Inc.,* 691 F.3d 476 (2nd Cir. 2012) applied an abuse of discretion standard of review to the district ct order denying a stay, rather than de novo, while noting a circuit split. The Second Circuit distinguished an equitable mootness decision from one on the merits of the appeal. It also pointed out that in addressing mootness, the district court may rely on the bankruptcy court's factual findings, unless clearly erroneous, and if necessary receive additional evidence. *See also In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3rd Cir. 2010) (court reviewed for abuse of discretion the district court's decision that the appeal was equitably moot); *In re Paige*, 584 F.3d 1327 (10th Cir. 2009) ("[W]e adopt the abuse-of-discretion standard of review for determinations of equitable mootness in bankruptcy cases."); *In re Hilal*, 534 F.3d 498 (5th Cir. 2008) ("We conclude that the district court abused its discretion in dismissing this appeal for equitable mootness."); *In re Cont'l Airlines*, 91 F.3d 553 (3d Cir. 1996) ("We have generally stated that we exercise plenary review of a district court's decision on mootness. However, none of those cases involved a determination, like the one we review here, that an appeal following a consummated bankruptcy reorganization should be dismissed for equitable and prudential reasons even though some effective relief is available…. Because the mootness determination we review here involves a discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III, using ordinary review principles we review that decision generally for abuse of discretion. A particular case may also raise legal and/or factual issues interspersed with the prudential ones, and then the applicable review standard, plenary or clearly erroneous, will apply.").

II. Briefing Considerations

A. Standard of Review

The standard of review is critical to briefing on the merits. Findings of fact on appeal are subject to the clearly erroneous standard of review, and conclusions of law are reviewed *de novo*. Bankruptcy Rule 8013; *In re Johnston,* 21 F.3d 323, 326 (9th Cir. 1994). Discretionary decisions such as the amount of professional fees to be awarded, adequate protection decisions, the propriety of stay relief, and many other issues arising during administration of a bankruptcy case are reviewed for an abuse of discretion.

The Ninth Circuit has emphasized the difficulty of overturning findings of fact on appeal. "[W]e will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009). This refinement reflects the Circuit's longstanding understanding that clear error review is "significantly deferential" and that a lower court's factual findings must be accepted unless the reviewing court has a "definite and firm conviction" that it erred. *Rhoades v. Henry*, 596 F.3d 1170, 1177 (9th Cir. 2010).

A bankruptcy court necessarily abuses its discretion on an erroneous view of the law or clearly erroneous factual findings. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 404-05 (1990) (discussing abuse of discretion). Before reversal is proper under the abuse of discretion standard, BAP must be definitely and firmly convinced that the bankruptcy court committed a clear error of judgment. *In re Black)*, 222 B.R. 896, 899 (9th Cir. BAP 1998). *In re Bever*, 300 B.R. 262, 264 (6th Cir. BAP 2003).

Circuit courts review BAP decisions and those of district courts sitting in an appellate capacity *de novo*, because both courts apply the same standard of review to underlying bankruptcy court judgments. *Johnston,* 21 F.3d at 326. Frame your brief in terms of the deference to the bankruptcy court's findings of fact and discretionary decisions and *de novo* review of all legal rulings.

When a district court reviews a bankruptcy court's proposed findings of fact and conclusions of law, which may occur more frequently after *Stern v. Marshall*, 131 S. Ct. 2596 (2011), the appellate standards of deference to the bankruptcy court as trial court do not apply. Insofar as the bankruptcy court considered and balanced the respective credibility of witnesses, however, such findings as a practical matter will be accorded more weight.

The standard of review may be critical to disposition of the appeal. In the Ninth Circuit, for example, the viability of separate classification of claims under a plan is an issue of fact, resulting in very deferential review. *Johnston*, 21 F.3d at 327.

B. Consider Your Audience

Bankruptcy Rules 8009 and 8010 describe the content and form of briefs. Appellate judges routinely express frustration with counsel or parties who omit critical pieces of the brief, such as the statement of jurisdiction, standard of review or statement of the case.

The appellate court generally has no understanding of the matter until reading the briefs and the appendix. Factual assertions in the statement of the case or other portions of the brief should be supported by citations to the excerpts of record designated and prepared under Bankruptcy Rule 8006 and 8007. Conversely, factual assertions not supported by the record may be ignored by or irritate the appellate court.

Unless the appeal is taken to the BAP, it is critical to realize that the audience consists of judges who are not immersed in the substance and practice of bankruptcy law. The brief must present the issues in the context of the overall Bankruptcy Code. Concepts bankruptcy lawyers consider basic, such as "property of the estate" and "administrative expenses" need to be explained, let alone difficult ones like "indubitable equivalent."

Bankruptcy judges are also used to financial hardship and its consequences, used to the principles entailed in valuing assets, and used to equitably balancing the needs and concerns of multiple parties in interest. That is not the diet of non-BAP appellate judges, and they can be expected to appreciate different nuances. Bankruptcy judges also tend to recognize the importance of deciding issues quickly. Cash collateral determinations can make or break prospects for reorganization, for example, and making a timely decision on sometimes inadequate briefing and little time to study new case law is par for the course. Appellate courts have the luxury of more time to reflect, and given the precedential value of their rulings, concern about the implications of their decisions in other cases. The different perspective of the appellate court should be taken into account in drafting the briefs.

Sound principles of general appellate practice are as important in bankruptcy appeals as other appeals, including focus on the standard of review in framing the arguments, telling the facts as a

compelling story while being scrupulously accurate and including adverse facts in their context, define the issues in a manner useful to the court and organize the approach to one that the court can follow in its opinion, limit and prioritize your issues and arguments, avoid hyperbole and demeaning statements about opposing counsel and the bankruptcy judge, and don't overstate your authorities.

III. Oral Argument

Oral argument may be permitted by the appellate court. See Bankruptcy Rule 8012. When preparing for oral argument, narrow your scope to the most important points you can present well orally - and they may be different than those most important for briefing. Policy and consequences can be presented better orally than detailed statutory construction points and multi-step reasoning. The argument should have a theme that you can express through your affirmative statements and your answers to questions. Brainstorm the likely judges' questions, and hone your answers. Moot courts are extremely useful, and should be employed before every appellate argument. In addition to helping determine likely questions and better answers to questions, they help in preparing to complete the argument in the short period available (unlike most bankruptcy court arguments), not speaking too quickly, not reading from notes, maintaining eye contact, and other important appellate practices.

A Primer on Interlocutory and Final Orders

Their Relevance in the Journey through the Bankruptcy Appellate Labyrinth

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Are we there yet?" We are all too familiar with this phrase, and typically associate it with long trips where the passengers (and sometimes the driver) wonder if they have concluded their journey.[1] Yet this phrase could easily serve as a regular outcry during the course of a bankruptcy proceeding. Think about it: Those of us embroiled in bankruptcy litigation have all suffered from "are we there yet?" syndrome at one time or another, wondering to ourselves whether a dispute in the bankruptcy has concluded.[2] As most of us have discovered, this is often a difficult question to answer.

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The underlying difficulty beneath this question is that bankruptcy litigation is akin to an oxymoron, containing an abundance of ingredients that differentiate it from traditional state or federal court civil litigation. A primary distinction between bankruptcy litigation and traditional civil litigation is the nature of the orders, judgments and decrees[3] that are entered in the two arenas. In traditional civil litigation, there is typically one fight that often concludes with the entry of a summary judgment order or a jury verdict (*i.e.*, a final order). From there, the losing party—with relative ease—concludes that it is time to consider an appeal. In contrast, a bankruptcy proceeding is filled with a variety of litigation battles, such as contested matters or adversary proceedings, that occur through the progression of the bankruptcy case. Due to the substance and complexity of these sometimes discrete skirmishes that occur amidst the bankruptcy, a final order is often difficult to identify and, in fact, may not even exist. The purpose of this article is to provide overview of the distinction between interlocutory and final orders, and how and when to appeal them.[4]

"Finality" in the Context of Bankruptcy Litigation

The starting point for bankruptcy appeals is 28 U.S.C. §158(a). Under this statute, final orders are appealable as a matter of right while interlocutory orders are (generally) permissively appealed, with the appellant seeking approval to appeal from a higher court.[5] However, neither this statute nor the Bankruptcy Code defines "interlocutory" or "final." Consequently, the courts have struggled with this challenging task.

The Supreme Court has acknowledged the difficulty of the task, holding that "no verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."[6] The Supreme Court provided some general guidance for courts to identify final and interlocutory orders by suggesting application of the "final judgment" rule, but the Court's definition of final judgment was better suited for nonbankruptcy litigation.[7] To date, the Supreme Court has not articulated more specific guidelines or factors for classifying orders.

Appellate courts, however, have assisted the Supreme Court by providing additional, but far from perfect, guidance. For example, a leading circuit case further addressing the issue of finality is *In re Saco Local Development Corp.*[8] In this case, the First Circuit developed the "discrete dispute" test for determining whether an order was final in the context of a bankruptcy proceeding.[9] Under the discrete-dispute test, courts consider whether the order "conclusively determines a separable dispute over a [party's] claim or priority."[10] Other circuits have since followed the First Circuit's lead by adopting other pragmatic approaches similar to the discrete-dispute test. Like the First Circuit, these courts recognize "that certain proceedings in a bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right."[11]

The concept of finality in bankruptcy is broader and more expansive than in traditional civil litigation.[12] Courts will continue to evaluate the finality of bankruptcy orders using pragmatic factors that keep in mind that bankruptcy litigation has a number of separate but related matters that should often be considered as their own independent piece of litigation.

Examples of Interlocutory and Final Orders

Due to the array of facts and circumstances that differentiate most bankruptcy cases from one another,

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1 Google this popular reference and you will find an astounding 129 million hits on this phrase.

2 Universal Studios provides a humorous illustration of "Are we there yet?" syndrome with a parody from "The Simpsons," which can be viewed at www.youtube.com/watch?v=raNM0UvR_Bo and happens to be a personal favorite of the author.

3 Hereinafter, references to an "order" or "orders" shall be interpreted broadly to include orders, judgments and decrees, unless otherwise noted.

4 As part of this overview, the author would be remiss if he did not tout ABI's *Bankruptcy Appeals Manual: Winning Your Bankruptcy Appeal*, authored by **Samuel R. Maizel** and **Jessica D. Gabel** and edited by **Richard M. Meth**. This publication served as a useful resource for preparing this article, and provides excellent references and insight for novice and seasoned bankruptcy practitioners on a wide variety of bankruptcy appellate litigation topics.

5 *See* 28 U.S.C. §158, which provides as follows:

> The U.S. district courts shall have jurisdiction to hear appeals
> (1) from final judgments, orders and decrees;
> (2) from interlocutory orders and decrees issued under §1121(d) of title 11 increasing or reducing the time periods referred to in §1121 of such title; and
> (3) with leave of the court, from other interlocutory orders and decrees;
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under §157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

6 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

7 The Court generally defined a final judgment as "one which ends the litigation...and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

8 711 F.2d 441(1st Cir. 1983).

9 *Id.*

10 *Id.* at 445-46.

11 *In re Rega Properties Ltd.*, 894 F.2d 1136, 1138 (9th Cir. 1990) (internal quotations omitted).

12 *See, e.g., In re Millers Cove Energy Co.*, 128 F.3d 449 (3d Cir. 1999).

providing exhaustive and comparative lists of final and interlocutory orders is a near-impossible task and beyond the scope of this article.[13] Nonetheless, reviewing and contrasting a limited sample of orders illustrates how determining whether an order is final involves a pragmatic analysis of the facts and circumstances of each dispute. Consider the following general examples: Orders confirming plans are final,[14] while orders denying confirmation are interlocutory.[15] Some orders approving a settlement agreement are final,[16] while other orders denying the approval of a settlement agreement are interlocutory.[17] Some orders granting exemptions are interlocutory,[18] while others are not.[19] An order disqualifying a trustee is interlocutory,[20] while an order appointing or denying the appointment of a trustee is final.[21]

It bears repeating that this list of examples constitutes just the tip of the iceberg when discussing the vast number of orders that arise in bankruptcy litigation. The omission of countless other orders only reinforces the notion that devising a uniform test for identifying interlocutory and final orders remains an insurmountable challenge for the courts, due to the complex and diverse nature of bankruptcy cases. Courts will continue to rely on pragmatic approaches and factors when evaluating the nature of a bankruptcy order.

Collateral Orders

A collateral order is an order that determines, with finality, claims of right that are separable from, but collateral to, rights asserted in the action, which are too important to be denied review and too independent of the actual cause of action itself to withstand the deferral of appellate consideration until the entire case is adjudicated.[22] Its underlying doctrine applies only to "those district court decisions that (1) are conclusive, (2) resolve important questions completely separate from the merits and (3) would render such important questions effectively unreviewable on appeal from final judgment in the underlying action."[23] Its purpose is to allow appeals from "a small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[24]

The collateral-order doctrine is applied narrowly by courts. Some of the limited instances where courts have applied this doctrine include orders (1) appointing a special master,[25] (2) transferring venue of a noncore proceeding[26] and (3) withdrawing the reference.[27] While this doctrine is limited, practitioners should note its existence and understand that it can be utilized under the right circumstances to obtain an appeal of an otherwise non-final order.

Appealing Interlocutory Orders from the Bankruptcy Court

Parties seeking to appeal an interlocutory order from a bankruptcy court have two options. One, a party may seek leave to appeal the order under §158(a)(3) of Title 28 of the U.S. Code.[28] Two, a party may seek a direct appeal under §158(d)(2).[29]

Under the §158(a)(3) option, the appellant must file a motion for leave of appeal and a notice of appeal[30] as provided in Bankruptcy Rule 8003(a).[31] The contents of a motion for leave shall include: "(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; and (3) a statement of the reasons why an appeal should be granted."[32] In response to the motion for leave, the appellee may file with the clerk an answer in opposition within 10 days after service of the motion.[33]

In 2008, subsection (d) was added to Rule 8003, which provides that "[i]f leave to appeal is required by ...§158(a) and has not earlier been granted, the authorization of a direct appeal by a court of appeals under... §158(d)(2) shall be deemed to satisfy the requirement for leave to appeal." Subsection (d) remedies the jurisdictional problem that may have arisen when a district court or bankruptcy appellate panel had not granted leave to appeal under §158(a)(3). If the court of appeals takes the appeal, the requirement of leave to appeal is deemed satisfied. Alternatively, if the court of appeals fails to authorize a direct appeal, the issue of whether to grant leave to appeal will be resolved by the district court or the bankruptcy appellate panel.

Under the direct appeal option, a court of appeals has discretion to hear an appeal directly from a bankruptcy court (or a bankruptcy appellate panel or district court).[34] The appeals court will exercise such discretion if it receives a certification that: (1) the judgment, order or decree involves a question of law as to which there is no controlling decision of the circuit court of appeals or of the Supreme Court, or involves a matter of public importance; (2) the judgment, order or decree involves a question of law requiring resolution of conflicting decisions; or (3) an immediate appeal from the judgment, order or decree may materially advance the progress of the case or proceeding in which the appeal is taken.[35] The certification can originate (1) from the bankruptcy court, the district court or the bankruptcy appellate panel involved, acting (a) on its own motion or (b) on the request of a party to the order, or (2) jointly from all parties to the appeal.[36]

Appealing Interlocutory Orders from the District Court to the Court of Appeals

Section 1292 of Title 28 provides appellate jurisdiction to circuit courts for orders of an interlocutory nature issued by a district court or Bankruptcy Appellate Panel (BAP).[37] Section 1292(a) grants such jurisdiction to circuit courts over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions."[38] Generally, an order is injunctive in nature and appealable under §1292(a) "only where it grants part or all of the ultimate relief sought by the [party]."[39] Section 1292(b) allows appeals of interlocutory orders from district courts or BAPs to

13 Undaunted, Mr. Maizel and Ms. Gabel attempt the impossible by having compiled thorough, if not exhaustive, lists of interlocutory and final orders. *See Bankruptcy Appeals Manual*, at 181-96.
14 *See, e.g., In re Interwest Business Equipment Inc.*, 23 F.3d 311 (10th Cir. 1994) (order confirming chapter 11 plan).
15 *See, e.g., In re Flor*, 79 F.3d 281 (2d Cir. 1996) (order confirming chapter 11 plan); *In re McConnell*, 303 B.R. 169 (B.A.P. 8th Cir. 2003) (order confirming chapter 13 plan).
16 *See, e.g., In re Rains*, 428 F.3d 893 (9th Cir. 2005).
17 *See, e.g., In re The Bennett Funding Group Inc.*, 439 F.3d 155 (2d Cir. 2006).
18 *See, e.g., In re Brayshaw*, 912 F.2d 1255 (10th Cir. 1990).
19 *See, e.g., In re Jones*, 768 F.2d 923 (9th Cir. 1985).
20 *See, e.g., In re BH&P Inc.*, 949 F.2d 1300 (3d Cir. 1991).
21 *See, e.g., In re Cajun Elec. Power Cooperative Inc.*, 69 F.3d 746 (5th Cir. 1995).
22 *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).
23 *Id.*
24 *Cohen*, 337 U.S. at 546.
25 *In re White Motor Corp.*, 25 B.R. 293 (N.D. Ohio 1982) (order appointing special master to address product-liability claims).
26 *In re Pan Am Corp.*, 16 F.3d 513 (3d Cir. 1994) (order transferring venue of tort litigation).
27 *In re Parklane/Atlanta Venture*, 927 F.2d 532 (11th Cir. 1991).
28 *See* 28 U.S.C. §158(a).
29 *See* 28 U.S.C. §158(d)(2). This second option was created as part of BAPCPA and applies only in cases filed on or after Oct. 17, 2005 (*See* Pub. L. No. 109-8, §1233(a)(2)(B) (2005)).
30 28 U.S.C. §158(a)(3).
31 Fed. R. Bankr. P. 8003(a).
32 *Id.*
33 *Id.*
34 *See* 28 U.S.C. §158(d)(2)(A).
35 *Id.*
36 *Id.*
37 *See* 28 U.S.C. §1292.
38 28 U.S.C. §1292(a).
39 *United States v. Santtini*, 963 F.2d 585, 591 (3d Cir. 1992).

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appellate courts not otherwise appealable by right in limited circumstances.[40] These circumstances must involve an interlocutory order containing a written finding by the lower-court judge that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[41] Parties considering appeal under §1292(b) should first note the interplay between this section and the recently legislated §158(d)(2), discussed *supra*, which likely has diminished the importance of §1292(b) to a significant degree.

40 28 U.S.C. §1292(b).

41 *Id.*

Conclusion

Navigating through the bankruptcy appellate process inherently involves uncertainty. Understanding the relevance of interlocutory and final orders and recognizing some of their more common defining characteristics in bankruptcy, however, can provide some clarity that will help steer your appeal in the right direction. ■

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Seven Bankruptcy Appeals Questions Answered

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It was not long ago that the authors were involved in a bankruptcy case in which two different parties sought untimely reconsideration of bankruptcy court orders. When reconsideration failed at the bankruptcy court level, the parties appealed, first to the district court and then, in one appeal, to the court of appeals. While we believe that the appeals ultimately would have been dismissed on the merits, the appellants made the process easier (although not fast) by making numerous procedural blunders in the appeal process, creating additional bases to dismiss the appeals. We trust that, with a quick review of this article, the young or new bankruptcy lawyer will not make the same procedural mistakes as the noted adversaries. In all cases, the young or new lawyer should be aware that the (infrequently-used) appeal procedures may present dangerous traps for the unwary.

When Is a Matter Appealable?


Douglas E. Deutsch

Broadly speaking, an appeal of a bankruptcy court order may be heard either when the order is final, as of right, or when the order is interlocutory, with leave of the district court. *See* 28 U.S.C. §158. As the *ABI Journal* examined these issues in a recent issue,[1] we address these concepts only briefly below.

[1] *See* Andrew D. Stosberg, "A Primer on Interlocutory and Final Orders," 28 *ABI Journal* 46 (June 2009)

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First, whether an order of the bankruptcy court is final is not necessarily easily determined. Courts take a pragmatic and flexible approach. *See, e.g., In re Armstrong World Indus. Inc.,* 432 F.3d 507 (3d Cir. 2005); *Comm. of Dalkon Shield Claimants v. A. H. Robbins Co.,* 828 F.2d 239, 241 (4th Cir. 1987).

Second, under 28 U.S.C. §158(a)(3) and in most cases, an appeal from an interlocutory order may be heard only with leave of the court. Significantly, only the district court or bankruptcy appellate panel (BAP) may hear an appeal from an interlocutory order under this section; a circuit court of appeals' jurisdiction is limited to final orders. *See In re White Beauty View Inc.,* 841 F.2d 524, 526 (3d Cir. 1988) (citations omitted) (dismissing appeal from interlocutory order where bankruptcy court failed to certify interlocutory order for appeal and district court did not grant leave to appeal). When an appellant seeks to appeal from an order under 28 U.S.C. §158(a)(3), that appellant must file not only a notice of appeal under Rule 8002 of the Federal Rules of Bankruptcy Procedure (FRBP), but also a motion for leave to appeal. *See* Fed. R. Bankr. P. 8001(b), 8003(a).[2]

[2] To address those instances where it is unclear whether an order is final, and the party files only a notice of appeal, but it turns out that the order was interlocutory, the district court or BAP may grant leave to appeal or direct the appellant to file a motion for leave to appeal. *See* Fed. R. Bankr. P. 8003(c).

What Are the Appeal Deadlines?


Thomas Michael Horan

Under Fed. R. Bankr. P. 8002, the notice of appeal must be filed with the clerk of the bankruptcy court that entered the order within 10 days of the date of entry of the order. *See* Fed. R. Bankr. P. 8002(a). This period is less than the 30 days generally provided in nonbankruptcy federal court appeals. (Do not listen to your litigators in this instance.) You would be well-served to monitor the court's docket as the time period will start whether you receive specific notice of the docketing of the relevant order or not. There are cases holding that a litigant has a responsibility to monitor the docket, and that failure to do so is not "excusable neglect." *See, e.g., SN Servicing Corp v. Kloza (In re Kloza),* 222 Fed. Appx. 547, 550 (9th Cir. 2007) (affirming BAP finding that counsel is expected to monitor docket and that failure to receive notice of order is not excusable neglect); *In re Barbel,* 212 Fed. Appx. 87, 89 (3d Cir. 2006) (stating that failure to receive order is no defense, and that appellant has responsibility to monitor docket).

The FRBP provide a very limited exception in cert-ain instances that extends the time period to file a notice of appeal from 10 days to 20 days. As a general practice, you should never seek to take advantage of this exception because the standard on the exception may be difficult to satisfy and a failure to timely file a notice of

Building Blocks

appeal within the 10 days creates a jurisdictional barrier that bars appellate review. *See Wiersma v. Bank of the West,* 483 F.3d 933, 938 (9th Cir. 2007); *In re Salem,* 465 F.3d 767, 774 (7th Cir. 2006); *Siemon v. Emigrant Savs. Bank,* 421 F.3d 167, 169 (2d Cir. 2005); *Shareholders v. Sound Radio Inc.,* 109 F.3d 873, 879 (3d Cir. 1997). Nevertheless, for those readers who like to push the envelope, we will quickly review the exception.

To satisfy the exception (and obtain an additional 20 days to file the appeal), a showing of "excusable neglect" must be made. The seminal case on the doctrine of "excusable neglect" is *Pioneer Inv. Servs. v. Brunswick Assocs.,* 507 U.S. 380 (1993). In *Pioneer,* in discussing what types of circumstances may present "neglect," the Supreme Court held that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. If a court determines that there was neglect, the court can then proceed to determine whether the neglect was excusable by looking at several factors: (1) danger of prejudice to the debtor; (2) the length of the delay and the resulting potential impact on judicial proceedings; (3) the reason for the delay, including whether the delay was within the reasonable control of movant; and (4) whether the movant acted in good faith. *Id.* at 395. Importantly, where the neglect at issue relates to a rule that is entirely clear, courts may expect "that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* case." *See Lynch v. USA (In re Lynch),* 430 F.3d 600, 604 (2d Cir. 2005) (citations omitted). As set forth below, a number of additional deadlines start to run after each subsequent event takes place in the appeal process.

What Steps Do I Take to Appeal a Bankruptcy Court Order?

Perfection of an appeal requires that the appellant take various steps. Whether the appeal is believed to be as of right or sought by leave of the court, the appellant's first step is to file a notice of appeal with—we add emphasis here because this does not seem inherently intuitive—the *clerk of the bankruptcy court. See* Fed. R. Bankr. P. 8001.[3] Unlike for most other pleadings, the clerk is tasked with serving notice of the filing of the appeal. *See* Fed. R. Bankr. P. 8004.[4]

Since the notice of appeal is only required to identify the order, judgment or decree from which appeal is taken, the appellant must take a next step (within 10 days of the filing of the notice of appeal) to (1) identify the issues to be presented on appeal and (2) define the record that the appeals court is to review. Fed. R. Bankr. P. 8006 addresses both of these requirements. The appellee then has an additional 10 days to file a designation of additional items to be included in the record on appeal and, if the appellee files a cross appeal, to serve a statement of the issues to be presented in the cross-appeal.

It is important to note that Fed. R. Bankr. P. 8006 specifically requires that the record on appeal include the following items: (1) the items designated by the parties; (2) the notice of appeal itself; (3) the order, judgment or decree that is the subject of the appeal; and (4) any opinions, findings of fact and conclusions of law of the court. Any party filing a designation of the record on appeal is also required to deliver to the clerk a copy of the items designated. In practice, each party typically will create a binder containing the documents, along with an index to the binder.[5]

The parties then wait for the appeal "record" to be docketed. *See* Fed. R. Bankr. P. 8007 and 8009. During this period, the parties are well-advised to monitor the court docket and check in with the court clerk occasionally. The docketing of the record will trigger the next step (15 days later): the filing of the appeal briefs. *See* Fed. R. Bankr. P. 8009. Detailed requirements are set forth in the FRBP regarding the form and length of the brief. *See* Fed. R. Bankr. P. 8010.

Fed. R. Bankr. P. 8001(a) provides that a failure to take any step other than the filing of the notice of appeal shall be grounds for the appeals court to take any action it deems appropriate, including dismissal of the appeal. *See, e.g., In re Tampa Chain Co.,* 835 F.2d 54, 55 (2d Cir. 1987) (appeal dismissed as, among other things, appellate brief was not filed within 15-day period established by Fed. R. Bankr. P. 8009); *Burton v. Schachter (In re Burton),* 316 B.R. 138, 139–40 (S.D.N.Y. 2004) (appeal dismissed as, among other things, designation of items and statement of issues not filed within 10-day period established by Fed. R. Bankr. P. 8006).

In What Court Can Bankruptcy Appeals Be Heard?

There are actually three forums in which bankruptcy appeals can be heard: (1) the local district court, (2) the relevant circuit's BAP, if such a panel exists in that circuit and (3) directly to the relevant circuit court of appeals but only in some instances. We will discuss each of these options in turn.

The most common approach is to appeal a bankruptcy ruling to the relevant district court. This is the standard that can be most easily followed in the FRBP, cited herein, and as can otherwise be found in the FRBP. *See* Fed. R. Bankr. P. 8008-8015. The other more-standard option permitted in the First, Sixth, Eighth, Ninth and Tenth Circuits is to appeal to a BAP. *See* 28 U.S.C. §158(c). A BAP consists of three sitting bankruptcy judges. However, the BAP is not a mandatory forum; parties to appeals in these circuits may elect to have their appeals be heard by district court judges instead of the BAP. Each BAP has specific rules that must be consulted prior to consideration as an appeal path.

Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), an appeal can also be made directly to the relevant circuit court of appeals where the case is pending. *See* 28 U.S.C. §158(d). Such a direct appeal is allowed only in limited instances where, among other things, it is certified that the case involves a question of law where there is no controlling decision in the relevant circuit, or the circuit must weigh in on the resolution of conflicting decisions.

What Is the Standard of Review on Appeal?

When reviewing an order, judgment or decree on appeal from the bankruptcy court, the appellate court reviews the bankruptcy court's legal determinations *de novo,* its factual findings for clear error and its exercise of discretion for abuse thereof. *See In re United Healthcare Systems Inc.,* 396 F.3d 247, 249 (3d Cir. 2005). Where there are

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3 Fed. R. Bankr. P. 8002 should rescue the appellant who mistakenly files a notice of appeal with the clerk of the district court or the clerk of the BAP.

4 The clerk is required to mail a copy on counsel of record to each party other than appellant, or if the party is not represented by counsel, to the party's last known address, and to "transmit" a copy of the notice of the appeal to the U.S. Trustee.

5 As with all matters involving an appeal, it is essential to check the court's local rules, as well as any applicable guidelines promulgated by the clerk of the court to see if there are specific requirements that must be followed.

mixed questions of fact and law, the court must accept the bankruptcy court's finding of "historical or narrative facts unless clearly erroneous, but exercise 'plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *See Mellon Bank NA v. Metro Communications Inc.,* 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals Inc. v. C. A. Hughes & Co.,* 669 F.2d 98, 101-02 (3d Cir. 1981)).

How Do You Obtain a Stay Pending Appeal?

In many instances, filing an appeal of a bankruptcy court order would be an empty gesture if the order were implemented. Indeed, the U.S. Court of Appeals for the Third Circuit has recognized that "myriad...circumstances can occur that would necessitate the grant of a stay pending appeal in order to preserve a party's position." *In re Highway Truck Drivers & Helpers Local Union #107,* 888 F.2d 293, 298 (3d Cir. 1989). For that reason, Fed. R. Bankr. P. 8005 provides a mechanism for seeking a stay of an order pending the outcome of the appeal.

Fed. R. Bankr. P. 8005 provides that, in the first instance, a request for a stay pending appeal "must ordinarily be presented to the bankruptcy judge." *See* Fed. R. Bankr. P. 8005. The bankruptcy court also possesses the authority—subject to the authority of the district court and the BAP—to continue or suspend other proceedings in the bankruptcy case or to enter any other order during the pendency of the appeal as will protect the rights of all parties in interest. *Id.*

Whether to grant a motion for stay pending appeal is within the court's discretion. The standards that guide the court in the exercise of its discretion are similar to the standards for granting a preliminary injunction. *See, e.g., In re Del. & Hudson Ry. Co.,* 90 B.R. 90, 91 (Bankr. D. Del. 1988). The party seeking a stay pending appeal must show that: "(1) it is likely to prevail on the merits of its appeal; (2) it will suffer irreparable injury absent a stay; (3) a stay will not cause substantial harm to other interested parties; and (4) a stay will not harm the public interest." *Id.* at 91. *See also U.S. v. Trans World Airlines Inc. (In re Trans World Airlines Inc.),* 18 F.3d 208, 211 (3d Cir. 1994). Significantly, the "[m]ovant's failure to satisfy one prong of the standard for granting a stay pending appeal dooms the motion." *In re Deep,* 288 B.R. 27, 30 (N.D.N.Y. 2003) (citations omitted)

If a stay pending appeal is not obtained from the bankruptcy court, a party may file a motion for a stay or modification or termination thereof from the district court and the BAP, but the motion must show why the relief was not obtained from the bankruptcy court. Fed. R. Bankr. P. 8005. Under those circumstances, the district court and the BAP may order the posting of a bond or other appropriate security. *Id.*

When Might Damages Be Awarded?

The FRBP governing costs and damages vary in certain respects from the otherwise-prevailing "American Rule." Fed. R. Bankr. P. 8014 provides that "[e]xcept as otherwise provided by law, agreed to by the parties, or ordered by the district court or the BAP, costs shall be taxed against the losing party on an appeal." *See* Fed. R. Bankr. P. 8014. However, there is no requirement that the district court or BAP award the prevailing party all its costs. *See, e.g., In re Walker,* 532 F.3d 1304, 1309 (11th Cir. 2008).

If the court determines that an appeal was frivolous, either on motion or *sua sponte,* after giving the appellant a reasonable opportunity to respond, the district court or the BAP may "award just damages or double costs to the appellee." *See* Fed. R. Bankr. P. 8020. Not surprisingly, there is a fairly exacting standard for a finding of frivolity; the result must be obvious and the appellant's argument must be without merit. *See, e.g., Ramirez v. Debs-Elias,* 407 F.3d 444, 450 (1st Cir. 2005) (sanctions warranted where "the overwhelming weight of precedent was against appellant's position, where appellant could set forth no facts to support its position, or where, in short, there simply was no legitimate basis for pursuing an appeal." (citation omitted)); *In re Alta Gold Co.,* 236 Fed. Appx. 266, 267 (9th Cir. 2007) (citation omitted). However, even when the court finds an appeal to be frivolous, whether to impose sanctions is within the court's discretion. *See, e.g., Flaherty v. Gas Research Institute,* 31 F.3d 451, 459 (7th Cir.1994).

Fed. R. Bankr. P. 8020 is identical, in relevant part, to Rule 38 of the Federal Rules of Appellate Procedure; "therefore, a court considering a Bankruptcy Rule 8020 motion should be guided by cases applying Appellate Rule 38." *See Safety Nat'l Cas. Corp. v. Kaiser Aluminum & Chem. Co.,* Civ. A. No. 02-1580 (JJF), 2003 U.S. Dist. LEXIS 23841, *4 (D. Del. Nov. 25, 2003) (citing 10 *Collier on Bankruptcy,* ¶8020.02 (15th ed. rev. 2003) (citation omitted)).

There appear to be relatively few reported cases where damages or costs were awarded under Fed. R. Bankr. P. 8020. However, in one recent case, a district court awarded damages against a *pro se* appellant where the court found the appellant's appeals to be frivolous and malicious under 28 U.S.C. §1915. *See Roper v. Garden Ridge Corp. (In re Garden Ridge Corp.),* Civ. A. No. 06-555 (GMS), 2009 U.S. Dist. LEXIS 1207, *5–9 (D. Del. Jan. 9, 2009). In another recent case, the appeals court affirmed the BAP's imposition of sanctions where the appeal was "wholly without merit" and the appellant lacked standing to litigate her claims. *See Spirtos v. Day (In re Spirtos),* 270 Fed. Appx. 540, 542 (9th Cir. 2008). ■

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Twelve Ways to a Bad Brief

Following instincts may hurt a submission to the court

BY JAMES W. McELHANEY

It was one of those great brainstorming sessions that you can never plan but sometimes just happens. I was talking with Chris Lutz of Steptoe & Johnson in Washington, D.C., about legal writing, and the discussion settled on bad briefs.

How many different ways are there to write a bad brief? Not theoretical possibilities or occasional oddities, but the kind of ordinary sins that even good lawyers commit every day. For every example that one of us gave, the other came up with a number of ways in which the profession has taken that basic mistake and developed it into an art form of ineffectiveness.

The whole conversation went so fast that I can't tell you who was responsible for which ideas. So if there is something you really like in this list, credit Lutz, and if there is something you find annoying, blame me.

1 Too Long There are lots of ways to make a brief too long: too many pages, too many points, too many citations, too many quotations, too many words.

The simplest crime to catch is too many pages. There are some judges who delight in reading only up to the page limit they have imposed by local rule and then stopping.

At least one appellate judge on the Eastern Seaboard actually tears off the offending extra pages so he will be unable to read any further, if for some reason he actually finds the brief interesting.

Modern word processing helped rule-dodgers—for a while. With variable line spacing, scalable font sizes, adjustable letter spacing and creative margin measurements, some prolix lawyers were able to squeeze five pounds of words into a four-pound brief.

But the same technology that created the illusion of complying with a page limit also created the means for getting caught. A number of courts have developed pretty sophisticated rules limiting length, spacing and margin size—and don't hesitate to enforce them.

So don't run your brief through the space compressor. A judge who knows you cheat on technical things will wonder about the honesty of everything else you do and say.

2 Too Many Issues Too many issues make a bad brief no matter how many words it has.

Of course, there are lawyers who figure they should throw everything they can against the wall and see what sticks.

The results are almost always dismal—a brief that raises too many issues lacks focus and direction.

So forget law school. A brief is not a final examination.

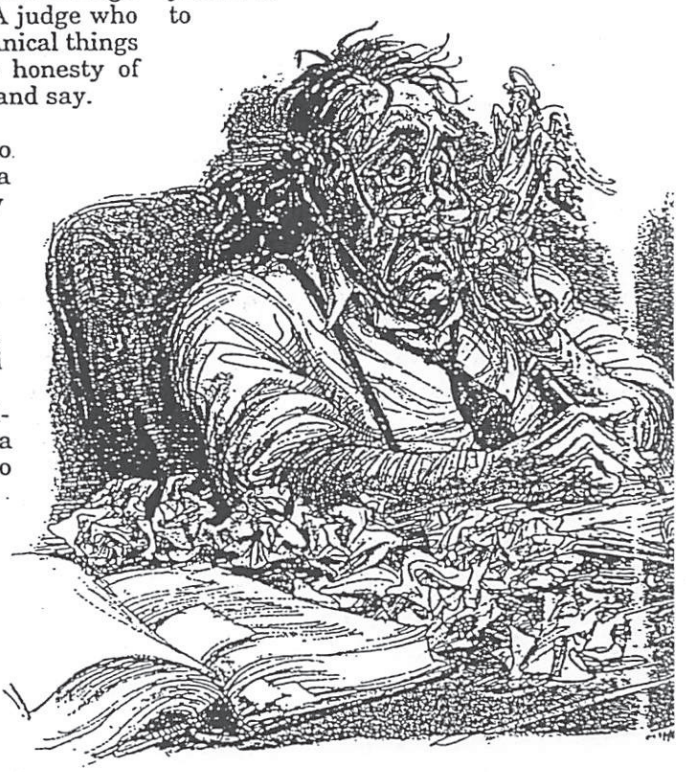
No one gives you extra points for spotting every possible legal question and discussing it. Even a legal gem that could point the way to the law of the future can get lost when it's buried in doctrinal quiddities.

3 Losing Arguments Seriously pressing a point that doesn't pass the giggle test is deadly because it undermines your credibility.

Sure, the law sometimes creates fictions to provide escape valves from legal doctrines that seem too harsh. But that's different from arguing wild impracticalities or ignoring a body of useful, well-established law.

4 Miscite a Case, Misrepresent a Rule Everyone makes mistakes. When you do, take the necessary steps to correct them at once. But mistakes are nothing compared to making an apparently deliberate misstatement of a case or a rule.

Judges do not always call lawyers on what they think may be purposeful misstatements, because intent is always hard to prove. But judges talk with each other—their club is a small one. Which is why you want to earn the reputation for being scrupulously accurate.



5 Unreasonable Arguments The advocacy system is supposed to work when each side makes its strongest arguments. But strongest does not mean loudest, longest or most one-sided. Making the best argument you can means being reasonable, logical, fair. Concede the obvious. Not every issue has two good sides to it.

6 Bombastic Language Exaggerated words go hand in hand with unreasonable arguments. Traditional legalisms are bad enough—they qualify as a way to write a bad brief

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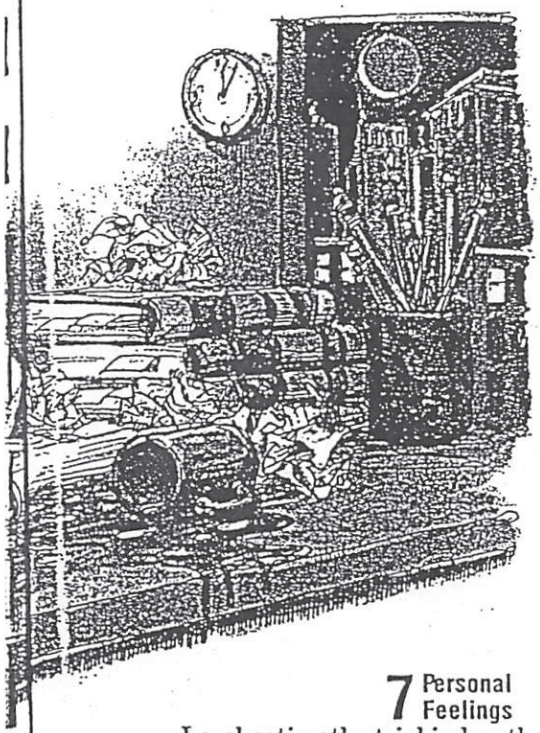
ILLUSTRATION BY JOHN SCHREITER

all on their own. But we somehow save our most annoying words for trying to state marginal points in the most positive language we can think of.

Manifestly, clearly, fatal, clear beyond peradventure, logic that is fatally flawed, egregious, contumacious, mere gossamer, must necessarily fail, totally inapposite. These are the kinds of words and phrases you should cross out on the first revision of any brief. If you can't be reasonable, at least try to *sound* reasonable.



7 Personal Feelings

Lambasting the trial judge, the other lawyer, the supreme court, Congress, the president or the state legislature is rarely necessary or even helpful in writing a brief. Even if your readers secretly agree with you, they will still disapprove of using a brief to let fly at your favorite targets.

And lawyers have come up with lots of ways to attack other people or institutions. The bombastic approach is obvious, and hardly ever gets points for style.

Some lawyers are likely to be snide or sarcastic. If that's a tone that tempts you, remember this saying from India: Sarcasm is the last weapon of the defeated wit.

Phony deference and insincere compliments are just a breath away from full sarcasm: "In a veritable tour de force that compassed nearly 30 pages of a 40-page brief, esteemed counsel for the petitioner forcefully argued that compensatory damages are inherently unconstitutional"; or, "The learned judge in the honorable court below focused considerable legal acumen on the question of mutuality of remedies, an issue unfortunately not presented by the facts in the case."

Why do we write this kind of stuff?

Because Mongo—the inner beast that dwells in every lawyer—has taken an argument or an adverse ruling personally, and is convinced that the pen is actually capable of inflicting a mortal wound.

Forget it. Get to the point. Argue the case, not your feelings.

8 Legalese Aiming for a tone of formality and respect, we almost always go too far and create a forest of awkward verbiage.

Interestingly, a lot of legalese has nothing to do with the law but is simply pretentious and difficult to follow. "Prior" and "subsequent" do not improve on "before" and "after." "With respect to" is a remote way of suggesting one thing is relevant to another without saying how, and talking about "obfuscation" does not clear up anything.

Real legalisms—even simple words like "plaintiff," "defendant," "petitioner," "respondent," "cross-complainant" and other procedural terms—also cast a cloud over your writing. They are especially confusing when you use them to identify people or explain how the case arose, because they force the reader to think of individuals in their procedural settings at the same time they are trying to sort out the facts and understand your arguments.

Once you have identified the players with their legal labels, use their real names from then on.

9 Too Many Citations Lots of briefs have lists of authorities that are two or three pages long. When you leaf through the text, you see a daunting bramblebush of quotations and case references on every page.

It says, "Heavy reading ahead. There is nothing clear about this case. It has a lot of difficult questions which could obviously go either way."

Two ways of citing too many cases are particularly annoying.

One is to give endless strings of case citations with almost no information about them. Stop it. You are supposed to be an advocate, not a database.

Another habit to kick is citing authority for everything you say. Only first-year law students need to prove that contracts can be enforced or that a battery is a tort.

Every citation says, "Here is a key authority on an important point." If that isn't true, get out your blue pencil.

10 Too Many Quotations Some briefs are wall-to-wall quotations, decorated with long, underlined passages, with the inevitable "emphasis added" sprinkled everywhere.

Quotations should be occasional gems that add sparkle to a page. Good quotes make important points in a memorable way. The problem is, good writing is hard to find in most judicial opinions, so extensive quotations tend to be deadly.

The overuse of underlining, italics and bold print is another problem. Visual clutter takes away from the message.

11 No Analysis Some brief writers run through statutes and case holdings well enough, but never really analyze the case, discuss the issues, show how the rules apply, or meet the difficulties they raise.

A brief is not just background information. It should show the court how to answer the hard questions and reach the right result.

12 No Story The last sin is the worst. Every brief should tell the story of an injustice, a wrong that needs to be righted or avoided.

Why?

The story is central to the way we process facts. It is the basic system we use to teach, to understand, to instill moral precepts and to memorialize important events. Telling an engaging story in the statement of facts and the issues they raise gives meaning to an otherwise dry assemblage of information. How you do it depends on whomever you are writing the brief for.

Trial judges are folks in the trenches whose goal is to do elemental justice. Appellate judges want to right wrongs, too—within their job of weaving and repairing the fabric of the law.

Always keep in mind who is going to read your story. ■

RULES

OF THE

UNITED STATES

BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

PREAMBLE

These rules of the United States Bankruptcy Appellate Panel of the Ninth Circuit are promulgated under the authority of Federal Rule of Bankruptcy Procedure 8018.

Adopted: February 24, 2000
As Revised: January 1, 2010

Table of Contents

8001(a)-1
NOTICE OF APPEAL

ORDER BEING APPEALED. The appellant shall attach to the notice of appeal filed in bankruptcy court a copy of the entered judgment, order or decree from which the appeal was taken. The clerk of the bankruptcy court shall forward these items to the BAP Clerk. If the notice of appeal is filed before entry of the order being appealed, it is appellant's duty to forward to the BAP Clerk a copy of the judgment or order immediately upon entry.

8001(e)-1
ELECTION TO TRANSFER APPEAL TO DISTRICT COURT

(a) TRANSFER. The Panel may transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the Panel deems appropriate.

(b) ELECTION PROCEDURE WHEN MOTION FOR LEAVE TO APPEAL IS PENDING. If appellant moves for leave to appeal pursuant to FRBP 8003, and fails to file a separate notice of appeal concurrently with filing the motion for leave, the motion for leave shall be treated as if it were a notice of appeal for purposes of calculating the time period for filing an election.

8006-1
TRANSCRIPTS

The excerpts of the record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel. The Panel is required to consider only those portions of the transcript included in the excerpts of the record. Parties shall consult local bankruptcy rules with regard to the proper procedure for ordering transcripts or for indicating that transcripts are not necessary.

Explanatory Note:

This rule addresses two problems. The first occurs when appellants challenge the oral tentative rulings, and/or the oral findings of fact and conclusions of law of the bankruptcy court, and do not include sufficient transcripts in the excerpts of the record to allow the Panel to properly review the bankruptcy court's decision. If findings of fact and conclusions of law were made orally on the record, a transcript of those findings is mandatory. In re McCarthy, 230 B.R. 414, 416 (9th Cir. BAP 1999).

The second problem arises when an appellant challenges a factual finding. In order to review a factual finding for clear error, the record should usually include the entire transcript and all other relevant evidence considered by the bankruptcy court. See In Re Friedman, 126 B.R. 63, 68 (9th Cir. BAP 1991) (failure to provide an adequate record may be grounds for affirmance); In re Burkhart, 84 B.R. 658 (9th Cir. BAP 1988).

8007(b)-1
DOCKETING APPEAL AND APPELLATE RECORD

As soon as the statement of issues, designation of record, and any transcripts that have been designated are filed with bankruptcy court, the clerk of the bankruptcy court shall transmit to the BAP Clerk a certificate that the record is complete. The BAP Clerk shall forthwith notify the parties of the date the certificate is filed at the BAP, and this date shall constitute the date of entry of the appeal on the docket for purposes of FRBP 8009. The record shall be retained by the clerk of the bankruptcy court. The BAP Clerk may request a copy of the record from the clerk of the bankruptcy court.

8008(a)-1
COMMUNICATIONS

All communications to the BAP shall be addressed to the Clerk of the United States Bankruptcy Appellate Panel of the Ninth Circuit, Richard H. Chambers Court of Appeals Building, 125 South Grand Avenue, Pasadena, California 91105.

8008(a)-3
FAX FILING

The BAP does not accept for filing documents transmitted by telephone facsimile machine ("fax"), except in emergency circumstances. Permission of the BAP Clerk, prior to the transmittal of the document, is always required.

Any document transmitted to the BAP by fax must be served on all other parties by fax or hand delivery, unless another form of service is authorized by the BAP Clerk, and the method of service shall be expressly stated on the proof of service. Within three days after the fax transmittal, the filing party shall file a signed original and the necessary copies with the BAP.

8009(a)-1
BRIEFS; NUMBER OF COPIES; EXTENSIONS OF TIME

(a) Number. A party filing briefs shall file an original and four (4) copies with covers, bound separately from the excerpts of the record. At the direction of the BAP the parties may be required to provide additional copies.

(b) Motion for Extension of Time for Filing Brief.

(1) Requirements. A motion for extension of time to file a brief shall be filed within the time limit prescribed by these rules for the filing of such brief and shall be accompanied by a proof of service. The motion shall be supported by a declaration stating:

(A) When the brief was initially due;
(B) How many extensions of time, if any, have been granted;
(C) Reasons why this extension is necessary;
(D) The specific amount of time requested; and
(E) The position of the opponent(s) with respect to the motion or why the moving party has been unable to obtain a statement of such position(s).

(2) BAP Clerk Authority. The BAP Clerk is authorized to grant extensions of time under the direction and guidelines of the Panel.

(3) Consequences. Appellant's failure to file a brief timely may result in the dismissal of the appeal. A brief received after the due date will not be accepted for filing unless it is accompanied by a motion for an extension of time and the motion is granted. The Panel has no obligation to consider a late brief. Sanctions may be imposed, such as the waiver of oral argument, monetary sanctions or dismissal.

8009(b)-1
APPENDIX (EXCERPTS OF THE RECORD)

(a) Number and Form. A party filing excerpts of the record shall file an original and four (4) copies bound separately from the briefs.

(1) Each copy shall be reproduced on white paper by any duplicating process capable of producing a clearly legible image.
(2) Each copy shall be bound with a white cover.

(3) The cover of the excerpts shall contain the caption information specified by 9th Cir. BAP Rule 8010(a)-1(a)(2).

(b) Organization of Appendix.

(1) Documents in the appendix shall be divided by tabs.
(2) The pages of the excerpts shall be continuously paginated.
(3) The appendix shall contain a complete table of contents listing the documents and identifying both the tab and page number where each document is located. If the appendix has more than one volume, the table of contents shall also identify the volume in which each document is located.

Explanatory Note:

The Panel generally limits its review to an examination of the excerpts of the record as provided by the parties. The Panel is not obligated to examine portions of the record not included in the excerpts. See In re Kritt, 190 B.R. 382, 386-87 (9th Cir. BAP 1995); In re Anderson, 69 B.R. 105, 109 (9th Cir. BAP 1986).

The parties are further referred to FRBP 8010 (a)(1)(D) and (a)(2) which address the related problem created by appellants who do not make explicit references to the parts of the record that support their factual allegations and arguments. Opposing parties and the court are not obliged to search the entire record unaided for error. See Dela Rosa v. Scottsdale Memorial Health Systems, Inc., 136 F.3d 1241 (9th Cir. 1998); Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991); FRAP Rule 10(b)(2).

8010(a)-1
FORM OF BRIEFS AND CERTIFICATION REQUIREMENTS

(a) Form. Briefs shall be produced by a standard typographic printing process that produces a clear black image on white paper, 8 ½ inches by 11 inches, with one-inch margins, in at least 14 point proportional type, or 10.5 point monospaced type, double-spaced, on opaque, unglazed paper.

(1) BRIEF COVER COLORS:

Appellant's opening brief:	BLUE
Appellee's opening brief:	RED
Appellant's reply brief:	GREY

(2) COVER INFORMATION:
Name of court
Case numbers (BAP, bankruptcy court case, and if applicable, adversary numbers)
Name of Debtor
Names of appellant(s) and appellee(s)
Title of document
Name, address, telephone number, and bar number of counsel filing document

(b) Certification as to Interested Parties. To enable the judges of a Panel to evaluate possible disqualification or recusal, all parties, other than governmental parties, shall attach to the inside back cover of their initial briefs, a list of all persons, associations of persons, firms, partnerships and corporations that have an interest in the outcome of the case. The certification should be in substantially the following form:

Certification Required by BAP Rule 8010(a)-1(b)

[BAP NUMBER, DEBTOR'S NAME]

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal [list the names of all such parties and identify their connection and interest]:

_____ _____
Signed Dated

(c) Certification of Related Cases. The appellant shall attach to the inside back cover of each copy of the opening brief a statement of all known related cases and appeals before the United States Court of Appeals, the United States District Court, or the BAP. A related case is defined as one which involves substantially the same litigants, substantially the same factual pattern or legal issues, or arises from a case previously heard by the Panel. The certification should be in substantially the following form:

Certification Required by BAP Rule 8010(a)-1(c)

[BAP NUMBER, DEBTOR'S NAME]

The undersigned certifies that the following are known related cases and appeals [list the case name, court and status of all related cases and appeals]:

_____ _____

Signed Dated

Explanatory Note:

Failure to comply with the Briefing Rules may result in striking the brief and dismissing the appeal, N/S Corp., v. Liberty Mutual Ins. Co., 127 F.3d 1145 (9th Cir. 1997), or imposing sanctions, In re MacIntyre, 181 B.R. 420, 422 (9th Cir. BAP 1995), aff'd, 77 F.3d 489 (9th Cir. 1996).

Briefs and excerpts of the record shall be securely fastened by any appropriate means.

8010(c)-1
LENGTH OF BRIEFS

Except with leave of the Panel, appellant's and appellee's initial briefs shall not exceed thirty (30) pages, and reply briefs shall not exceed twenty (20) pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations or similar materials.

Explanatory Note:

Motions for leave to exceed page limitations are rarely granted. Motions should be filed well in advance of the due date for the brief.

8011(d)-1
EMERGENCY MOTIONS

(a) Form and Number. An emergency motion must have a cover page bearing the legend "Emergency Motion" in large, bold type. The motion must be filed with the BAP Clerk in an original and three copies.

(b) Contents. The motion and supporting declaration(s) must set forth the facts showing the existence and nature of the alleged immediate and irreparable harm.

(c) Appendix. The emergency motion must be accompanied by an appendix containing:

(1) A conformed copy of the notice of appeal, and

(2) A copy of the entered judgment, order or decree from which the appeal was taken;

(3) If the emergency motion concerns a stay pending appeal, the appendix must also contain:

(i) a conformed copy of the court's order denying or granting the stay and any explanation by the court of its ruling, or a declaration explaining why such a copy is unavailable; and

(ii) copies of all papers regarding the stay filed in bankruptcy court.

(d) Service. The motion and appendix must be accompanied by a proof of service showing service on all parties.

Explanatory Note:

When the emergency motion concerns a stay pending appeal, the parties are directed to In re Wymer, 5 B.R. 802, 805-07 (9th Cir. BAP 1980), for standards in granting a stay pending appeal.

8011(e)-1
DELEGATION OF AUTHORITY TO ACT ON MOTIONS

The BAP judges may delegate to the BAP Clerk authority to act on motions that are subject to disposition by a single judge pursuant to FRBP 8011(e), upon the condition that the order entered on the motion does not dispose of the appeal or resolve a motion for stay pending appeal. The order disposing of the motion is subject to reconsideration by a judge if a written request for judicial review is received within fourteen (14) days of the entry of the order.

8012-1
ORAL ARGUMENT

The BAP Clerk will provide notice of the time and place of argument. Once the hearing date is scheduled, a motion for continuance will be granted only under exceptional circumstances.

The Panel may determine that oral argument is not needed either *sua sponte* or on motion for submission of the appeal on the briefs. If the Panel determines that oral argument is not needed, it will issue an order to that effect.

Rule 8012-2
EN BANC HEARING AND DETERMINATION OF APPEALS

(a) **EN BANC HEARING AND DISPOSITION AUTHORIZED; NOT FAVORED.** The Panel may hear and dispose of an appeal by sitting en banc as authorized in this rule. An en banc hearing or decision of an appeal is not favored and ordinarily will not be ordered unless it appears that it is necessary to secure or maintain uniformity of the Panel's decisions including, without limitation, when there is a challenge to an existing precedent of the Panel.

(b) **PROCEDURE FOR A PARTY TO REQUEST AN EN BANC HEARING.**

(1) **Motion**. A party may request that the Panel hear and decide an appeal en banc. The request must be made by motion filed with the Clerk and served upon the other parties to the appeal (including any party appearing amicus curiae). Such motion should be filed and served not later than the date set for the filing of that party's opening brief. If made, the motion must be accompanied by a brief setting forth the reasons why an en banc hearing and decision of an appeal is appropriate under the standard set forth in subsection (a).

(2) **Response**. Any other party to the appeal (including any party appearing amicus curiae) may file and serve a response to the motion and brief not later than fourteen (14) days after the motion is filed. No reply brief is authorized.

(3) **Page Limit**. The motion or response, together with the brief in support thereof, must not exceed a combined total of 15 pages.

(c) **PROCEDURE FOR THE PANEL INITIALLY ASSIGNED TO APPEAL TO REQUEST AN EN BANC HEARING**.

Two or more of the judges assigned to hear and decide the merits of an appeal,

including any pro tem judge, may request that the Panel should hear and decide an appeal en banc. The request should be made prior to the disposition of the appeal.

(d) **PROCEDURE FOR DETERMINING WHETHER APPEAL SHOULD BE HEARD EN BANC**

(1) **Vote of the Panel**. If a timely request for an en banc hearing and decision is made under either subsection (b) or (c), the Clerk will promptly poll the regular members of the Panel eligible to participate in the disposition of that appeal.

(2) **Affirmative Vote; Minimum Number of Judges Who Must Participate**. The appeal will be heard (or, as appropriate, reheard) and decided en banc if:

(a) at least five regular members of the Panel are eligible to participate, and do participate, in the vote; or, if less than five members of the Panel are eligible to participate in the en banc call, the Chief Judge of the Ninth Circuit, after consultation with the Presiding Judge, shall designate such pro tem judges as may be necessary to bring the number of the judges considering the en banc call to five, and all five judges vote; and

(b) a majority of the judges polled vote in favor of the request.

(3) **Negative Vote**. If a timely request for an en banc hearing and decision is made under subsection (b) or (c), and no affirmative vote as required by paragraph (2) is obtained within fourteen (14) days of the initial polling, the matter will not be heard en banc.

(e) **PROCEDURE AFTER REQUEST AND VOTE**.

(1) **Constituting the En Banc Panel**. If the Panel votes to hear and decide a matter en banc, the en banc panel shall consist of all members of the Panel eligible to participate in the appeal's disposition, but in no event may an en banc panel consist of fewer than five judges. If fewer than five members of the Panel are eligible to participate in the en banc hearing, the Chief Judge of the Ninth Circuit, after consultation with the Presiding Judge, shall designate such pro tem judges as may be necessary to bring the membership of the en banc panel to five.

(2) **Order Regarding Vote; Procedure Thereafter**. The Presiding Judge of the Panel shall promptly cause an order to be entered that is consistent with the results of any vote taken in accordance with subsection (d), and with the actions required by subsection (e). Thereafter, the Clerk, in consultation with the Presiding Judge, will take such actions as are necessary or appropriate to carry out such order.

Rule 8013-1
DISPOSITION OF APPEAL

(a) **DISPOSITION**. The Panel will dispose of all appeals by entry of an Opinion, Memorandum or Order.

(b) **DESIGNATION.**

(1) *Opinion*. A disposition of an appeal may be designated as an Opinion if it:

(A) Establishes, alters, modifies or clarifies a rule of law;

(B) Calls attention to a rule of law which appears to have been generally overlooked;

(C) Criticizes existing law; or

(D) Involves a legal or factual issue of unique interest or substantial public importance.

(2) *Memorandum or Order***.** A disposition of an appeal not designated as an Opinion will be designated as either a Memorandum or an Order.

(3) *Manner of Designation.* A disposition shall be designated an Opinion if:

(A) two of the three judges assigned to hear and dispose of the appeal, including the author of the disposition, agree that the disposition shall be designated an Opinion at the time such disposition is filed with the Clerk, or within 28 days thereof; or

(B) an interested party, or any member of the Panel, requests, in writing, that a Memorandum or Order be redesignated as an Opinion, and that it be published. The request must be received no later than 28 days after the filing of the Memorandum or Order and must state concisely the reasons for publication. The judges assigned to hear and dispose of the appeal shall vote on whether to change the initial designation and, if two of the three judges assigned to hear and dispose of the appeal, including the author of the disposition, agree that the disposition shall be designated an Opinion.

(c) **CITATION AND EFFECT.**

(1) *Opinions*. Opinions shall be published. They shall bind the Panel as precedent unless they are modified or reversed in an Opinion issued by the Panel sitting en banc, or unless they no longer are precedent due to changes in the law, whether by act of Congress or by decision of the Ninth Circuit Court of Appeals or the

Supreme Court.

(2) *Memoranda and Orders*. Except as provided in subsection (d), Memoranda and Orders will not be published, shall have no precedential value, and may not be cited except when relevant under the doctrine of law of the case, or under rules of claim or issue preclusion.

(d) **PUBLICATION.**

(1) *Opinions*. If the disposition is to be published, the BAP Clerk will release a copy to recognized channels for dissemination to the public.

(2) *Orders.* An Order may be designated for publication if so designated by the process provided in subsection (b)(3), with the following changes: (i) only two judges, one of whom is the author of the Order, need to agree as to publication; and (ii) the Order shall be treated as if it were a disposition of the appeal for all other purposes of applying that subsection. When so published, the Order may be used for any purpose for which an Opinion may be used. Upon designation as published, the BAP Clerk will release a copy to recognized channels for dissemination to the public.

8014-1
COSTS

Costs under FRBP 8014 are taxed by filing a bill of costs with the clerk of the bankruptcy court.

8018(b)-1
SILENCE OF LOCAL RULES

In cases where Part VIII of the Federal Rules of Bankruptcy Procedure and these rules are silent as to a particular matter of practice, a Panel may apply the Rules of the United States Court of Appeals for the Ninth Circuit and the Federal Rules of Appellate Procedure.

8018-2
CITATION TO RULES

These rules shall be cited as:

"9th Cir. BAP R. _____."

8070-1
DISMISSAL FOR FAILURE TO PROSECUTE

When an appellant fails to file an opening brief timely, or otherwise fails to comply with rules or orders regarding processing the appeal, the BAP Clerk, after notice, may enter an order dismissing the appeal. The order dismissing the appeal is subject to reconsideration by the Panel if a written request for judicial review is received within fourteen (14) days of the entry of the order.

Rule 9001-1
DEFINITIONS

(a) The words "BAP Clerk" as used in these rules mean the Clerk of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(b) The word "Judge" as used in these rules, unless otherwise designated, means a member of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(c) The word "Panel" as used in these rules means a panel of the judges of the United States Bankruptcy Appellate Panel of the Ninth Circuit.

(d) The acronym "BAP" as used in these rules means United States Bankruptcy Appellate Panel of the Ninth Circuit.

(e) The acronym “FRBP” as used in these rules means Federal Rules of Bankruptcy Procedure.

(f) The acronym "FRAP" as used in these rules means Federal Rules of Appellate Procedure.

9010-1
ATTORNEYS--Duties, Withdrawal, Substitution

(a) DUTIES. Counsel must ensure that the appeal is perfected on behalf of the represented party in a manner and within the times prescribed in these rules and must prosecute the appeal with diligence. Counsel must provide counsel’s name, bar number, address, and telephone number on all documents filed with the BAP. Changes in address of counsel or client must be reported to the BAP Clerk in writing.

(b) ADMISSION. Any attorney admitted to practice before a District Court of the Ninth Circuit or the Court of Appeals for the Ninth Circuit and who is in good standing before such court shall be deemed admitted to practice before the BAP. An attorney not so admitted may apply to the BAP for permission to appear in a particular appeal.

(c) WITHDRAWAL AND SUBSTITUTION. No attorney who has appeared in an appeal before the BAP may withdraw without either:

(1) Filing and serving a Notice of Substitution of Attorney. The notice shall contain substitute counsel's name, bar number, address, telephone number and signature; or

(2) Obtaining an order of the BAP allowing the attorney to withdraw. The BAP may grant such an order if an attorney files and serves on opposing counsel and the attorney's client a motion to withdraw as counsel. Any motion to withdraw shall include the client's current address and telephone number.

(d) NOTICE OF APPEARANCE. Immediately upon undertaking the representation, any attorney who represents a party in an appeal, and who is not identified in either the notice of appeal or a notice of substitution of attorney, shall file and serve a notice of appearance containing counsel's name, bar number, address, and telephone number.

9010-2
PRO SE PARTIES

Parties unrepresented by counsel and appearing before the Panel are considered to be "pro se parties" representing themselves. Only individuals are permitted to appear pro se. Pro se parties must ensure their appeal is perfected in a manner and within the time limits prescribed in these rules and must prosecute the appeal with diligence. Changes in address must be reported to the BAP Clerk in writing.

Explanatory Note:

See In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996); In re Eisen, 14 F.3d 469, 471 (9th Cir. 1994). Corporations, partnerships and associations are not permitted to appear in federal court except through a licensed attorney. Rowland v. California Men's Colony, 506 U.S. 194 (1993); In re America West Airlines, Inc., 40 F.3d 1058 (9th Cir. 1994).

LOCAL RULES OF BANKRUPTCY APPEAL PROCEDURE[8]

8 The Local Rules of Bankruptcy Appeal Procedure may be cited as "LRBankr".

9th Cir. BAP R. 8001(a)-1. Notice of Appeal

LRBankr 8001-1

NOTICE OF APPEAL

Order Being Appealed. The appellant shall attach to the notice of appeal filed in bankruptcy court a copy of the entered judgment, order or decree from which the appeal was taken. If a 28 U.S.C. Sec. 158(c) election to have the appeal heard by the district court is filed by the appellant at the time of filing the notice of appeal, the bankruptcy court clerk shall transmit the appeal to the district court clerk. If such an election is filed by any other party with the clerk of the bankruptcy appellate panel within thirty days after service of the notice of appeal, the clerk of the bankruptcy appellate panel shall transfer the appeal to the district court. If the notice of appeal is filed before entry of the order being appealed, it is the appellant's duty to transmit to the district court clerk a copy of the judgment or order immediately upon entry.

Committee Notes: Generally, the Local Rules of Bankruptcy Appeal Procedure track the content and the numbering of the local rules of the Ninth Circuit Bankruptcy Appellate Panel.

9th Cir. BAP R. 8001(e)-1. Election to Transfer Appeal to District Court

LRBankr 8001-2

ELECTION PROCEDURE FOR MOTION FOR LEAVE TO APPEAL

If the appellant moves for leave to appeal pursuant to FRBP 8003 and fails to file a separate notice of appeal concurrently with filing the motion for leave, the motion for leave will be treated as if it were a notice of appeal for purposes of calculating the time period for filing an election to transfer the appeal to the district court.

9th Cir. BAP R. 8006-1. Transcripts

LRBankr 8006-1

TRANSCRIPTS

Any party submitting excerpts of the record shall include all transcripts necessary for adequate review in light of the standard of review applicable to the issues before the district court. The district court is required to consider only those portions of the transcript included in the excerpts of the record. If findings of fact and conclusions of law were made orally on the record, a transcript of those findings is mandatory.

9th Cir. BAP R. 8007(b)-1. Docketing Appeal and Appellate Record

LRBankr 8007-1

DOCKETING APPEAL AND APPELLATE RECORD

As soon as the statement of issues, designation of record, and any designated transcripts are filed with the bankruptcy court, the bankruptcy court clerk, upon exercise of the 28 U.S.C. Sec. 158(c) election to have the appeal heard by the district court, shall transmit to the district court clerk a certificate that the record is complete and shall notify the parties of that transmittal unless the certificate has been filed with the bankruptcy appellate panel. The date the bankruptcy court clerk transmits the certificate that the record is complete shall constitute the date of entry of the appeal on the docket of the district court. The bankruptcy court clerk shall retain the record. The district court clerk may request a copy of the record from the bankruptcy court clerk.

9th Cir. BAP R. 8008(a)-1. Communications

(NO LOCAL RULE)

9th Cir. BAP R. 8008(a)-3. Fax Filing

(NO LOCAL RULE)

9th Cir. BAP R. 8009(a)-1. Briefs; Number of Copies; Extensions of Time

LRBankr 8009-1

BRIEFS – TIME LIMITS AND NUMBER

(a) **Scheduling Order.** Upon entry of the appeal on the docket, the district court shall issue a scheduling order regarding submission of briefs. Parties shall file briefs within the time limits set forth in the scheduling order rather than the time limits set forth in FRBP 8009(a)(1), (2), and (3).

(b) **Number.** Upon the filing of a brief, a party shall also provide one paper copy for use by the District Judge to whom the case is assigned, bound separately from the excerpts of the record. At the direction of the district court, the parties may be required to provide additional copies.

(c) **Motion for Extension of Time for Filing Brief.**

(1) Requirements. A motion for extension of time to file a brief shall be filed within the time limit prescribed by these rules for the filing of such brief and shall be accompanied by a proof of service. The motion shall be supported by a declaration stating:

1. When the brief was initially due;
2. How many extensions of time, if any, have been granted;
3. Reasons why this extension is necessary;
4. The specific amount of time requested; and
5. The position of the opponent(s) with respect to the motion or why the moving party has been unable to obtain a statement of such position(s).

(2) Consequences. Appellant's failure to file a brief timely may result in the dismissal of the appeal. A brief received after the due date will not be accepted for filing unless it is accompanied by a motion for an extension of time and the motion is granted. The district court has no obligation to consider a late brief. Sanctions may be imposed, such as the waiver of oral argument, monetary sanctions or dismissal.

9th Cir. BAP R. 8009(b)-1. Appendix (Excerpts of the Record)

LRBankr 8009-2

BRIEFS AND EXCERPTS OF THE RECORD

(a) **Number and Form.** Upon the filing of any excerpts of the record, a party shall also provide one paper copy for use by the District Judge to whom the case is assigned, bound separately from the briefs. The copy shall be reproduced on white paper by any duplicating process capable of producing a clearly legible image and be bound with a white cover. The cover of the excerpts shall contain the caption information specified by LRBankr 8010-1(a).

(b) **Organization of Appendix.** Documents in the excerpts shall be divided by tabs in the paper copy provided for use by the Judge. The pages of the excerpts shall be continuously paginated. The excerpts shall contain a complete table of contents listing the documents and identifying both the tab and page number where each document is located. If the excerpts have more than one volume, the table of contents shall also identify the volume in which each document is located.

9th Cir. BAP R. 8010(a)-1. Form of Briefs and Certification Requirements

LRBankr 8010-1

BRIEFS – FORM AND CERTIFICATION REQUIREMENTS

(a) **Form.** Briefs shall comply with the form requirements of LRCiv 7.1 and shall contain the following cover information:

Name of Court;

Case numbers (District Court, Bankruptcy Court, and if applicable, adversary number(s));

Name of debtor;

Names of appellant(s) and appellee(s);

Title of document; and

Name, address, telephone number, email address, and bar number of counsel filing document.

(b) **Certification as to Interested Parties.** To enable the district judge to evaluate possible disqualification or recusal, all parties, other than governmental parties, shall attach to the inside back cover of their initial briefs, a list of all persons, associations of persons, firms, partnerships and corporations that have an interest in the outcome of the case. The certification should be in substantially the following form:

Certification Required by Local Bankruptcy Rule 8010-1(b)

[DISTRICT COURT CASE NUMBER, DEBTOR'S NAME]
The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable the district judge to evaluate possible disqualification or recusal [list the names of all such parties and identify their connection and interest]:

Signed Dated

(c) **Certification of Related Cases.** The appellant shall attach as the last page of each copy of the opening brief a statement of all known related cases and appeals before the United States Court of Appeals, the BAP, or the district court. Appellee's answering brief shall contain appellee's certification of related cases. A related case is defined as one which involves substantially the same litigants, substantially the same factual pattern or legal issues, or arises from a case previously heard by the district court. The certification should be in substantially the following form:

Certification Required by Local Bankruptcy Rule 8010-1(c)

[DISTRICT COURT NUMBER, DEBTOR'S NAME]

The undersigned certifies that the following are known related cases and appeals [list the case name, court and status of all related cases and appeals]:

Signed Dated

Committee Notes: Rule 8010-1 tracks 9th Circuit BAP Rule 8010(a)-1, except that the form requirements of LRCiv 7.1 are adopted over the differing form requirements of the BAP Rule, and colored brief covers are not required.

9th Cir. BAP R. 8010(c)-1. Length of Briefs

LRBankr 8010-2

LENGTH OF BRIEFS

Except with leave of the district court, the appellant's and appellee's initial briefs may not exceed seventeen (17) pages, and reply briefs may not exceed eleven (11) pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations or similar materials.

Committee Notes: The page limits are those set by LRCiv 7.2(e) for civil motions generally and differ from those in the Ninth Circuit BAP.

9th Cir. BAP R. 8011(d)-1. Emergency Motions

LRBankr 8011-1

EMERGENCY MOTIONS

(a) **Form and Number.** An emergency motion must have a cover page bearing the legend "Emergency Motion" in large, bold type. Upon filing the motion, one paper copy must be provided for use by the District Judge to whom the case is assigned.

(b) **Contents.** The motion and supporting declaration(s) must set forth the facts showing the existence and nature of the alleged immediate and irreparable harm.

(c) **Appendix.** An emergency motion must be accompanied by an appendix containing: (1) a conformed copy of the notice of appeal, and (2) a copy of the entered judgment, order or decree from which the appeal was taken. If the emergency motion concerns a stay pending appeal, the appendix must also contain: (1) a conformed copy of the bankruptcy court's order denying or granting the stay and any explanation by the bankruptcy court of its ruling, or a declaration explaining why such a copy is unavailable; and (2) copies of all documents regarding the stay filed in bankruptcy court.

(d) **Service.** The motion and appendix must be accompanied by a proof of service showing service on all parties.

9th Cir. BAP R. 8011(e)-1. Delegation of Authority to Act on Motions

(NO LOCAL RULE)

9th Cir. BAP R. 8012-1. Oral Argument

LRBankr 8012-1

ORAL ARGUMENT

Unless otherwise directed by the district court, a party desiring oral argument shall request it by placing "Oral Argument Requested" immediately below the title of the brief. If oral argument is granted, notice will be given in a manner directed by the district court.

9th Cir. BAP R. 8012-2. En Banc Hearing and Determination of Appeals

(NO LOCAL RULE)

9th Cir. BAP R. 8013-1. Disposition of Appeal

(NO LOCAL RULE)

9th Cir. BAP R. 8014-1. Costs

LRBankr 8014-1

COSTS

Costs under FRBP 8014 are taxed by filing a bill of costs with the bankruptcy court clerk.

9th Cir. BAP R. 8018(b)-1. Silence of Local Rules

LRBankr 8018-1

SILENCE OF LOCAL RULES OF BANKRUPTCY APPEAL PROCEDURE

In cases where these Local Rules of Bankruptcy Appeal Procedure and the FRBP are silent as to a particular matter of practice relating to a bankruptcy appeal, the District Court may apply the Rules of the United States Court of Appeals for the Ninth Circuit, the Federal Rules of Appellate Procedure and/or this Court's Local Rules of Civil Procedure including, but not limited to, the General Provisions, LRCiv 81-86, thereof.

9th Cir. BAP R. 8018-2. Citation to Rules

LRBankr 8018-2

CITATION TO LOCAL RULES OF BANKRUPTCY APPEAL PROCEDURE

Parties shall cite these Local Rules of Bankruptcy Appeal Procedure as:

"LRBankr".

LRBankr 8019-1

SUSPENSION OF LOCAL RULES OF BANKRUPTCY APPEAL PROCEDURE

Upon application, or upon the district court's own motion, any judge of the district court may suspend any of these Local Rules of Bankruptcy Appeal Procedure for good cause shown.

9th Cir. BAP R. 8070-1. Dismissal for Failure to Prosecute

LRBankr 8020-1

DISMISSAL FOR FAILURE TO PROSECUTE

When an appellant fails to file an opening brief timely, or otherwise fails to comply with rules or orders regarding processing the appeal, the district court, after notice, may enter an order dismissing the appeal.

9th Cir. BAP R. 9001-1. Definitions

(NO LOCAL RULE)

9th Cir. BAP R. 9010-1. Attorneys-Duties, Withdrawal, Substitution

(NO LOCAL RULE)

9th Cir. BAP R. 9010-2. Pro Se Parties

(NO LOCAL RULE)