AMERICAN BANKRUPTCY INSTITUTE

2018 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Appealing Bankruptcy Decisions

Hon. Daniel S. Opperman
U.S. Bankruptcy Court (E.D. Mich.); Bay City

Elizabeth M. Abood-Carroll
Orlans PC; Troy, Mich.

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CONCURRENT SESSION

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2018 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Presented by the American Bankruptcy Institute and the Consumer Bar Association of the Eastern District of Michigan

APPEALING BANKRUPTCY DECISIONS

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I. GETTING IT RIGHT IN THE BANKRUPTCY COURT

A. INTRODUCTION

In preparing for this panel, the panelists agreed that, before there is an appeal, one should try to *prepare* and *think about* the possibility that either party may appeal. If you think that there may be an appeal, then it is imperative that one should put forth the best possible record in their case.

While your case may seem obvious to you, it is not always obvious to the trial court. You should view it as your job to educate the court about the facts of your case, as well as the law. It is not the job of the court to make your arguments for you, nor do they or their law clerks have the time to do so.

It is especially important that in educating the courts about your case that you put forth a case and record that an appellate court can review. The reviewing court has documents to review, including transcripts of hearings and depositions, and does not have the benefit of judging the demeanor of testifying witnesses. Often, there is much for the appellate court to sift through and parse. Many times, oral argument in bankruptcy appeals is not granted, and decisions are rendered on the briefs alone.

Also, putting forth the best possible case can have the effect of deterring the other side from appealing. This can often be the case where the factual record is one-sided because factual findings are only set aside for clear error. If you can win on the facts, do so!

Finally, even if bankruptcy counsel will not be engaging in a subsequent appeal, bankruptcy counsel should still put forth a case that enables subsequent appellate counsel to put forth the best possible case on appeal.

B. KNOW THE ELEMENTS OF YOUR CASE

Although the strictures of the old common law pleading have given way to more liberal pleading rules, it is no longer sufficient to merely parrot the rote

elements of a cause of action. Under the Supreme Court cases of *Twombly*[1] and *Iqbal*,[2] one must provide *factual* matter sufficient to show that the party is plausibly entitled to the requested relief. Failure to properly plead the elements of the case can lead to dismissal.

Furthermore, when proving your case, and in order to survive a motion for summary judgment, one must provide *facts* pertaining to *each* element of the case and parties cannot rely on the pleadings. Rule 56 requires citation to the record, with affidavits, documents, deposition transcripts, etc.

Even if the bankruptcy litigation is a contested matter, counsel must be able to provide *evidence* and not just stand on unsupported assertions.

Although bankruptcy is in many ways "form driven," and many issues can be easily resolved or handled, it appears that there is a temptation to take the short route in order to save time and money. Understandably, the economics of a situation can make it difficult to put in the time necessary. But, in the end, putting forth the time to develop facts and argumentation will end in better results for the client, and avoiding the need for further litigation trying to rectify oversights and mistakes.

C. Develop The Argument Clearly and Completely

Many were taught in law school to put forth your best arguments first, and exclude the weakest arguments. However, in actuality, what counsel may learn is that they *should* put forth even the "weaker" arguments and make efforts to try to develop all the arguments that can be made.

One cannot be certain what will catch a court's attention, or how that court may be swayed. Facts catch the eyes, and impress and mean different things to different people. Legal arguments persuade, or fail, based on the bent and experience of the court.

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[1] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)
[2] Ashcroft v. Iqbal, 556 U.S. 662 (2009)

In reading various decisions, counsel learns that there are many times that a court will decide a case in a party's favor on what looks like, at first blush, the weakest argument. Sadly, and too often, certain arguments that may be perfectly valid are raised on appeal for the first time – but were not raised in front of the trial court. Generally, a court will not review those arguments made for the first time.

Therefore, given that uncertainty, it may be prudent to address all possible arguments to the court, because, failing to do so can result in waiver of an argument that was not raised or which counsel failed to articulate or develop. It may be the winning argument!

Besides, you would be standing on better ground to address all of your arguments to the court, taking your cue from one of the cases that the Sixth Circuit quotes all too often:

> "Perhaps more important, we see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."

United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)

D. MAKE A GOOD RECORD

This point may seem obvious, but it is so vital – bankruptcy counsel should be of the mind to put forth the best possible case with an eye to dealing with a potential appeal.

One issue which your panelist has seen all too often is the simple failure to put forth detailed facts in affidavits. Affidavits provide the factual basis to the court and are necessary for the bankruptcy court to make the factual determination supporting its decision.

Bankruptcy judges have denied what should be routine motions to extend the automatic stay due to the failure to even provide an affidavit with factual matter supportive of the motion.

Your panelist has seen opposing counsel fail to point to documents, deposition testimony, or even file affidavits in support of a motion for summary judgment in adversary proceedings. This was fatal to the case and opposing counsel was left scrambling trying to amend a complaint after the close of discovery and motions for summary judgment were filed.

Also seen is the failure to do adequate discovery, request documents, conduct depositions, and the like. Of all the things that should be done, it is the factual presentation in a motion or complaint which is the bedrock supporting your position. Bankruptcy Rule 9014(c) makes discovery under Rules 26 and 28-37 available in contested matters, and counsel should take advantage of the opportunity to conduct discovery.

Again, any appeal is determined by the underlying record, and a sparse record on appeal can leave the appellate judges frustrated. Without evidence in the record, an appellate court will likely have no basis to overturn a decision which could be overturned.

II. POST JUDGMENT MOTIONS

In trying to correct a judgment that bankruptcy counsel believes to be erroneous, the first appeal is not necessarily to the district court, but to the bankruptcy court itself.

There are numerous methods provided for by the Federal Rules of Civil Procedure for correcting the bankruptcy court's decision. These include motions for reconsideration (Rule 59(e)), for relief from judgment (Rule 60(b)), to amend or make additional findings of fact (Rule 52(b), or for a new trial (Rule 59(a)).

It can be beneficial to make your first appeal to the bankruptcy court that rendered a decision against you. The bankruptcy court heard testimony and arguments and can be in the best position to reconsider its position. Granted, the

bankruptcy court that just ruled against counsel may not be the most sympathetic court to appeal to. But, bankruptcy judges in this district *have* granted motions for reconsideration.

Furthermore, *failure* to make such motions prior to filing a notice of appeal may also cost counsel the opportunity to make these initial appeals for correction and prevent later attempts to do so.

A. LOST OPPORTUNITY – LOSING JURISDICTION – BUT INDICATIVE RULING!

The first reason to seek relief from the bankruptcy court in the first instance is because you may lose the ability to raise your meritorious motion for reconsideration or for relief from judgment.

The simple reason is that the filing of a notice of appeal transfers jurisdiction of the case to the court of appeals, and the district court no longer has jurisdiction "except to act in aid of the appeal." First National Bank of Salem, Ohio v. Hirsch, 535 F.2d 343, 345 n.1 (6th Cir. 1976). See also Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982).

Thus, once the notice of appeal is filed and case is docketed, *the bankruptcy court lost jurisdiction of the case!*

The point to make is that if you believe that you have the opportunity to correct the bankruptcy court, and you want to raise a motion for reconsideration or relief from judgment, make that case *before* filing a notice of appeal.

If you do file the notice of appeal first, and you later realize that you might have raised a motion for reconsideration or for relief from judgment, there is a method for raising such motions after the fact. Bankruptcy Rule 8008 allows for "indicative rulings." Basically, the bankruptcy court can "indicate" to the district court or BAP that "it would grant the motion or that the motion raises a substantial issue." The court hearing the appeal retains jurisdiction and "may" remand to the bankruptcy court and allow for the motion to be heard.

B. NO EXTENSION OF TIME TO FILE MOTIONS FOR RECONSIDERATION AND RELIEF FROM JUDGMENT

Bankruptcy counsel should be aware that under Rule 6(b)(2), a court has no authority to extend the time to file motions under either Rule 59(e) or (60)(b). Thus, a late filed motion will not save the right to appeal.

If a court *erroneously*, extends the time for filing a motion for reconsideration or motion for relief from judgment, and the resulting notice of appeal is actually untimely, an appellate court may still hear the appeal under the "unique circumstances" doctrine.

The "unique circumstances" doctrine stems from the Supreme Court case of *Thompson v. INS*, 375 U.S. 384 (1964) and was later clarified by the Supreme Court in Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) and applies in cases "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."

The Sixth Circuit recognizes the "unique circumstances" doctrine. See *Lawrence v. International Brotherhood of Teamsters*, 320 F.3d 590 (6th Cir. 2003) and *Bowles v. Russell*, 432 F.3d 668 (6th Cir. 2005).

C. Effect Of Filing Of Motion On The Timing Of Filing Of Notice Of Appeal

Bankruptcy Rule 8002 alters the timing of the filing of a notice of appeal if certain motions are filed. That rule states:

> (b) Effect of a Motion on the Time to Appeal.
>
> > (1) In General. If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
> >
> > > (A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;
> > >
> > > (B) to alter or amend the judgment under Rule 9023;

> (C) for a new trial under Rule 9023; or
>
> (D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

Thus, the filing of any of the aforementioned motions extends the time for filing of a notice of appeal until after resolution of the motion.

Importantly and immediately, one should notice the effect of 8002(b)(1)(D) and its effect on motions brought under Bankruptcy Rule 9024.

Bankruptcy Rule 9024 covers *any* relief sought under Rule 60, including relief under Rule 60(b). *However*, Rule 60(c) allows a motion to be brought under Rule 60(b) within a "reasonable time" or within one year after the judgment, depending on the relief sought.

The impact of 8002(b)(1)(D) is that the any motion brought under Rule 60(b) must be made within 14 days after entry of the judgment, ***regardless of the time limits of Rule 60)(c)***, if you seek to also extend the time to file the notice of appeal.

D. Motions For Reconsideration / Alter or Amend Judgment – Rule 59(e)

1. Generally

In reality, there is no provision under the Federal Rules of Civil Procedure for a "motion for reconsideration." Instead, a motion for reconsideration is treated as a motion to alter or amend a judgment under Rule 59(e). See Peabody Coal Co. v. United Mine Workers, 484 F.2d 78, 81 (6th Cir. 1973) ("The present case involves a motion to reconsider, which is in the nature of a Rule 59 motion to alter or amend judgment, and therefore should be treated similarly.")

Bankruptcy Rule 9023 incorporates Rule 59 for all purposes.

2. Timing Of Motion

Per Bankruptcy Rule 9023, a motion to alter or amend judgment must be brought within 14 days after entry of judgment.

What happens if you file the motion for reconsideration on the same day that you file a notice of appeal? The notice of appeal is suspended while the court considers the motion for reconsideration. See *Markowitz v. Campbell (in re Markowitz)*, 190 F.3d 455 (6th Cir. 1999).

3. Standard Of Review For Motion To Reconsider / Alter Or Amend Judgment

A court reviews the decision on a Rule 59(e) motion for abuse of discretion. Intera Corp. v. Henderson, 428 F.3d 605, 619 (6th Cir. 2005).

Furthermore, courts in this district will turn down such motions if the motion fails to demonstrate a palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof.

E. Motions For Relief From Judgment – Rule 60

1.Relief Available

Rule 60 contains two important provisions for the correction of erroneous judgments and Rule 60 is incorporated by Bankruptcy Rule 9024, with some caveats.

Relief under Rule 60(a) allows a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."

Rule 60(b) allows for six forms of relief from judgment. The basis for relief are:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

2. TIMING OF MOTIONS UNDER RULE 60 – AND TRAPS FOR THE UNWARY!

The effect of Bankruptcy Rule 8002(b)(1)(D) and its effect on the timing of the filing of a motion under Rule 60(b) if the timing of a notice of appeal is to be extended has already been noted above.

This next exception is not bankruptcy specific, but is a generally applicable exception when counsel seeking a motion for relief from judgment arguing that the court made a mistake of law and is worth noting.

A Rule 60(b)(1) motion for a "mistake" also covers mistakes of law. The normal reading of the Rule 60(c) would be that one should have at least a year to make a Rule 60(b)(1) motion for a mistake of law.

However, the Sixth Circuit has held that when it comes to rectifying mistakes of law, a Rule 60(b)(1) motion must be filed within the normal time for filing an appeal if the court is to consider the denial of any such motion on appeal. See Daniel v. DTE Energy Co., 592 Fed Appx. 489 (6th Cir. 2015) (citing Barrier v. Beaver, 712 F.2d 231, 234 (6th Cir. 1983).

3. Standard of Review for Rule 60(b)

i. GENERALLY

"A motion to vacate judgment under Rule 60(b) is addressed to the sound discretion of the Court, whose determination will not be disturbed upon appeal except for an abuse of discretion." Smith v. Kincaid, 249 F.2d 243, 245 (6th Cir. 1957).

ii. MISTAKE, INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLECT

As expressed by the Sixth Circuit:

> In order to be eligible for relief under 60(b)(1) the movant must demonstrate the following: (1) The existence of mistake, inadvertence, surprise, or excusable neglect. (2) That he has a meritorious defense.

Marshall v. Monroe & Sons, Inc., 615 F.2d 1156, 1160 (6th Cir. 1980).

As noted previously, if counsel is alleging a mistake of law, this is covered under Rule 60(b)(1). Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir. 1985).

One of the motions often seen is a request for relief from judgment because of a missed deadline to respond, file papers, or other attorney error – claiming excusable neglect. Maybe a deadline was scheduled, notice was not sent to a client, or some other reason. Whatever the reason, the motion is brought as a way of an attorney to fall on the proverbial sword, plead for relief from the court, and not visit the consequences of the attorney's error on the client.

A court's determination of excusable neglect is reviewed for an abuse of discretion. Nafziger v. McDermott International Inc., 467 F.3d 514, 522 (6th Cir. 2006). The determination of excusable neglect is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer Inv. Serv. Co. v. Brunswick Assocs. Partnership, 507 U.S. 380, 395 (1993). In Pioneer, the Supreme Court set out five factors for courts to balance when determining the existence of excusable neglect:

(1) the danger of prejudice to the nonmoving party,

(2) the length of the delay and its potential impact on judicial proceedings,

(3) the reason for the delay,

(4) whether the delay was within the reasonable control of the moving party, and

(5) whether the late-filing party acted in good faith.

Importantly, as *Pioneer* makes clear, the fact that the attorney erred is *not* necessarily grounds for relief. As the court stated there: "we have held that clients must be held accountable for the acts and omissions of their attorneys." *Pioneer*, at 396.

Furthermore, an attorney's strategic errors, blunders, or misreading of the law do not constitute grounds for relief under Rule 60(b)(1). McCurry v. Adventist Health System/Sunbelt, Inc., 298 F.3d 586, 593-594 (6th Cir. 2002).

iii. FRAUD, MISREPRESENTATION, MISCONDUCT

To be entitled to relief under Rule 60(b)(3), the moving party must prove fraud, misrepresentation or misconduct by an opposing party. The Sixth Circuit has explained the relevant misbehavior as follows:

> "Misrepresentation" can be interpreted as an affirmative misstatement. "Fraud" can be interpreted as reaching deliberate omissions when a response is required by law or when the non-moving party has volunteered information that would be misleading without the omitted material. And "other misconduct" can be interpreted to reach questionable behavior affecting the fairness of litigation other than statements or the failure to make statements.

Jordan v Paccar, Inc., 1996 U.S. App. LEXIS 25358 (6th Cir. 1996).

Many are the ways that fraud can be practiced on the court or the parties during the course of litigation and these materials could not possibly cover all the machinations of parties or counsel.

However, two issues are worth noting in particular: (1) the withholding of information during discovery, and (2) perjury.

Both issues were addressed in the case of H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976). The points that are worth taking away from the case are the following:

- The failure of a party to disclose or provide discovery not requested, and which may be helpful to the other side, is not fraud.

- The willful failure to provide requested documents *may* be fraud.

- The fact that a person commits perjury is not necessarily fraud on the court.

- "Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." *H.K. Porter*, at 1119.

- A party must be able to demonstrate fraud *first* before asking for additional post-judgment discovery.

In order to set aside a judgment based on Rule 60(b)(3), the fraud must be shown by clear and convincing evidence.

iv. JUDGMENT IS VOID

Relief under Rule 60(b)(4) is granted where the judgment is void.

In the bankruptcy context, this rule was applied in the Supreme Court case of United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010).

In Espinosa, the Supreme Court dealt with the situation in which a Chapter 13 plan was confirmed containing a provision discharging the interest portion of student loan debt after payment of the principal amount without any determination of undue hardship under § 523(a)(8). Debtor paid, completed his plan, and received a discharge. When the creditor later sought to collect the unpaid interest, the debtor reopened the case to enforce the discharge injunction.

The Ninth Circuit ultimately found that the confirmation order was a final order from which the creditor could have appealed, but did not. At most, the

bankruptcy court committed legal error in confirming the plan, but that did not render the confirmation order "void."

In affirming the Ninth Circuit, the *Espinosa* court held that "a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." Espinos*a*, at 270. The court went on to note that judgments are not void simply because they are erroneous. *Id.*

Another reason to consider a judgment void is due to lack of subject matter jurisdiction. The Espinosa court addressed this argument as well, noting that if the trial court is merely erroneous in finding that it has subject matter jurisdiction, this is not enough to seek relief under Rule 60(b)(4). Instead, the *Espinosa* court held that "[f]ederal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." Espinosa, at 271.

Give the Supreme Court's view as expressed in *Espinosa*, the granting of relief under Rule 60(b)(4) is a tough hill to climb.

The important takeaway – a legally erroneous order is not "void."

v. ANY OTHER REASON JUSTIFYING RELIEF

Relief under Rule 60(b)(6) is given in "extraordinary circumstances." Pioneer Investment Services, at 393.

Furthermore, relief covered under Rule 60(b)(1)-(5) cannot be sought under Rule 60(b)(6). As explained by the Sixth Circuit:

> This Circuit adheres to the view that courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. See Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir. 1985), cert. denied, 474 U.S. 1104, 88 L. Ed. 2d 925, 106 S. Ct. 890 (1986). A claim of strictly legal error falls in the category of "mistake" under Rule 60(b)(1) and thus is not cognizable under 60(b)(6) absent exceptional circumstances. See *id.*, at 451. The parties may

> not use a Rule 60(b) motion as a substitute for an appeal, Federal Practice § 2852 at 142, or as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise. Federal's, Inc. v. Edmonton Investment Co., 555 F.2d 577, 583 (6th Cir. 1977). Notwithstanding the extraordinary nature of relief under 60(b)(6), district courts may employ subsection (b)(6) as a means to achieve substantial justice when "something more" than one of the grounds contained in Rule 60(b)'s first five clauses is present. See Federal Practice § 2864, at 219-20. Accordingly, a motion made under Rule 60(b)(6) is addressed to the trial court's discretion which is "especially broad" given the underlying equitable principles involved. Cf. Overbee v. Van Waters & Rogers, 765 F.2d 578, 580 (6th Cir. 1985); Matter of Emergency Beacon Corp., 666 F.2d 754, 760 (2d Cir. 1981).

Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989).

F. STAY PENDING APPEAL

In the event of an adverse decision, bankruptcy counsel should consider filing a motion for a stay pending appeal. This is especially true because (1) an judgment/order is enforceable until overturned, and (2) by the express terms of Rule 60(c)(2), a motion for relief from judgment "does not affect the judgment's finality or suspend its operation."

A stay pending appeal is governed by Bankruptcy Rule 8007.

As to the standard in considering whether to grant a stay pending appeal, the Sixth Circuit explained as follows:

> In determining whether a stay should be granted under Fed. R. App. P. 8(a), we consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting

the stay. These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.

Although the factors to be considered are the same for both a preliminary injunction and a stay pending appeal, the balancing process is not identical due to the different procedural posture in which each judicial determination arises. Upon a motion for a preliminary injunction, the court must make a decision based upon "incomplete factual findings and legal research." Even so, that decision is generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.

Conversely, a motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment, usually following completion of discovery. As a result, a movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.

To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any

potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."

In evaluating the harm that will occur depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. In evaluating the degree of injury, it is important to remember that

> [t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again.

Michigan Coalition of RadioActive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153-54 (6th Cir. 1991) (citations omitted).

The moving party bears the burden of proving by a preponderance of the evidence that a stay should issue. In re Holstine, 458 B.R. 392, 394 (Bankr. E.D. Mich. 2011) (McIvor). "[A] court's decision to [grant or] deny a Rule [8007] stay is highly discretionary." *Id*. (quoting In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1301 (7th Cir. 1997)).

III. BANKRUPTCY APPELLATE JURISDICTION

28 U.S.C. § 158

The jurisdiction of a court of appeals over bankruptcy decisions begins with 28 U.S.C. § 158. Importantly, that section provides that:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 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.
>
> * * *
>
> (d)
>
> (1) The courts of appeals shall have jurisdiction of appeals from all *final* decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section

Under 28 U.S.C. 158(a)(3) the *district courts* have jurisdiction to hear appeals of interlocutory orders. Such appeals are granted by leave.

However, § 158(d)(2) provides that the *circuit court* may only hear "*final* decisions, judgments, orders, and decrees entered under subsections (a) and (b)."

Thus, although the District Court can hear the appeal of an interlocutory order, bankruptcy counsel cannot appeal as of *right* the District Court's decision to the Circuit Court because it is not *final*. An order appealed under § 158(a)(3) is not a *final* order. See In re Cottrell, 876 F.2d 540 (6th Cir. 1989).

However, if the District Court order "cures" the issue of finality, then the appeal may be heard by the Circuit Court. As explained by the court in *Cottrell*:

> This section has been interpreted to vest a court of appeals with jurisdiction when both the bankruptcy and district courts' orders are 'final.' Conversely, if the bankruptcy court's order is interlocutory the general rule is that a court of appeals lacks jurisdiction unless the district court order in some sense 'cures' the nonfinality of the bankruptcy court order. The concept of 'finality' in the bankruptcy context for purposes of appellate review to both the district court and court of appeals should be viewed functionally. In this regard, the courts of appeals have consistently considered finality in a more pragmatic and less technical way in bankruptcy cases than in other situations.

Cottrell, at 541-542.

This does *not* prevent *circuit courts* from hearing appeals from orders that are interlocutory.

ADDITIONAL SOURCE OF APPELLATE JURISDICTION – 28 U.S.C. § 1292

The Sixth Circuit has held that § 158 is *not* the exclusive source of appellate jurisdiction and 28 U.S.C. 1292 can also be utilized to confer jurisdiction on the circuit court. In re Baker & Getty Financial Services, 954 F.2d 1169 (6th Cir. 1992). That said, as was even noted by the Sixth Circuit, this is a *minority* view. See *Baker & Getty*, at 1171 and fn 6.

Importantly, 28 U.S.C. § 1292 allows for the circuit court to hear appeals of interlocutory orders.

IV. BAP vs. District Court Election

U.S. district courts have jurisdiction to hear appeals from final judgments, orders, and decrees, and with leave of the court from other interlocutory orders and decrees of bankruptcy judges. 28 USC §158(a)(1).

If a bankruptcy appellate panel ("BAP") has been authorized in your district, an appeal from a bankruptcy court shall be heard by a 3-judge panel of the BAP unless: (A) the appellant elects at the time of filing the appeal; or (B) another party elects, not later than 30 days after service of notice of appeal, to have the appeal heard by the district court. 28 USC §158(c)(1); Fed.R.Bankr.P. 8005.

In other words, an appeal from a bankruptcy court will automatically go to the BAP (in those districts which authorize a BAP) unless one of the parties timely elects the district court to hear the appeal.

If a party to the appeal files any paper (other than a notice of appearance) with the BAP, the party waives the right to elect the appeal to be heard by the district court. 6th Cir. BAP LBR 8005-1(a).

BAP's have been established in the First, Sixth, Eighth, Ninth and Tenth federal judicial circuits.

In the Sixth Circuit, all districts have authorized appeals to the BAP except the Eastern District of Michigan, and the Eastern District of Tennessee.

The BAP judges for the Sixth Circuit, effective 1/1/2018, are:

Chief Judge Daniel S. Opperman, Bay City, MI
Judge Tracey N. Wise, Lexington, KY
Judge Guy R. Humphrey, Dayton, OH
Judge Marian F. Harrison, Nashville, TN
Judge Scott W. Dales, Grand Rapids, MI
Judge Beth A. Buchanan, Cincinnati, OH

A BAP decision constitutes precedent unless the BAP states that the precedential effect of the decision shall be limited to the case. 6th Cir. BAP LBR 8024-1(b).

Practice Tip: BAP judges are bankruptcy judges and are more familiar with bankruptcy law/procedure than district judges. If your issue pushes the boundaries under bankruptcy law/ procedure, you may get a more open reception from a district court judge who will not be as entrenched in bankruptcy norms as the BAP. On the other hand, if you are appealing a ruling for being outside of bankruptcy norms, the BAP may be more able to recognize the aberration and more willing to overrule the bankruptcy court than a district court judge.

V. Certification to Appeal Directly to the Court of Appeals

Under certain circumstances, an appeal from the bankruptcy court may proceed directly to the U.S. Court of Appeals, thereby bypassing the district court and/or BAP. The process involves "certification" under 28 U.S.C. §158(d).

Pursuant to 28 U.S.C. §158(d), the U.S. Court of Appeals has jurisdiction to hear an appeal directly from the bankruptcy court if the bankruptcy court, the district court, or the BAP, acting on its own motion or a party's request, or all the appellants and appellees (if any) acting jointly certify that: (a) the order involves a question of law as to which there is no controlling authority or involves a matter of public importance; (b) the order involves a question of law requiring resolution of conflicting decisions; or (c) an immediate appeal may materially advance the progress of the case. Certification by the bankruptcy court, the district court, or the BAP may also occur based on the request of a majority of the appellants and a majority of the appellees (if any).

VI. Interlocutory vs. Final Orders[3]

A party may appeal as of right a bankruptcy court's final order, judgment or decree to a district court or BAP as elected. 28 U.S.C. §158 (a)(1).

[3] Information in this section is taken in part from Wendy K. Lappenga's article entitled "A Review of Final Orders" presented at a seminar sponsored by Federal Bar Association Bankruptcy Section- Western District of Michigan on July 23-25, 2009.

In contrast, a party must seek leave to appeal a bankruptcy court's interlocutory order or decree. 28 U.S.C. §158 (a)(3). "Under 28 U.S.C. § 1292(b), a district court [or BAP as elected] may hear an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Because interlocutory appeals contravene the judicial policy opposing piecemeal litigation and the disadvantages of delay and disruption associated with it, review under § 1292(b) should be sparingly granted and then only in exceptional cases." Fieger & Fieger, P.C. v. Nathan (In re Romanzi), 2017 U.S. Dist. LEXIS 11954 (E.D. Mich. 2017) (citations and internal quotations omitted).

An order is not final if it does not alter the status quo or fix the rights and obligations of the parties. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015). "[A] bankruptcy court does not finally resolve a dispute merely by choosing between competing contentions with respect to separable issues. Similarly, an order is not final if it is a solitary decision that functions only as a step toward a final judgment into which it will merge." GE Capital Corp. v. Collins & Aikman Corp. (In re Collins & Aikman Corp.), 351 B.R. 459, 464 (E.D. Mich. 2006)(citations and internal quotation marks omitted). It must be noted that courts are to take a practical approach to determining whether an order is "final." See Peabody Coal Co. v. United Mine Workers, 484 F.2d 78, 83 (6th Cir. 1973).

In the Sixth Circuit, "[f]or the purpose of an appeal, a final order is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Finality is considered in a more pragmatic and less technical way in bankruptcy cases than in other situations. This is because Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." Fieger & Fieger, P.C. v. Nathan (In re Romanzi), 2017 U.S. Dist. LEXIS 11954 (E.D. Mich. 2017) (citations and internal quotations omitted).

Whether an order is final or interlocutory may depend on which direction the order takes the case rather than the type of the underlying motion. For example,

an order granting a motion for summary judgment is final while an order denying such a motion is not. *See* Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 Fed. Appx. 386 (6th Cir. 2016). See further examples below.

The district court/BAP has discretion to hearing interlocutory appeals from the bankruptcy court. 28 U.S.C. §158 (a)(3). However, the U.S. Court of Appeals has jurisdiction to hear bankruptcy appeals only when both the bankruptcy court and district court/BAP's orders are "final." 28 U.S.C. §158 (d); Taunt v. Vining (In re M.T.G., Inc.), 403 F.3d 410 (6th Cir. 2005). There is an exception under 28 U.S.C. §1292(a) which says the U.S. Court of Appeals has jurisdiction from district courts' interlocutory orders that grant, continue, modify, refuse or dissolve injunctions.

A. Examples of Final Orders

- Order granting relief from automatic stay. In re Sun Valley Foods Co., 801 F.2d 186 (6th Cir. 1986).
- Order finding violation of the automatic stay. Buckey Check Cashing, Inc. v. Meadows (In re Meadows), 396 B.R. 485 (B.A.P. 6th Cir. 2008).
- Order denying a discharge. Hamo v. Wilson (In re Hamo), 233 B.R. 718 (B.A.P. 6th Cir. 1999).
- Dismissal of case. *See* Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).
- Dismissal of complaint. Murray, Inc. v. Agripool, SRI (In re Murray, Inc.), 392 B.R. 288 (B.A.P. 6th Cir. 2008).
- Order confirming a plan with prejudice and dismissing the case. *See* Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).
- Order confirming a plan over the trustee's objections. Burden v Seafort (In re Seafort), 437 BR 204 (B.A.P. 6th Cir. 2010).
- Order granting motion to modify a plan. Storey v. Pees (In re Storey), 392 B.R. 266 (B.A.P. 2008).
- Order denying debtor's claim of exemption. In re Zingale, 451 B.R. 412 (B.A.P. 6th Cir. 2011).
- Order requiring turnover of property. In re Moody, 817 F.2d. 365 (9th Cir. 1987); In re Cash Currency Exch., 762 F.2d 542, 546 (7th Cir. 1985).

- Order granting or denying motion to reopen bankruptcy case. In re Blair, 2006 U.S. Dist. LEXIS 38880 (E.D. Mich. 2006); Bonner v. Sicherman (In re Bonner), 2005 Bankr. LEXIS 1683 (B.A.P. 6th Cir. 2005).
- Order granting motion for summary judgment. *See* Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 Fed.Appx. 386 (6th Cir. 2016);Drown v. Nat'l City Bank (In re Ingersoll), 420 B.R. 414 (B.A.P. 6th Cir. 2009).
- Determinations of nondischargeability under 11 U.S.C. §523(a). Colvin v. Raffeld (In re Raffeld), 2006 Bankr. LEXIS 3032 (B.A.P. 6th Cir. 2006).
- Order denying the Chapter 7 trustee's final report. United States Trustee v. Ste-Bri Enterprises, Inc., 579 B.R. 448 (N.D. Ohio 2017).
- Order granting motion for abstention and remanding litigation to state court. *See* Fieger & Fieger, P.C. v. Nathan (In re Romanzi), 2017 U.S. Dist. LEXIS 11954 (E.D. Mich. 2017).
- Order overruling objections to claims. Morton v. Morton (In re Morton), 298 B.R. 301 (B.A.P. 6th Cir. 2003); Pilch v. Bareham, 2008 U.S. Dist. LEXIS 53351 (W.D. Mich. 2008).
- Order disallowing a claim. Greer v. O'Dell, 305 F.3d 1297 (11th Cir. 2002); Estate of Mingus v. Lombardo (In re Lombardo), 2005 Bankr. LEXIS 692 (B.A.P. 6th Cir. 2005).
- Order sustaining objection to proof of claim. In re Bowers, 506 B.R. 249 (B.A.P. 6th Cir. 2013); Malden Mills Indus., Inc. v. Maroun (In re Malden Mills Indus. Inc.), 303 B.R. 688 (B.A.P. 1st Cir. 2004).
- Order determining that a claim is not entitled to priority status. Mich. Unemployment Ins. Agency v. Boyd (In re Albion Heath Servs.), 360 B.R. 588 (B.A.P. 6th Cir. 2007).
- Order determining that a claim is or is not an administrative expense. In re Appalachian Fuels, LLC, 493 B.R. 1 (B.A.P. 6th Cir. 2013); Peters v. Enterasys Networks, Inc. (In re Native Am. Sys.), 351 B.R. 135 (B.A.P. 10th Cir. 2006).
- Order granting or denying a request to convert from one chapter to another. Condon v. Brady (In re Condon), 358 B.R. 317 (B.A.P. 6th Cir. 2007); Results Sys. Corp. v. MQVP, Inc. 395 B.R. 1 (E.D. Mich 2008).

- Order regarding attorney compensation. In re Scarlet Hotels, LLC. 392 B.R. 698 (B.A.P. 6th Cir. 2008); In re Alda, 2010 Banrk. LEXIS 4098 (B.A.P. 2010).
- Order granting a preliminary injunction that effectively grants all the relief requested. Peabody Coal Co. v. United Mine Workers, 484 F.2d 78, 83 (6th Cir. 1973).
- Order denying motion for reconsideration. Hamerly v. Fifth Third Mortg. Co. (In re J & M Salupo Dev. Co.), 388 B.R. 795 (B.A.P. 6th 2008).
- Order imposing sanctions, including nonmonetary sanctions, depending on the circumstances. *See* B-Line, LLC v. Wingerter (In re Wingerter), 594 F.3d 931 (6th Cir. 2010).
- Order determining discharge of student loan. Oyler v. ECMC (In re Oyler), 300 B.R. 255 (B.A.P. 6th Cir. 2003), *rev'd on other grounds*, 397 F.3d 382 (6th Cir. 2005).
- Order denying motion for extension of time to file a notice of appeal. Belfance v. Black River Petroleum (In re Hess), 209 B.R. 79 (B.A.P. 6th Cir. 1997).
- Order approving a settlement. In re Wright, 566 B.R. 457 (B.A.P. 6th Cir. 2017).

B. Examples of Interlocutory Orders

- Order denying confirmation of a plan with leave to amend. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).
- Order denying motion to settle malpractice lawsuit. Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 Fed.Appx. 386 (6th Cir. 2016).
- Order denying motion for summary judgment. *See* Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 Fed.Appx. 386 (6th Cir. 2016); Buchwald Capital Advisors, LLC, Papas (In re Greektown Holdings, LLC), 2015 U.S. Dist. LEXIS 7145(E.D. Mich. 2015).
- Order denying motion to dismiss or abstain. Fieger & Fieger, P.C. v. Nathan (In re Romanzi), 2017 U.S. Dist. LEXIS 11954 (E.D. Mich. 2017); *but see* In re GF Corp., 127 B.R. 384, 385 (Bankr. N.D. Ohio 1991).

- Order denying motion to dismiss for lack of subject matter jurisdiction. Simon v. Lis (In re Graves), 483 B.R. 113 (E.D. Mich. 2012)(applying the holding of Catlin v. United States, 324 U.S. 229, 236, 65 S. Ct. 631, 635, 89 L. Ed. 911 (1945) to bankruptcy court rulings).
- Order denying motion to dismiss for improper venue. Gold v. Bandman (In re Harvey Goldman Co.), 2012 U.S. Dist. LEXIS 79716 (E.D. Mich. 2012).
- Order granting motion to compel party to produce documents and appear at Rule 2004 exam. In re Gray, 447 B.R. 524 (E.D. Mich. 2011).
- Order denying motion to compel payments under lease agreement. GE Capital Corp. v. Collings & Aikman Corp. (In re Collins & Aikman Corp.), 351 B.R. 459 (E.D. Mich. 2006)(holding that "it is not enough that an appealing party identify some particular subissue that has been 'finally" decided by the court below.")
- Order denying petitioner's demand for jury trial, recusal and to summon a grand jury. In re Pitcher, 2010 U.S. Dist. LEXIS 52689 (E.D. Mich. 2010).

VII. Appellate Timeline

Document to File	Deadline to File/Serve	Which Court to File In?
Notice of Appeal* FRBP 8002	14 days after entry of order being appealed or order on motion for reconsideration	Bankruptcy Court
Motion for Leave to Appeal FRBP 8004	14 days after entry of order being appealed or order on motion for reconsideration	Bankruptcy Court
Response in opposition to Motion for Leave to Appeal FRBP 8004	14 days after service of the Motion for Leave to Appeal	BAP/District Court as elected
Statement of Election to appeal to district court vs. BAP	For appellant- at time of filing Notice of Appeal. For any other	Bankruptcy Court

FRPB 8005; 28 USC §158(c)(1)	party- 30 days after service of Notice of Appeal. *If a party other than appellant files a document other than Notice of Appearance in the BAP, said party waives the remainder of the 30-day election period. 6th Cir. BAP LBR 8005-1(a).	
Motion for Stay of bk proceedings pending appeal to BAP/District Court FRBP 8007	Either before or after Notice of Appeal is filed.	Bankruptcy Court (as a general rule) or the BAP/District Court as elected if moving first in bk court would be impracticable
Designation of Items to be included in the record on appeal** & Statement of Issues to be Presented FRBP 8009(a)	For appellant- within 14 days after Notice of Appeal or entry of Order granting leave to appeal. For appellee- within 14 days after being served with appellant's Designation of Items & Statement of Issues	Bankruptcy Court
Ordering transcripts** (written request required) or Certificate that no transcripts will be ordered FRBP 8009(b)	For appellant- within 14 days after Notice of Appeal or entry of Order granting leave to appeal. For appellee- within 14	Bankruptcy Court

	days after being served with appellant's Designation of Items & Statement of Issues	
Corporate Disclosure Statement FRBP 8012	Upon filing the first pleading/document in the BAP/District Court as elected	BAP/District Court as elected
Appellant's brief FRBP 8018	Within 30 days after the docketing of the notice that record was transmitted unless BAP/District Court issues a briefing schedule	BAP/District Court as elected
Appellee's brief FRBP 8018	Within 30 days after service of the appellant's brief unless BAP/District Court issues a briefing schedule	BAP/District Court as elected
Appellant's reply brief FRBP 8018	Within 14 days after service of appellee's brief	BAP/District Court as elected
Motion for Rehearing by BAP/District Court FRBP 8022	Within 14 days after entry of order sought to be reconsidered	BAP/District Court as elected
Notice of Appeal of decision of BAP/District Court to the US Court of Appeals. Fed.R.App.P.4 and Fed.R.App.P.6	Within 30 days after entry of order being appealed or entry of order on motion for rehearing. If the appellant is the federal government, the deadline extends to 60 days	BAP/District Court as elected

Designation of Items to be included in the record on appeal/ Statement of Issues for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P.6	For appellant- within 14 days after Notice of Appeal. For appellee- within 14 days after being served with appellant's Designation	BAP/District Court as elected
Corporate Disclosure Statement Fed.R.App.P.26.1	Upon filing the first pleading/document in the US Court of Appeals	US Court of Appeals
Appellant's brief for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P.31	Within 40 days after the record is filed, unless Court of Appeals issues a briefing schedule	US Court of Appeals
Appellee's brief for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P. 31	Within 30 days after the appellant's brief is served, unless Court of Appeals issues a briefing schedule	US Court of Appeals
Appellant's reply brief for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P.31	Within 14 days after service of the appellee's brief but at least 7 days before argument, unless Court of Appeals issues a briefing schedule	US Court of Appeals
Civil Appeal Statement of Parties and Issues (in relation to conferences/mediations scheduled by the court) 6th Cir. R. 33	To be filed by appellant as directed by the US Court of Appeals	US Court of Appeals

*Notice of Appeal - Failure to timely file notice of appeal is a jurisdictional defect which bars appellate review of the bankruptcy court's order. In re Jackson, 585 B.R. 410 (B.A.P. 6th Cir. 2018)(appeal dismissed because notice of appeal was filed after the deadline); Genoak Const. Co. v. Joseph Inv. Group, L.L.C.(In re Joseph Inv. Group, L.L.C.) , 2005 U.S. Dist LEXIS 42229 (E.D. Mich. 2005)(appeal dismissed because notice of appeal was prematurely filed before both the announcement and entry of the bankruptcy court's decision).

** Record on Appeal - You may lose on appeal if you fail to ensure the relevant parts of the lower court record are included in the record on appeal. Colvin v. Raffeld (In re Raffeld), 2006 Bankr. LEXIS 3032 (B.A.P. 6th Cir. 2006)(the panel has no basis on which to determine whether the bankruptcy court's finds of fact are erroneous because the trial transcript and documentary evidence admitted at trial are not part of the record on appeal); Armour v. First Heritage Credit of Tenn., LLC, 2015 U.S. Dist. LEXIS 37930 (W.D. Tenn. 2015)(Appellant must file designation of items and order required transcripts in ten days or her appeal will be dismissed).

VIII. BRIEFS

A. The Applicable Rules.

For appeal briefs presented to the BAP or district court, FRBP 8014 and FRBP 8015 apply.

For appeal briefs presented to the U.S. Court of Appeals, Fed.R.App.P. 28 and Fed.R.App.P. 32 apply. Also review the rules for your specific circuit. See Sixth Circuit Rules and Internal Operating Procedures found on the court's websites.

Be sure to READ THE RULES!

In general, the appeal briefs must include: a corporate disclosure statement for corporate parties; a table of contents; a table of authorities; a jurisdiction statement; a statement of issues presented and standard of review; a statement

of the case; a summary of the argument; the argument; a short conclusion; a certificate of compliance.

In addition, the appeal briefs must be on 8 ½ by 11 inch paper, the text must be double-paced but quotations more than two lines long may be indented and single-spaced, headings and footnotes must be single-spaced, margins must be at least one inch on all sides, the font must be 14-point or larger. A principal brief must not exceed 30 pages unless the word limit is no more than 14,000 words for appeals before the BAP/district court and no more than 13,000 words for appeals before the U.S. Court of Appeals. A reply brief must not exceed 15 pages unless the word limit is less than half the volume allowed for the principal brief.

B. Request for Oral Argument

If you want oral argument, your brief must include a statement explaining why the court should hear oral argument. If you fail to make the request, the court may deem oral argument to have been waived. 6th Cir. Rule 34.

C. Standard of Review

CORRECT DECISION – WRONG REASON

Even if counsel thinks that the trial court got something wrong, what counsel must be aware of is that if there is *another* reason to uphold the trial court's decision, then the decision will not be overturned.

A trial court's judgment will be affirmed "'if correct for any reason, including a reason not considered' by the district court." Allen v. Collins, 529 Fed. Appx. 576, 582 (6th Cir. 2013).

In these types of cases, an appellate court might actually "reverse" the decision of the trial court on the particular issue, correcting the court's error, but nevertheless upholding the decision on a different basis.

HARMLESS ERROR

Bankruptcy Rule 9005 incorporates F.R.C.P. 61. Under F.R.C.P. 61 and F.R.E. 103, no error in admitting evidence, or any other error by the court or a party is

grounds for setting aside a judgment or decision unless the error affects the party's "substantial rights."

- Harmless error for trustee to file motion for declaratory relief and not adversary proceeding where appellant conducted no discovery. Tully Constr Co v Cannonsburg Environmental Assoc (In re Cannonsburg Environmental Assoc), 72 F3d 1260, 1264 (6th Cir. 1996). See also Reed v. Nathan, 558 B.R. 800, 822 (E.D. Mich. 2016).

CONCLUSIONS OF LAW

Conclusions of law are reviewed de novo. Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 359 (6th Cir. 1994). De novo means that the reviewing court is "deciding the issue as if it had not been heard before with no deference being given to the trial court's conclusions of law." In re Falvo, 227 B.R. 662, 664 (B.A.P. 6th Cir. 1998).

- Issues of statutory construction are reviewed de novo. Board of Education v. L.M., 478 F.3d 307, 317 (6th Cir. 2007).
- Dismissal of suit due to lack of subject matter jurisdiction reviewed de novo. Lovely v. United States, 570 F.3d 778, 781 (6th Cir. 2009)
- Dismissal of suit for failure to state a claim reviewed de novo. Arrow v. Fed. Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004).

FINDINGS OF FACT

Both F.R.B.P. 7052 and 9014(c) incorporate F.R.C.P. 52 into adversary and contested proceedings. Under F.R.C.P. 52(a)(6), findings of fact are not to be set aside unless clearly erroneous. A finding of fact is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake has been committed." Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 436 (6th Cir. 1998) (quoting United States v. United States Gypsum Co., 333 U.S. 364 (1948)).

ABUSE OF DISCRETION

When a matter is subject to the court's discretion, it is reviewed on appeal for abuse of discretion.

As described by the Sixth Circuit:

> An abuse of discretion occurs when a district court 'commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact.'

King v. Harwood, 852 F.3d 568, 579 (6th Cir. 2017) (quoting Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 454 (6th Cir. 2008)).

The court will find an abuse of discretion "when our review leaves us with a definite and firm conviction that the trial court committed a clear error of judgment." Franklin v. Jenkins, 839 F.3d 465, 472 (6th Cir. 2016).

The abuse of discretion must be more than harmless error. Tompkin v. Phillip Morris USA, Inc., 362 F.3d 882, 897 (6th Cir. 2004).

- Evidentiary determinations are reviewed for abuse of discretion, but the legal conclusions of such determinations are reviewed de novo. As the Sixth Circuit explained, this is because it is an abuse of discretion to make errors of law and clear factual errors. U.S. v. McDaniel, 398 F.3d 540, 544 (6th Cir. 2005).
- Court's decision to dismiss a case with prejudice is reviewed for abuse of discretion. Ernst v. Rising, 427 F.3d 351, 366 (6th Cir. 2005) (en banc). Furthermore, "errors of law" invariably establish an abuse of discretion and the court applies de novo review in interpreting an order to determine whether it dismisses claims with prejudice. *Id.*
- Court's decision whether to permit a plaintiff to amend its complaint reviewed for abuse of discretion. United States ex rel Bledsoe v. Cmty. Health Sys., 342 F.3d 634, 644 (6th Cir. 2003). However, when the district court bases its denial of a motion to amend on the legal conclusion that the proposed amendment would not survive a motion to dismiss, the decision

is reviewed de novo. Greenberg v. Life Ins. Co. of Va., 177 F.3d 507, 514 (6th Cir. 1999).

- Abuse of discretion to make legal errors regarding interpretation of the Constitution. U.S. v. Blackwell, 459 F.3d 739, 752 (6th Cir. 2006). Consequently, review of constitutional interpretation is de novo. *Id.*
- Imposition of sanctions reviewed for abuse of discretion. In re Fordu, 201 F.3d 693 (6th Cir. 1999).
- Bankruptcy court's denial of attorney fees reviewed for abuse of discretion. Mapother & Mapother v. Cooper (In re Downs*)*, 103 F.3d 472, 478 (6th Cir. 1996).

IX. POST APPEAL REMAND

A. Remands and Law Of The Case Doctrine / Mandate Rule

If a case is remanded back to a trial court for further proceedings, you may now find yourself bound by the "law of the case" doctrine. As explained by the Sixth Circuit:

> The law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The doctrine precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition. Pursuant to the law of the case doctrine, and the complementary 'mandate rule,' upon remand the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court. The trial court is required to implement both the letter and the spirit of the appellate court's mandate, taking into account the appellate court's opinion and the circumstances it embraces.
>
> The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three 'exceptional circumstances' exists: (1) where substantially different evidence is raised on subsequent trial; (2)

> where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice.
>
> * * *
>
> [T]he law of the case doctrine is limited to those issues decided in the earlier appeal, and the district court may therefore consider those issues not decided expressly or impliedly by the appellate court. [Westside Mothers v. Olszewski, 454 F.3d 532, 538 (6th Cir. 2006).]

Importantly, you should note that where *new evidence* arises in the course of the proceedings then it may be possible to avoid a potentially adverse decision.

B. Remand –Final Order vs. Interlocutory Order

A district court/BAP's order remanding a case to the bankruptcy court is a final order as long as the remand pertains only to ministerial matters; otherwise it is an interlocutory order and does not qualify for appeal as of right. Settembre v. Fid. &Guar. Life Ins. Co. 552 F.3d 438 (6th Cir. 2009)(holding that the Sixth Circuit lacked jurisdiction over the district court's order because the case was remanded to the bankruptcy court for trial to proceed).

*****PRACTICE POINTERS FOR APPELLATE ATTORNEYS*****

There are three major areas that can impact your appeal.

I. Taking and Perfecting an Appeal

A. Meet all deadlines - - Time is important in the appellate process, so make sure you know and then meet each deadline. If you miss a deadline, your appeal may be dismissed without a hearing. You are then left scrambling to attempt to reinstate your appeal.

B. File a complete designation of the record - - You need to ensure that all the pleadings and exhibits that you want in the appellate record are transmitted to the District Court or BAP. Don't rely on opposing counsel to do this for you and don't expect the Bankruptcy Court, the District Court or BAP to find it for you.

C. Be precise on what is designated - - The bankruptcy clerk's office has to search through a lot of entries to include in the transmittal. Help them help you by making that easy to find. Also, if someone from the clerk's office calls you for guidance, take or return the call and cooperate.

D. Be familiar with local practice - - Familiarize yourself with the applicable court website, which may include practice pointers and local rules specific to bankruptcy appeals. For instance, in the Sixth Circuit, the BAP has a link for its Practice Guidelines: www.ca6.uscourts.gov/bankuptcy-appellate-panel

II. Drafting the Brief

A. Identify the important issue(s) - - You have time to do this, so think about how to frame the issues that you want considered on appeal. Hopefully, you raised that issue at the trial court level, perhaps early and often. This also helps you write a concise and persuasive brief.

B. Stay within the page limits - - The page limits are there for a reason, and fatigue sets in with longer briefs. If you are over the page limit in your first few drafts, consider editing out sections that are duplicative or words that are unnecessary. The editing process takes time, so don't sit down the night before the brief is due to write your first draft.

C. If you think you need a page extension, reconsider your request - - Some judges may grant extensions like giving out candy at Halloween, but ask yourself if you really need it, and then ask a partner or trusted colleague what she thinks.

D. Be concise and on point - - Persuasive writing is often concise and clear. It also helps you stay within the page limits. A shorter, well written brief is often more persuasive because the focus is on the important facts and law, and no lost in the clutter.

E. Be accurate in your case citations and quotes - - It seems simple, but you would be surprised at the number of incomplete or incorrect case cites. Worse yet, too many briefs cite cases for doubtful principles of law. There are some instances where the quoted language is either incomplete or misleading. Chances are your adversary will catch this, and if not, the judge will.

F. Don't repeat - - The other side of the coin of Part D. While it is appropriate to emphasize certain facts and law, pure repetition is not persuasive. Don't feel the need to fill the full page limit with repetitive statements.

III. Oral Argument

A. Ask for oral argument - - Whenever possible, you want another chance to convince the District Court or BAP. If the issue was important enough to appeal, you should be ready to go all out. If you represent the Appellee and can't afford oral argument, it may be time to consider Settlement.

B. Have a reason for oral argument - - Some courts require the parties to have a good reason to have oral argument, so you should know why the issues in the appeal needs oral argument. Also, knowing why you need oral argument helps you make your oral argument.

C. Don't misrepresent the law or facts.

D. Be aware of any time constraints - - If oral argument is limited to 15 minutes, stay well within the time limits. You may get interrupted by questions or have to deal with a new twist on an issue, so give yourself time to do so. If you are the Appellant, reserve 1-3 minutes for rebuttal, otherwise you won't get the last word on argument. Also, judges vary as to enforcement of time. Some judges will cut you off mid-sentence.

E. Listen to questions asked of opposing counsel and of you - - The questions give tips of what issue a judge thinks important, so you may want to tailor your argument. In doing so, be prepared for the opposite side of the issue when it is your turn. It goes without saying that when a judge asks you a question, you should answer that question.

F. Stay on task - - Your oral argument should be structured and focused on 2-3 issues. You will be interrupted by judges with their pesky questions, so answer that question and then go back to your issues – but not necessarily your script.

G. Don't read from your brief - - The judge can read faster than you can talk and has already read your brief. Ditto for long quotes. Instead, prepare talking points and go from there. You can then handle the inevitable interruptions and detours, get back on point, and persuasively argue for your client.

H. "Be sincere, be brief, be seated" - - A phrase attributed to FDR, who knew how to convince people to do things. You don't need to fill all your allotted time, so if you have made your arguments effectively, with no questions from the bench, you can thank everyone and sit down.

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 meditation 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.