

**BANKRUPTCY APPELLATE PANEL
OF THE SIXTH CIRCUIT
PRACTICE GUIDELINES**

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INTRODUCTION

A Bankruptcy Appellate Panel (abbreviated “BAP”) is a group of judges of the United States bankruptcy courts who are appointed to hear appeals from certain bankruptcy cases under the supervision of the United States Courts of Appeal. The Sixth Circuit is one of five circuits with bankruptcy appellate panels. The others are the First, Eighth, Ninth, and Tenth. This manual is intended to serve as a guide for attorneys and litigants appearing in proceedings before the BAP of the Sixth Circuit. The manual should be read in conjunction with the BAP Local Rules and Parts VII and VIII of the Federal Rules of Bankruptcy Procedure.¹

The central office of the BAP is in Cincinnati, Ohio. The Clerk of the BAP, Deborah S. Hunt, is also clerk of the United States Court of Appeals for the Sixth Circuit. The panel clerk’s office is located in Room 540 of the Potter Stewart U.S. Courthouse. All filings made with the panel are to be made using ECF, the Sixth Circuit’s adaptation of the Electronic Court Filing program implemented throughout the federal judiciary. Pro se parties should contact the panel clerk’s office for instructions regarding paper filing.

¹ These Practice Guidelines are a starting point for attorneys and litigants, and the relevant statutes and/or rules would prevail over any perceived conflict that may arise. Users should note that these Practice Guidelines may not be updated concurrently with statutory and/or rule revisions. Practitioners are responsible for the accuracy of their pleadings and for ensuring they are properly and timely filed with the BAP.

I. INITIATING THE APPEAL

The information in this guide is intended to assist you in your appeal of a judgment or order of a bankruptcy court in a district which has authorized appeals to the BAP. See 28 U.S.C. § 158(b)(6). Currently, all district courts in the Sixth Circuit have made such an authorization, with the exception of the Eastern District of Michigan and the Eastern District of Tennessee.

(a) Final Order or Judgment. If the judgment, order, or decree 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 14 days of the filing of the judgment, order, or decree being appealed. 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8002(a), 8003(a). With few exceptions, compliance with the 14-day filing rule is jurisdictional. *In re Jackson*, 585 B.R. 410, 412-13 (B.A.P. 6th Cir. 2018) (citing *Hamer v. Neighborhood Hous. Servs. of Chicago*, ___ U.S. ___, 138 S. Ct. 13 (2017)) (“time requirements of 28 U.S.C. § 158(c)(2) are jurisdictional in nature”). The bankruptcy court clerk will serve all parties to the appeal (other than the appellant) with a copy of the notice of appeal and transmit it to the United States Trustee. Fed. R. Bankr. P. 8003(c). A fee of \$298 is required to be paid to the clerk of the bankruptcy court at the time the notice of appeal is filed.²

(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. 8004. 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 \$298. Fed. R.

² Fees are determined by the Judicial Conference of the United States pursuant to Title 28 U.S.C. § 1930(b).

Bankr. P. 8004(a). The party filing the motion is required to serve a copy on all other parties. Fed. R. Bankr. P. 8004(a)(3). The motion for leave to appeal must include: (1) the facts necessary to understand the question presented, (2) the question itself, (3) the relief sought, (4) the reasons why leave to appeal should be granted, and (5) a copy of the interlocutory order or decree and any related opinion or memorandum. Fed. R. Bankr. P. 8004(b)(1). The bankruptcy clerk will promptly transmit the notice of appeal and motion to the panel clerk. Fed. R. Bankr. P. 8004(c)(1). Any party opposing the motion for leave to appeal is entitled to file a response with the panel clerk within 14 days after service of the motion. Fed. R. Bankr. P. 8004(b)(2). 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. Every appeal filed in participating bankruptcy courts shall be heard by the BAP except as provided by Federal Rule of Bankruptcy Procedure 8005.

Election to Have Appeal Heard by the District Court instead of the BAP.

(a) Filing of a statement of election

To elect to have an appeal heard by the district court, a party must:

- (1) file a statement of election that conforms substantially to the appropriate Official Form [17A]; and
- (2) do so within the time prescribed by 28 U.S.C. § 158(c)(1).

Fed. R. Bankr. P. 8005(a). An appellant (or cross-appellant) must make the election at the time of filing the appeal, and any other party must make the election not later than 30 days after service of notice of the appeal. 28 U.S.C. § 158(c)(1). If a party other than the appellant files any document other than a notice of appearance with the panel clerk, that party is deemed to have waived the remainder of the 30-day election ("opt-out") period, with the result that the case will remain with the BAP for the duration. 6th Cir. BAP LBR 8005-1(a). Once a party has made an election, it is binding on any

cross-appeal from the same order or judgment filed by that party, unless the BAP orders otherwise.

HELPFUL TIPS

Familiarize yourself with the BAP's local rules and the Federal Rules of Bankruptcy Procedure regarding appeals.

File the notice of appeal with and pay the fee to the clerk of the bankruptcy court. Make sure the notice of appeal is filed timely.

Appellants and cross-appellants must file a written statement of election with the notice of appeal. Note Part 4 of Official Form 17A.

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 bankruptcy court clerk 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 a letter to counsel for all the parties 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 by the deadline indicated, the appeal may be dismissed for want of prosecution.

(b) Assignment of Panel. A case is assigned to a panel of three members after the appellant brief has been filed. A case will be assigned a panel earlier if pre-briefing issues are raised. A judge cannot be assigned to the panel on a case which originates in the member's home district. 28 U.S.C. § 158(b)(5).

HELPFUL TIP

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 immediately.

III. MEDIATION

Sixth Circuit BAP LBR 8027-1 describes a procedure for the review of appeals shortly after filing to determine whether a mediation conference would benefit the panel or the parties and to explore the possibilities of settlement or simplification of the issues. Any party may request a mediation conference by submitting a mediation conference request directly to the Sixth Circuit Mediation Office. The requests are completely confidential and not entered on the docket

The conference is conducted by an experienced attorney trained as a mediator and employed by the Sixth Circuit Mediation Office.

Any party may be required to attend a mediation conference, in person or by telephone. The possibility of settlement, simplification of issues, the use of mediation and any other matters which the panel or conference attorney determines may aid in disposition of the appeal may be considered at the mediation conference.

This program, used by the Sixth Circuit Court of Appeals, is highly successful. See <http://www.ca6.uscourts.gov/about-mediation-conferences>.

HELPFUL TIPS

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

<http://www.ca6.uscourts.gov/sites/ca6/files/documents/forms/MediationConferenceRequest.pdf>

If it is determined by the Panel or Mediator that a mediation conference would be helpful, attendance is mandatory.

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 takes 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 and serve on the appellee a designation of items to be included in the record on appeal. This must be filed and served within 14 days of the notice of appeal as of right or the order granting leave to appeal is entered. Fed. R. Bankr. P. 8009(a)(1)(B).

The appellee (and cross-appellant) may file and serve a designation of additional items to be included in the record on appeal within 14 days after service of the appellant's designation. Fed. R. Bankr. P. 8009(a)(2). A cross-appellee may file and serve a designation of additional items to be included in the record within 14 days after service of the cross-appellant's designation and statement. Fed. R. Bankr. P. 8009(a)(3).

Note that the following items must be included in the record on appeal:

- the docket entries kept by the bankruptcy clerk;
- items designated by the parties;
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification required for a direct appeal to the court of appeals;
- any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings;
- any transcript ordered under subdivision (b);

- any statement required by subdivision (c); and
- any additional items from the record that the court where the appeal is pending orders.

Fed. R. Bankr. P. 8009(a)(4).

Within 14 days of filing the notice of appeal, an appellant has a duty to order in writing from a reporter, a transcript of such parts of the proceedings not already on file and to file a copy of the order with the bankruptcy court clerk. If an appellant is not ordering a transcript, a certificate stating so must be filed with the bankruptcy court clerk within the same 14 days. Cross-appellants have 14 days after the appellant files a copy of the transcript order or a certificate of not ordering a transcript to order in writing from a reporter additional parts of the proceedings necessary for the appeal, and file a copy with the bankruptcy clerk, or to file a certificate stating that the cross-appellant is not ordering a transcript. The same is true for appellees and cross-appellees. Fed. R. Bankr. P. 8009(b).

At the time of ordering, the party ordering the transcript must make satisfactory arrangements with the reporter for paying the cost of the transcript. Fed. R. Bankr. P. 8009(b)(4). The reporter must file with the clerk of the bankruptcy court an acknowledgment of the request that shows when the request was received and when the reporter expects to have the transcript completed. Fed. R. Bankr. P. 8010(a)(2)(A). Reporters are expected to prepare the transcript and deliver it to the bankruptcy clerk within 30 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 bankruptcy court clerk. Fed. R. Bankr. P. 8010(a)(2)(C).

If a party intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, that party must include the transcript in

the record of all relevant testimony and copies of all relevant exhibits. Fed. R. Bankr. P. 8009(b)(5).

(b) Statement of the Issues. The appellant is required to file with the clerk of the bankruptcy court, within 14 days of the filing of the notice of appeal, a statement of the issues to be presented. Fed. R. Bankr. P. 8009(a)(1). An appellee who files a cross-appeal must file a statement of the issues to be presented on the cross-appeal. Fed. R. Bankr. P. 8009(a)(2).

Failure of an appellant (or cross-appellant) to comply with the requirements of Rule 8009 is grounds for dismissal for failure to prosecute. See Fed. R. Bankr. P. 8009(a)(2). The Sixth Circuit has stated that “[a] district court may in particular exercise its discretion to dismiss an appeal for a violation of Rule [8009] where there is a showing of bad faith, negligence, or indifference.” *Kloian v. Simon (In re Kloian)*, 137 F. App’x 780, 783 (6th Cir. 2005) (citation omitted).

HELPFUL TIPS

Think carefully about what needs to 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.

Individual bankruptcy courts may differ on exactly how they want the designation to be made, so always check the particular bankruptcy court's local rules and procedures.

V. MOTIONS

(a) In General. Regardless of the nature of the motion being filed, you must electronically file with the panel clerk the motion with accompanying documents. The specifics of form and content are contained in Fed. R. Bankr. P. 8013(a). A certificate of service should be included with your motion.

(b) Response. Rule 8013(a)(3) 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 Motions. Motions are ruled upon by the panel clerk or by a judge or panel of three judges, depending upon the type of motion.

(1) **Procedural Motions.** Certain procedural motions can be decided by the panel clerk without submission to a judge. 6th Cir. BAP LBR 8013-1(a). These include:

- motions that are procedural or relate to the preparation or filing of the record or briefs;
- motions for voluntary dismissal of appeals;
- motions to dismiss for want of prosecution;
- motions for extensions of time;
- motions to withdraw or for substitution of counsel; and
- such other motions as the BAP may designate the panel clerk to act upon that

are subject to disposition by a single judge under Rule 8013(e).

Any rulings on motions by the panel clerk will show that they were entered pursuant to 6th Cir. BAP LBR 8013-1. Any party adversely affected by an order entered by the panel clerk shall be entitled to reconsideration by a judge or panel if, within the deadline provided in Fed. R. Bankr. P. 8013(b), the party files a motion for reconsideration.

- (2) **Other Motions.** 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). Unless ordered otherwise, motions will be determined without oral argument. Fed. R. Bankr. P. 8013(c).
- (3) **Emergency Motions.** In limited situations, emergencies arise that require the panel to consider and rule quickly. See Fed. R. Bankr. P. 8013(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. 6th Cir. BAP LBR 8013-2. 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. Expedited relief is appropriate upon a showing of irreparable harm. A motion seeking expedited relief must include:

- an affidavit setting out the nature of the emergency;
- state whether all grounds for it were submitted to the bankruptcy court and, if not, why the motion should not be remanded for the bankruptcy court to consider;
- include the e-mail addresses, office addresses, and telephone numbers of moving counsel and, when known, of opposing counsel and any unrepresented parties to the appeal; and
- be served as prescribed by Fed. R. Bankr. P. 8011.

Fed. R. Bankr. P. 8013(d)(2). The word "Emergency" must be inserted before the title of the motion. Fed. R. Bankr. P. 8013(d)(1). All relevant documents should be attached to the motion. 6th Cir. BAP LBR 8013-2.

(4) **Motions for Rehearing.** Upon filing of a motion for a rehearing, a panel may reconsider its own action. A motion for rehearing must be filed not later than 14 days after the entry of the

order or judgment sought to be reconsidered unless the time is shortened or extended by order or local rule. Fed. R. Bankr. P. 8022(a)(1). The motion must state with particularity each point of law or fact that the movant believes the BAP has overlooked or misapprehended and must argue in support of the motion. Fed. R. Bankr. P. 8022(a)(2). Responses are only permitted upon request by the panel. Fed. R. Bankr. P. 8022(a)(3). Oral argument is not permitted. Fed. R. Bankr. P. 8022(a)(2)

HELPFUL TIPS

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

If it appears that you have an emergency situation developing, call the panel clerk for guidance immediately.

VI. BRIEFS

(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.

When filing the briefs, parties should refer to the "Sixth Circuit Guide to Electronic Filing" available at www.ca6.uscourts.gov. See 6th Cir. BAP LBR 8011-1.

(b) Briefing Notice from the Panel Clerk. Upon the filing of the record on appeal, the panel clerk will issue to all parties a schedule for the filing of the brief.

Extensions of time for filing either the brief 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 remains due as originally scheduled unless and until there is a ruling otherwise.

Compliance with the briefing 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 to a variety of formatting and mechanical requirements. Fed. R. Bankr. P. 8014, Fed. R. Bankr. P. 8015, 6th Cir. BAP LBR 8014-1. Requirements include:

- Opening and answer briefs are limited to 30 pages, and reply briefs to 15 pages. Fed. R. Bankr. P. 8015(a)(7)(A).
- Briefs shall be submitted in compliance with the “Sixth Circuit Guide to Electronic Filing.” 6th Cir. BAP LBR 8014-1(a).
- Briefs shall be double-spaced in a font not less than 12 points in size with margins of not less than one inch. 6th Cir. BAP LBR 8014-1(d).

(d) Appendices. Pursuant to the Sixth Circuit Guide to Electronic Filing and 6 Cir. R. 30(a), appendices are no longer required in appeals to the BAP unless the panel directs otherwise.

Helpful Tips

Make sure that your brief conforms to all formatting requirements.

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

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

VII. ORAL ARGUMENT

In General. Oral argument must be allowed in every case unless the panel assigned to hear the appeal, after examining the briefs and the record, determines unanimously that oral argument is unnecessary because: (1) the appeal is frivolous; (2) the dispositive issue or issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Fed. R. Bankr. P. 8019(b).

As part of their briefs, both the appellant and the appellee must include a statement explaining why oral argument should, or need not, be permitted. Fed. R. Bankr. P. 8019(a); 6th Cir. BAP LBR 8014-1(b). If counsel is satisfied that the party's position is fully presented in the brief and oral argument is not desired, it is not a dereliction of representation for counsel to so indicate in the statement regarding oral argument.

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 have 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. The appellant may reserve part of that time for rebuttal. A

party which has not filed a brief will not be allowed to present oral argument unless otherwise directed by the panel. 6th Cir. BAP LBR 8019-1(c)(1).

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

Once the matter is set on the panel's docket, the panel clerk will notify counsel of the scheduled start time for arguments. Counsel should check in thirty minutes prior to the start of the docket in the courtroom designated in the notice of oral argument.

(b) Recording of Oral Argument. Each oral argument is recorded. Audio files of oral argument are available at www.ca6.uscourts.gov/audio-files-completed-arguments.

HELPFUL TIPS

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

Check in on time on the morning of your argument.

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

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 those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. 6th Cir. BAP LBR 8024-1(a). Otherwise, a written opinion or order will be entered.

(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). Opinions can also be accessed through PACER at www.pacer.gov. For assistance, call 1.800.676.6856.

(2) Judgment. Once the panel 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 by the panel clerk, with a copy sent to all parties. Fed. R. Bankr. P. 8024(a).

(b) Stay of Judgment. Unless the panel orders otherwise, the judgment will automatically be stayed for 14 days to allow time to file a motion for rehearing pursuant to Fed. R. Bankr. P. 8022(a)(1). Fed. R. Bankr. P. 8025(a).

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 Fed. R. App. P. 4.