

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

PRACTICE MANUAL

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INTRODUCTION

This manual is intended to serve as a guide for attorneys and litigants appearing in proceedings before the Bankruptcy Appellate Panel of the Sixth Circuit (“BAP”). The manual should be read in conjunction with the Rules of the BAP and Part VIII of the Federal Rules of Bankruptcy Procedure.

The members of the BAP are:

Hon. Marcia P. Parsons, Chief Judge	Greeneville, Tennessee
Hon. Thomas H. Fulton	Louisville, Kentucky
Hon. Marci B. McIvor	Detroit, Michigan
Hon. Steven W. Rhodes	Detroit, Michigan
Hon. Joseph M. Scott	Lexington, Kentucky
Hon. Marilyn Shea-Stonum	Akron, Ohio

The central office of the BAP is located in Cincinnati, Ohio. The Clerk of the BAP, Leonard Green, is also clerk of the U.S. Court of Appeals for the Sixth Circuit. The panel clerk's office is located in Room 532 of the Potter Stewart U.S. Courthouse, and is open Monday through Friday, 8:30 A.M. to 5:00 P.M. On days when arguments are heard in a courtroom of the Sixth Circuit Court of Appeals, the clerk's office is open at 8:00 A.M. to allow counsel to check in. All filings made with the panel are to be made with the panel clerk's office in Cincinnati, and all decisions and other rulings of the BAP are filed there as well.

The clerk's office welcomes telephone inquiries (513/564-7000) from counsel regarding rules, practices, procedures, and special problems.

I. INITIATING THE APPEAL

The information in this manual is intended to assist you in your appeal of a judgment or order of a bankruptcy judge in a district which has authorized appeals to the BAP. See 28 U.S.C. § 158(b)(6). Currently the district courts for the Eastern District of Kentucky, the Western District of Michigan, the Northern District of Ohio, the Southern District of Ohio, the Middle District of Tennessee, and the Western District of Tennessee have made such an authorization.

(a) **Final Order or Judgment.** If the order or judgment from which you are appealing is final, you may appeal as of right. 28 U.S.C. § 158(a)(1). The party taking the appeal (the appellant) must initiate the process by filing a notice of appeal with the clerk of the bankruptcy court within ten days of the filing of the order or judgment being appealed. Fed. R. Bankr. P. 8001(a), 8002(a). The bankruptcy clerk will serve all parties other than the appellant with a copy of the notice of appeal. Fed. R. Bankr. P. 8004. A fee of \$255 is required to be paid to the clerk of the bankruptcy court at the time the notice of appeal is filed.

(b) **Interlocutory Order.** A party seeking to appeal an interlocutory order must first seek and obtain the permission of the BAP to do so. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8001(b), 8003. *The motion must be filed with the clerk of the bankruptcy court and must be accompanied by a notice of appeal and the filing fee of \$255.* Fed. R. Bankr. P. 8001(b). The party filing the motion is required to serve a copy on all other parties. Fed. R. Bankr. P. 8008(b). Any party opposing the motion for leave to appeal is entitled to file a response with the clerk of the bankruptcy court within ten days after service of the motion. Fed. R. Bankr. P. 8003(a).

The bankruptcy clerk will forward the notice, the motion for leave to appeal, and any answers, to the panel clerk as soon as the answer period has run. The panel clerk, in turn, will submit these documents to the panel which has been assigned to decide the motion. As soon as a decision has been filed, the panel clerk will notify the parties and the clerk of the bankruptcy court.

(c) **Election to Have Appeal Determined in District Court.** In those districts that have authorized appeals to the BAP, **every appeal is determined by the BAP unless:**

- (1) The appellant or cross-appellant files with the clerk of the bankruptcy court, at the time the notice of appeal is filed, a separate written statement indicating the election to have the appeal determined by the district court; or
- (2) any other party to the appeal elects to have it determined by the district court by filing with the panel clerk, within thirty days of service of the notice of appeal, a separate written statement evidencing that intention.

28 U.S.C. § 158(c)(1). If a party other than the appellant files with the panel clerk any document other than a notice of appearance, that party is deemed to have waived the remainder of the thirty-day election (“opt-out”) period, with the result that the case will remain with the BAP for the duration. Once a party has made its election, it is binding on any cross-appeal from the same order or judgment filed by that party, unless the BAP orders otherwise. See *In re Linder*, 215 B.R. 826 (B.A.P 6th Cir. 1998).

REMEMBER

File the notice of appeal with and pay the fee to the clerk of the bankruptcy court.

Appeals will remain with the BAP unless and until a party affirmatively and timely elects to have it determined by the district court.

II. OPENING THE APPEAL

(a) **Case Opening Letter.** As soon as the panel clerk receives from the clerk of the bankruptcy court a copy of the notice of appeal and a copy of the order or judgment being appealed, the case will be entered on the BAP's docket and assigned a docket number.

Once the appeal has been opened, the panel clerk will send to counsel for all parties a letter informing them of the date the appeal was opened and the number assigned. The case opening letter will also state whether the filing fee requirement has been satisfied and, if not, the letter will serve as notice that, if the fee is not paid within the deadline indicated, the appeal may be dismissed for want of prosecution.

(b) **Assignment of Panel.** A case is assigned to a panel as soon as it is filed. A judge will not be assigned to a case which originates in his or her home district. 28 U.S.C. § 158(b)(5).

REMEMBER

You will receive a letter from the panel clerk as soon as the appeal is docketed. The letter contains important instructions, and should be read at once.

III. PREARGUMENT CONFERENCE AND MEDIATION

Sixth Circuit BAP Rule 8080-2 describes a procedure for the review of appeals shortly after filing, to determine whether a preargument conference would benefit the panel or the parties, and to explore the possibilities of settlement or simplification of the issues.

The conference may be conducted by one of the Sixth Circuit mediation attorneys — each of whom is a seasoned attorney and mediator — or by a panel judge designated by the Chief Judge. If a judge participates in a conference, the judge will not later sit on a panel which considers any aspect of the appeal.

This program parallels the highly successful preargument conference program which has been in place in the Sixth Circuit Court of Appeals for twenty years.

REMEMBER

You may request a preargument conference if you think it would be helpful.

IV. THE RECORD ON APPEAL AND THE STATEMENT OF ISSUES

(a) **The Record on Appeal.** As is the case with any appellate court, review is predicated on the record of proceedings before the lower court, and for that reason it is imperative that the appellant take the necessary steps to ensure the prompt and complete preparation of the record.

The appellant is required to file with the clerk of the bankruptcy court, within ten days of the filing of the notice of appeal, a designation of those parts of the record developed before the bankruptcy court that are to comprise the record on appeal. Fed. R. Bankr. P. 8006. The several bankruptcy courts may vary on exactly how they want this designation to be made, so you should check the particular bankruptcy court's local rules and procedures for doing so.

Rule 8006 of the Federal Rules of Bankruptcy Procedure also requires that the appellant order the relevant transcript for the appeal and make satisfactory financial arrangements with the court reporter(s) upon filing the designation of record. If an appellee determines that transcripts in addition to those already ordered will be necessary, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal. The appellant must then place the additional order within ten days. If the appellant fails to do so in the required time period, then the appellee may either do so or move the bankruptcy court for an order requiring the appellant to do so.

Court reporters are expected to prepare the transcript and deliver it to the bankruptcy clerk within thirty days of the date when financial arrangements were completed. A court reporter who cannot make that deadline must seek an extension of time from the panel clerk.

The failure of an appellant to timely arrange for the completion of the record on appeal may lead to dismissal of the appeal for want of prosecution.

(b) **Statement of the Issues.** Rule 8006 also requires that the appellant file with the clerk of the bankruptcy court, within ten days of the filing of the notice of appeal, a statement of the issues to be presented.

REMEMBER

Think carefully about what should be included in the record on appeal, and then file your designation of the record with the clerk of the bankruptcy court.

Order and make arrangements to pay for all necessary transcripts as soon as possible.

File your statement of issues with the clerk of the bankruptcy court.

V. MOTIONS

(a) **In General.** Regardless of the nature of the motion being filed, you must file with the panel clerk an original and three copies of the motion itself and any memorandum of law or other documentation offered in support of the motion. The specifics of form and content are contained in Rule 8011(a) of the Federal Rules of Bankruptcy Procedure. Make certain that you include a certificate of service with your motion. Fed. R. Bankr. P. 8008(d).

(b) **Response.** Rule 8011(a) allows any party to file a response to a motion other than one for a procedural order within seven days after service of the motion. The panel may, however, lengthen or shorten that time.

(c) **Determination of the Motion.** Motions are ruled upon by the panel clerk or by a judge or panel of three judges, depending upon the type of motion.

(1) Certain procedural motions can be decided by the panel clerk without submission to a judge, B.A.P. 6th Cir. R. 8011-2(a). These include:

- Motions which are procedural, or deal with preparation or filing of the briefs or appendix
- Motions for voluntary dismissal
- Motions for dismissal for want of prosecution
- Motions for extensions of time
- Motions to withdraw or to substitute counsel
- Any other type of motion delegated to the clerk by the panel, which is subject to disposition by a single judge pursuant to Rule 8011(e) of the Federal Rules of Bankruptcy Procedure.

Any rulings on motions by the panel clerk will show that they were entered by him or her pursuant to Sixth Circuit BAP Local Rule 8011-2(a). A party may seek reconsideration of such a ruling by a judge or a panel by filing a motion for reconsideration within ten days of service of notice of the entry of the order. Fed. R. Bankr. P. 8011(b).

- (2) All other motions are referred to the panel which is assigned to the appeal. This includes motions for certification of direct appeal to the Sixth Circuit Court of Appeals under 28 U.S.C. § 158(d)(2). It is extremely unlikely that a panel will want to have oral argument on the motion. See Fed. R. Bankr. P. 8011(c). If it does, it will give you the appropriate direction.
- (3) An appeal may be expedited upon a showing of good cause. If an appeal is ordered expedited, the panel clerk will fix a briefing schedule that permits the appeal to be set for oral argument at an early date, or otherwise as directed by the panel. The panel clerk will usually have some idea of the approximate date of when the hearing will be, and can advise counsel accordingly when the order is issued.
- (4) Upon filing of a motion for reconsideration, a panel may reconsider its own action. A motion for reconsideration must be filed not later than ten days after the entry of the order or judgment sought to be reconsidered. See Fed. R. Bankr. P. 8015. A motion for additional time or for permission to file out of time is referred to the panel assigned to the appeal. Counsel should not assume that a request for additional time will be granted.

(d) **Emergency Motions.** Situations will arise in which motions are filed which will require panel consideration and ruling very quickly. See Fed. R. Bankr. P. 8011(d).

It is expected that as soon as it becomes likely that an emergency motion will have to be filed, counsel will contact the panel clerk immediately for direction. In no event should counsel go directly to a panel judge without first having made every practicable effort to contact the panel clerk.

Emergency motions often precede the filing of the record on appeal. It is therefore essential that the movant include with the motion, in addition to copies of the notice of appeal and the order or judgment being appealed, copies of all portions of the record which will be necessary for the disposition of the motion.

Because of the abbreviated time frame within which the panel has to decide the motion, the normal response time will likely need to be shortened. The panel clerk will advise counsel of the deadline for filing the response.

REMEMBER

All motion papers are to be filed with the panel clerk, and a copy must be served on all other counsel.

Call the panel clerk for guidance as soon as it appears likely that you have an emergency situation developing.

VI. THE BRIEFS AND APPENDIX

(a) **In General.** The brief is the principal vehicle by which a party tries to persuade the panel why it should decide the case in that party's favor. An effective brief will discuss the factual and legal issues cogently and succinctly, and will call to the panel's attention relevant precedent to support the party's position.

(b) **Briefing Notice from the Clerk.** Upon the filing of the record on appeal with the panel clerk, he or she will issue to all parties a schedule for the filing of the brief and the appendix.

Extensions of time for filing either the brief or the appendix must be supported by a showing of good cause. The movant **should not assume** that the motion will be granted; rather, the assumption should be that the brief or appendix remains due as originally scheduled unless and until there is a ruling otherwise.

Compliance with the briefing and appendix deadlines is crucial to the timely processing and determination of the case. Failure of any party to the appeal to comply with these filing requirements may result in the imposition of sanctions, including the dismissal of the appeal for want of prosecution or the prohibition of that party from further participation in the appeal (including participation in oral argument).

(c) **Requirements for the Brief.** The brief must conform with a variety of formatting and mechanical requirements, Fed. R. Bankr. P. 8010 and B.A.P. 6th Cir. R. 8010-1:

- Opening and answer briefs are limited to 50 pages, and reply briefs to 25 pages.
- Briefs shall be submitted on white 8.5 x 11 inch paper in typewritten form, using electronic word processing or similar process, and reproduced by photocopying or similar process. Briefs shall be double-spaced in a font not less than 12 points in size, with margins of not less

than one inch. Times New Roman and Arial are commonly used fonts which are presumptively acceptable.

- Covers are of the following colors:

Appellant's First Brief	Tan
Appellee's First Brief	Green
Appellant's Second Brief (cross appeal)	Yellow
Appellee's Second Brief (cross appeal)	White
Intervenor or Amicus Brief	White
Appendix	White.

(d) **The Appendix.** The appendix is a distillation of the record, containing those parts that are essential to the panel's understanding of the facts and legal issues necessary to an informed resolution of the appeal. Because there is only one original record and three panel judges located in separate cities will be preparing to decide the appeal, the appendix should be a self-contained document to which the judges can refer as they study the briefs.

The appellant files the appendix with the initial brief. Fed. R. Bankr. P. 8009(b). If the appellee feels that the appendix submitted by the appellant omits necessary materials, a separate appendix can be filed by the appellee with the appellee's brief.

The party filing the appendix must:

- File an original and 4 copies
- Use 8.5 x 11 inch paper
- Attach white covers
- If there are multiple volumes to the appendix, make sure that each volume begins with an index to that volume

- Include each item listed in Rule 8009(b) of the Federal Rules of Civil Procedure, and all other transcripts and portions of the record that the party considers necessary to the panel's understanding of the appeal — no more, no less
- Be paginated, with the table of contents setting forth the appendix page number at which each document starts, along with the record entry number of the documents from the bankruptcy court docket sheet.

Fed. R. Bankr. P. 8009(b); B.A.P. 6th Cir. R. 8009-3 (as revised by General Order).
The panel clerk will return any appendix not conforming to Sixth Circuit BAP Local Rule 8009-3.

REMEMBER

Make sure that your brief and appendix conform to all formatting requirements.

Be sure to have the proper color cover.

Make sure the appendix is paginated, and includes a proper table of contents.

If you file a motion for an extension of time, do not assume that it will be granted.

The Panel strongly encourages complete transcripts. Partial transcripts may be filed if the complete transcript is voluminous. However, the Panel may request further portions of a transcript or the entire transcript if needed, and this may delay the appeal.

VII. ORAL ARGUMENT

(a) **In General.** A panel has the discretion to decide appeals with or without oral argument, Fed. R. Bankr. P. 8012, and, if argument is to be held, to decide whether to have argument in person or to use teleconference or other means. Appeals will be scheduled for oral argument unless the panel unanimously agrees that it is not necessary, or unless the panel accepts the parties' stipulation to waive argument. Waiver is encouraged as a means to avoid increased costs to the parties or undue delay in the submission and decision of the case.

Oral argument affords the panel an opportunity to focus on any particular questions it may have about the case, and to seek counsel's help in clarifying or expanding on the points made in the brief. Counsel should anticipate and welcome questions from the panel, since the answers to those questions will help the judges come to a better understanding of the case.

Counsel can expect that each of the panel judges will have prepared thoroughly in advance of argument, and will be fully conversant with the facts of the case. **You should not simply read from your brief.** Argument time will generally be limited to 15 minutes per side, and counsel must carefully plan how to use that limited time to discuss the most salient issues. A party which has not filed a brief will not be allowed to present oral argument. B.A.P. 6th Cir. R. 8012-1(c)(1).

(b) **Place and Time of Arguments.** Arguments are generally scheduled the first Wednesday of February, May, August, and November, depending on the caseload. Arguments may be held in Cincinnati (in a courtroom of the United States Court of Appeals for the Sixth Circuit or of the United States Bankruptcy Court for the Southern District of Ohio), or in another location convenient to the panel members and the attorneys for the parties.

The day's docket will begin at 9:00 a.m. Counsel should check in by 8:30 a.m. When arguments are heard in a Sixth Circuit courtroom in Cincinnati, counsel should

check in at the Sixth Circuit clerk's office, which is located in Room 524 of the Potter Stewart U.S. Courthouse (on 5th Street between Walnut and Main Streets in downtown Cincinnati). In the case of oral argument at other locations or oral argument by teleconference, the panel clerk will inform counsel of all the particulars (including where to check in) as soon as possible.

(c) **Waiver of Oral Argument.** If counsel is satisfied that the party's position is fully presented in the brief and oral argument is not desired, a motion for the waiver of oral argument may be filed. It is not a dereliction of representation for counsel to request a waiver of argument, or to join in a stipulation of waiver with other counsel, in such circumstances.

(d) **Recording of Oral Argument.** Each oral argument is recorded. A copy of a recording may be purchased from the panel clerk for a fee, currently \$26.

REMEMBER

Check in on time on the morning of your argument.

Budget your argument time wisely; discuss the most important issues, and do not simply recite from your brief.

Decide whether argument is likely to be necessary or helpful for your case.

VIII. DECISIONS

(a) **In General.** Decisions on motions will be made by way of a written order signed by the panel clerk and entered on the docket. In cases argued to a panel, the decision may be announced from the bench at the conclusion of argument, B.A.P. 6th Cir. R. 8013-1(a), or by an order or opinion issued after the panel has heard argument and taken the matter under advisement.

(1) **Opinions.** A copy of the opinion is sent to each counsel on the date of filing. In addition, each opinion that the panel determines should have precedential effect is sent for publication to West's Bankruptcy Reporter, Lexis, Westlaw, and other publishers. All BAP opinions are posted on the Sixth Circuit's website (www.ca6.uscourts.gov). (The website can be accessed through PACER, 1-800-676-6856; pacer.psc.uscourts.gov.)

(2) **Judgment.** Once the clerk receives the written opinion of the panel, or once the panel has announced its decision from the bench, a judgment will be prepared, signed, and entered on the docket, with a copy sent to all parties.

(b) **Stay of Judgment.** Unless the panel orders otherwise, the judgment will automatically be stayed for ten days to allow time to file a motion for rehearing pursuant to Rule 8015 of the Federal Rules of Bankruptcy Procedure.

IX. APPEAL OF BAP DECISION

Appeals from decisions of the BAP are taken to the United States Court of Appeals for the Sixth Circuit. The appeal is initiated by filing a notice of appeal with the panel clerk, specifying the order or judgment appealed from and naming the appellant(s), pursuant to the deadlines established in Rule 4 of the Federal Rules of Appellate Procedure.