AMERICAN BANKRUPTCY INSTITUTE

2017 Bankruptcy Battleground West

Appealing Positions: Everything You Need to Know About Appeals

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CONCURRENT SESSION

2017

Appellate Election: Bankruptcy Appellate Panel vs. United States District Court[1]

An appeal from the Bankruptcy Court in the Ninth Circuit automatically goes to the Bankruptcy Appellate Panel ("BAP"). Once an appeal of a bankruptcy ruling is filed the parties to the appeal each have the right to elect the District Court instead of remaining with the BAP. The Appellant is required to make the election when the notice of appeal is filed and the Appellee may elect to have the appeal transferred to the District Court not later than 30 days after service of the notice of appeal. 28 U.S.C. § 158(c)(1).

Various factors should be considered when making this selection. Some of these factors include the following:

- **Verbosity**
    - District Court word count is 13,000 for briefs – FRAP 32(a)(7)(B)(i)
    - District Court word count is 6,500 for the reply brief – FRAP 32(a)(7)(B)(i)
    - Bankruptcy Appellate Panel word count is 14,000 for briefs – FRBP 8015(a)(7)
    - Bankruptcy Appellate Panel word count is 7,000 for the reply brief – FRBP 8015(a)(7)

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- **Preference for appellate argument**

    - Bankruptcy Appellate Panel argument - similar to arguing before the Ninth Circuit Court of Appeals.

        - 3 judges

        - The BAP will usually have oral argument unless all parties waive it.

        - Time limit for argument

            - ❖ Oral argument is typically limited to 15 minutes per side.
            - ❖ Parties aligned on the same side typically are asked to split their 15 minutes.

        - Be prepared to answer any and all questions.

        - Do not reargue your brief.

    - District Court argument

        - 1 judge

        - The District Courts for the Central District of California have no established rules or procedure on oral argument for bankruptcy appeals. *See* Chapter IV of the Local Rules of the Central District of California.

        - District Court judges often issue a ruling without setting the matter for oral argument.

- If a hearing on the appeal is scheduled there generally are no time limits imposed.

  - ❖ Know your audience
  - ❖ Pay attention to body language
  - ❖ Be prepared to answer any and all possible questions

- **Review by three judges vs. single judge**

  - Appeals to the BAP will be heard by a panel of 3 members of the BAP.

  - BAP judges are all active bankruptcy court judges from districts within the Ninth Circuit.

  - Appeals to the BAP will not be heard by a Judge from the district where that Judge is appointed or designated under 28 U.S.C. § 158(b)(6). *See* 28 U.S.C. § 158(b)(5).

  - Appeals to District Court will be heard by one District Court Judge from the district where the case is pending.

- **Rules that Apply**

  - BAP follows Federal Rules of Bankruptcy Procedure and Rules of the United States Bankruptcy Panel of the Ninth Circuit.

  - District Courts follow the Federal Rules of Appellate Procedure.

  - Some District Courts have their own "local local" rules.

  - No risk of "local local" rules with the BAP.

- **Subject matter of the appeal**

    - Issues of Bankruptcy Code interpretation may be better suited for decision by the BAP.

    - Issues arising under non-bankruptcy law or procedure may be better suited for decision by District Court.

- **Desire for finality**

    - 42.7% of all bankruptcy appeals before the Ninth Circuit Court of Appeals emanated from the BAP. Appeals Before the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP Litigator Manual")

    - 57.3% of all bankruptcy appeals before the Ninth Circuit Court of Appeals were taken from the District Courts. *Id.*

    - The reversal rate for BAP decisions range between 5% and 20%. *Id.*

    - Only 16% of the BAP decisions were appealed to the Court of Appeals. *Id.*

    - Approximately 32% of district court bankruptcy decisions were appealed to the Court of Appeals. *Id.*

    - Nationally, the likelihood of some affirmance (whether in part or in full) by the court of appeals is 77% for district courts and 93% for BAPs. Jonathan Remy Nash & Rafael I. Pardo*, An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review (2008)* 61 Vand. L. Rev. 1745.

- Nationally, the likelihood of full affirmance by the court of appeals is 69% for district courts and 85% for BAPs. *Id.*

- **Timing**

  - BAP review – expeditious

    - BAP hears cases 9 months out of the year.

    - Oral argument is scheduled in nearly all fully-briefed cases as soon as possible after the briefs are filed.

    - Of the appeals that have been fully briefed, argued and a decision on the merits has been rendered, the median time from the commencement of the appeal to final disposition is approximately 10 Months. BAP Litigants Manual, p. 43.

  - District Court review – no control over when the Judge will review pleadings and rule.

- **Whether your Order is interlocutory**

Appeals Before The Bankruptcy Appellate Panel Of The Ninth Circuit

AUGUST 2016 EDITION

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(Rev'd 5/16)

I. INTRODUCTION[1]

These materials are designed to assist attorneys and litigants involved in a bankruptcy appeal before the BAP.

Appellate rules are found in Part VIII of the Federal Rules of Bankruptcy Procedure (FRBP), Rule 8001 et seq. To view these rules, see http://www.uscourts.gov/rules-policies/current-rules-practice-procedure. Local rules of the BAP also apply. Revised local rules for practice before the BAP were adopted by the Ninth Circuit Judicial Council on June 15, 2015, and may be found on the BAP website at http://www.ca9.uscourts.gov/bap/.

Where the FRBP and local rules are silent or where they so specify, the Federal Rules of Appellate Procedure (FRAP), the Federal Rules of Civil Procedure (FRCP), the Federal Rules of Evidence (FRE) or the Ninth Circuit Rules (Circuit Rules) may apply. See 9th Cir. BAP R. 8026-1.

II. JURISDICTION OF THE BAP

The district court has always had the jurisdiction to review decisions of a bankruptcy court. 28 U.S.C. § 158(a).[2] However,

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[1] This summary is the cumulative work of many current and former BAP judges, law clerks and staff dedicated to the common pursuit of providing up-to-date materials to the public and bar. While they have been updated numerous times, these materials were first prepared and released on March 15, 1985, by the Hon. Sidney C. Volinn, who served as a BAP Judge and Bankruptcy Judge from the Western District of Washington.

The analysis contained herein is summary in nature, is not intended as legal advice and is no substitute for legal research. It is the responsibility of attorneys and litigants to review and comply with applicable laws and rules governing appellate practice and procedure.

[2] 28 U.S.C. § 158(a) provides:

> (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

(continued...)

a circuit may establish a BAP, 28 U.S.C. § 158(b), and the Ninth Circuit did so on October 1, 1979, the effective date of the Bankruptcy Reform Act of 1978 (commonly referred to as the Bankruptcy Code).[3]

The order continuing the BAP was most recently amended as of February 18, 2015, and is set forth at the end of these materials.

Specific issues of appellate jurisdiction are discussed in sections V and VII.C, below.

III. INTRODUCTION TO THE BAP

Seven bankruptcy judges are authorized by the Ninth Circuit Judicial Council to serve on the BAP. Each appeal is heard by a panel of three judges. No bankruptcy judge may hear an appeal originating from his or her district. 28 U.S.C. § 158(b)(5).[4]

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[2](...continued)

> 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;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under 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.

[3] Currently, the First, Sixth, Eighth, Ninth and Tenth Circuits have BAPs. District judges must authorize appeals to the BAP from their districts (28 U.S.C. § 158(b)(6)). All of the districts of the Ninth Circuit have granted that authorization.

[4] 28 U.S.C. § 158(b)(5) provides:

> An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such
>
> (continued...)

The BAP judges are all active bankruptcy court judges from districts within the Ninth Circuit. All maintain a regular trial docket in their home districts. Currently there are six members of the BAP; the seventh position is vacant to keep operating costs low and to allow opportunities for *pro tem* judge participation. The current members of the BAP are:

Hon. Meredith A. Jury (C.D. California), Chief Judge
Hon. Ralph B. Kirscher (D. Montana)
Hon. Laura S. Taylor (S.D. California)
Hon. Frank Kurtz (E.D. Washington)
Hon. Robert J. Faris (D. Hawaii)
Hon. William J. Lafferty, III (N.D. California)

BAP judges are appointed by the Circuit for a seven-year term. At the end of that term, they may seek reappointment for an additional three years.

The BAP also routinely utilizes *pro tem* judges in order to give appellate experience to other bankruptcy judges within the Ninth Circuit. A *pro tem* judge sits on a one-day merits panel and has an equal vote with the regular BAP judges. Normally, a *pro tem* judge only participates on motions in appeals where the *pro tem* judge has been assigned to hear the merits. The contributions of the *pro tem* judges allow the BAP to set more calendars and hear more cases.

The BAP hears cases nine months out of the year, with the three-judge panels traveling to various venues in the Ninth Circuit. The BAP does not normally hold hearings during April, August and December.

The BAP utilizes video conferencing and, where not available, teleconferencing and continues to explore the use of new technology to facilitate more convenient hearings for counsel and litigants.

The BAP is staffed by its clerk, two staff attorneys and other personnel who maintain the files and dockets and otherwise run the business of the court.

Address: Bankruptcy Appellate Panel, Court of Appeals Building, 125 South Grand Avenue, Pasadena, CA 91105

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[4](...continued)
member is appointed or designated under section 152 of this title.

Telephone: Appeals from Central District of California, Los Angeles Division (626) 229-7220; Appeals from all other districts and divisions, (626) 229-7225.
Filing Hours: Monday - Friday, 8:30 a.m. to 5:00 p.m. Pacific Time Zone
Website: http://www.ca9.uscourts.gov/bap/

IV. PRACTICE BEFORE THE BAP AND ELECTRONIC FILING

To practice before the BAP, an attorney must be admitted and in good standing to practice before the Ninth Circuit Court of Appeals or before a district court within the Ninth Circuit. An attorney not so admitted may request permission to appear in a specific case by motion to the BAP. 9th Cir. BAP R. 9010-1.

Electronic filing is **mandatory** for all attorneys appearing before the BAP. The governing procedures are subject to change. The best way to keep apprised of the BAP's electronic filing procedures is through the Administrative Order Regarding Electronic Filing in BAP Cases, which is posted on the BAP's Electronic Case Filing page of its website at http://www.ca9.uscourts.gov/bap/.

Here are a few procedural highlights:

- Electronic filing is mandatory for all attorneys in all BAP cases (see Admin Order at Rule 1);
- Any litigant who is not a licensed attorney authorized to practice before the BAP may file a motion with the BAP to obtain permission to register for BAP electronic filing (see Admin. Order at Rule 2(d));
- Sealed documents and motions to file documents under seal may not be electronically filed (see Admin. Order at Rule 4); and
- When a document is electronically filed, the BAP neither requires nor allows the filing of paper copies of the electronically-filed document, unless otherwise specifically ordered (see Admin. Order at Rule 11(b)).

V. STARTING THE APPEAL PROCESS

A. Time and Method for Filing a Notice of Appeal

A notice of appeal must be filed with the bankruptcy court within 14 days of entry of the judgment, order,

or decree appealed from. FRBP 8002(a), 8004(a)(1) and 9006(a). If a timely notice of appeal is filed, any other party may file a notice of appeal (often a cross-appeal) within 14 days of the date on which the first notice of appeal was filed. FRBP 8002(a)(3). Appellant must attach to the notice of appeal a copy of the entered judgment, order or decree from which the appeal was taken, if available. FRBP 8003(a)(3)(B). The timely filing of a notice of appeal is "mandatory and jurisdictional." Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 264 (1978); Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 185 (9th Cir. BAP 2002).

Discretionary extensions may be granted by the bankruptcy court, with some exceptions,[5] upon written motion. Any extension granted may not exceed the later of: (1) 21 days from the expiration of the time for filing a notice of appeal, or (2) 14 days from the entry of the extension order. FRBP 8002(d)(3).

If the motion is filed not later than 21 days after the expiration of the original 14-day period, an extension may be granted upon a showing of excusable neglect. See Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc)(mistake by attorney in delegating task of determining appeal deadline to non-lawyer, who misinterpreted the unambiguous deadline, can be considered excusable neglect at the trial court's discretion). The BAP may not extend the time requirements of FRBP 8002. See FRBP 9006(b)(3). Once the appeal period has expired, absent a finding of excusable neglect under a timely extension motion, it **cannot** be resurrected.

B. Tolling Motions

If, within 14 days of entry of the judgment, order or decree, a party files a motion

[5] FRBP 8002(d)(2) prohibits the bankruptcy court from extending the time to appeal orders granting relief from stay; authorizing sale or lease of property, extensions of credit and use of cash collateral; assumption and assignment of executory contracts or unexpired leases; approval of a Chapter 11 disclosure statement; and confirmation of a plan under Chapters 9, 11, 12 and 13.

(1) to amend or make additional findings of fact under FRBP 7052,
(2) to alter or amend the judgment under FRBP 9023,
(3) for a new trial under FRBP 9023, or
(4) for relief under FRBP 9024,

then the 14 days for filing an appeal runs from the entry of the order disposing of the last such motion outstanding. FRBP 8002(b)(1).

The BAP considers a motion for reconsideration filed within 14 days to be a motion to "alter or amend the judgment" within the meaning of FRBP 8002(b). Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist., 374 F.3d 857, 863 (9th Cir. 2004). See generally 16A Wright & Miller, Federal Practice & Procedure § 3950.4 (4th ed.).

A notice of appeal filed after the court announces or enters a judgment, order or decree but before it disposes of any tolling motion "becomes effective when the order disposing of the last such remaining motion is entered." FRBP 8002(b)(2). Therefore, even if a notice of appeal is filed, the bankruptcy court continues to have jurisdiction to rule on any **timely** tolling motion. See Miller v. Marriott Int'l, Inc., 300 F.3d 1061, 1063-64 & n.1 (9th Cir. 2002)(noting that appeals court lacked jurisdiction until tolling motions were resolved by the trial court).

A party wishing to appeal an order resulting from a tolling motion must file a notice of appeal or an amended notice of appeal. FRBP 8002(b)(3).

C. Premature Notice of Appeal

A premature notice of appeal (filed after the announcement of a decision but before entry of the judgment or order) is treated as filed on the day of and after entry of the judgment or order. FRBP 8002(a)(2).

If the notice of appeal is filed before entry of the order being appealed, appellant must forward to the BAP clerk a copy of the judgment or order immediately upon entry. 9th Cir. BAP R. 8003-1.

A separate second notice of appeal after entry of the order on appeal is not necessary.

A notice of appeal also is premature if an unresolved tolling motion is pending (see § V.B. above).

D. Appeal Fees and *In Forma Pauperis* Motions

A filing and docketing fee of $298 is required and should be made payable to the "Clerk of Court." The fee should be paid to the bankruptcy court at the same time the notice of appeal is filed.

Under Perroton v. Gray (In re Perroton), 958 F.2d 889 (9th Cir. 1992), and Determan v. Sandoval (In re Sandoval), 186 B.R. 490, 496 (9th Cir. BAP 1995), the BAP has no authority to grant *in forma pauperis* motions under 28 U.S.C. § 1915(a) because bankruptcy appellate panels are not "court[s] of the United States" as defined in 28 U.S.C. § 451.

The BAP routinely transfers *in forma pauperis* motions to the district court for the district from which the appeal arises for the limited purpose of granting or denying the motion; the cases are then returned to the BAP for determinations on the merits.

However, the fee-waiver provisions of 28 U.S.C. § 1930(f), as well as the procedures and guidance promulgated by the Judicial Conference of the United States with respect to this statute, permit the bankruptcy court to waive appellate fees with respect to individual Chapter 7 debtors.

E. Election to the District Court (Opt-Out)

The appeal from the bankruptcy court automatically goes to the BAP unless a party timely elects to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1).

1. To elect to have an appeal heard by the district court, appellant must indicate in the notice of appeal (by checking off a box in Part 4 of the Official Form) that appellant elects to have the appeal heard by the United States District Court. See Form B 17A entitled Notice of Appeal and Statement of Election.

2. "Any other party" (e.g., appellee) must make the election not later than 30 days after service of notice of the appeal. 28 U.S.C. § 158(c)(1). In HBI, Inc. v. Sessions Payroll Management, Inc. (In re Mackey), 232 B.R. 784, 787 (9th Cir. BAP 1999), the BAP held that the 30-day deadline begins to run on the date of the court's transmission of the notice of appeal, not the date that the order being appealed is entered nor the date the notice of appeal is filed by appellant, and that the 3-day extension provided in FRBP 9006(f) applies.

3. The BAP "may transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the Panel deems appropriate." 9th Cir. BAP R. 8005-1.

F. Petition to Appeal Directly to Court of Appeals

1. The parties may request permission to appeal directly to the Court of Appeals. 28 U.S.C. § 158(d)(2); FRBP 8006(g). The petition generally is brought before the Court of Appeals in the same manner as other permissive appeals under FRAP 6(c). FRBP 8006. See Blausey v. U.S. Tr. (In re Blausey), 552 F.3d 1124, 1129-30 (9th Cir. 2009). A certification for a direct review of a judgment, order or decree of a bankruptcy court is effective when: (1) the certification is filed; (2) a timely appeal has been taken under FRBP 8003 or 8004; and (3) the notice of appeal has become effective under FRBP 8002. FRBP 8006(a).

2. Before the parties file their direct appeal petitions with the Court of Appeals, they generally must first obtain a certification from either the bankruptcy court, the district court or the BAP, as contemplated in 28 U.S.C. § 158(d)(2)(B). If all of the parties to the

appeal unanimously agree, then they may self-certify their appeal. See § V.F.5, below.[6]

3. A request for certification (FRBP 8006(f)(1)) must be filed with the clerk of court where the matter is pending within 60 days after entry of the judgment, order or decree. For purposes of a direct appeal, a matter remains pending in the bankruptcy court for 30 days after the effective date under FRBP 8002 of the first notice of appeal from the judgment, order or decree for which review is sought. A matter is pending in the district court or BAP thereafter. FRBP 8006(b). Only the court where the matter is pending may certify a direct review on request of the parties or on its own motion. FRBP 8006(d).

4. The court in which the certification request is properly filed must serve the request on all parties to the appeal. FRBP 8006(f)(2).

5. If all of the parties to the appeal unanimously agree that a direct appeal is appropriate, then their self-certification must be filed in the appropriate court. FRBP 8006(c). While there is a 60-day time limit for certification requests made pursuant to 28 U.S.C. § 158(d)(2)(B)(see 28 U.S.C. § 158(d)(2)(E)), no express time limit is specified for self-certifications or for a court certification made on the court's own motion.

6. Once a certification becomes effective under FRBP 8006(a), the parties have 30 days to file their request for permission to take a direct appeal to the Court of Appeals with the Clerk of the Court of Appeals. FRBP 8006(g).[7]

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[6] For an example of a certification of an interlocutory appeal by the BAP, see Ransom v. MBNA America Bank, N.A. (In re Ransom), 380 B.R. 809, 811-12 (9th Cir. BAP 2007).

[7] In re Blausey, above, involved a series of mistakes, in (continued...)

7. Absent an order to the contrary, neither the issuance of a certification nor the Court of Appeals' granting of a petition for permission to appeal suspends prosecution of an appeal before the BAP or the district court. 28 U.S.C. § 158(d)(2)(D). If the Court of Appeals grants the direct appeal petition, the BAP might either stay or dismiss the corresponding BAP appeal.

8. If leave to appeal is required by 28 U.S.C. § 158(a) and has not yet been granted by the BAP or district court, the authorization of a direct appeal by the Court of Appeals under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal. FRBP 8004(e).

G. Final Orders vs. Interlocutory Orders

In general, the BAP has jurisdiction to hear bankruptcy appeals from final judgments, orders and decrees. See 28 U.S.C. § 158(a), (b)(1).

In addition, the BAP has jurisdiction to hear appeals from two types of interlocutory orders:

(1) Orders under 11 U.S.C. § 1121(d) increasing or reducing exclusivity time periods, 28 U.S.C. § 158(a)(2), Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hospital (In re Henry Mayo Newhall Mem'l Hospital), 282 B.R. 444 (9th Cir. BAP 2002); and

(2) Interlocutory orders as to which the BAP grants a motion for leave to appeal, 28 U.S.C. § 158(a)(3). See also Official Comm. of Unsecured Creditors v. Credit Lyonnais Bank Nederland, N.V. (In re NSB Film Corp.), 167 B.R. 176, 180 (9th

[7](...continued)
part based on some confusion by the bankruptcy and court of appeals clerks' offices over the timing of various steps in the then new direct appeal process. The court made it clear that in the future, the procedural rules would be enforced: "[B]ankruptcy petitioners and bankruptcy courts should now be on notice of this potential pitfall. Consequently, future failure to timely file a petition to appeal in these circumstances is unlikely to be given the benefit of the good cause exception." 552 F.3d at 1151.

Cir. BAP 1994). See generally 16 Wright & Miller, Federal Practice & Procedure § 3926.2.

The BAP lacks jurisdiction to hear appeals from interlocutory orders (except § 1121(d) orders) unless the BAP grants leave to appeal.

1. Definition of Finality

The standard for determining finality in the bankruptcy context is more flexible than in other areas. In re NSB Film Corp., 167 B.R. at 180. In contrast to an ordinary civil case where "a complete act of adjudication ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," a bankruptcy order is final if it "end[s] any interim disputes from which appeal would lie." Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 n.1 (9th Cir. 2007)(internal quotation marks and citations omitted).

An order can be appealed under the "flexible finality" doctrine if it "1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." Elliott v. Four Seasons Props. (In re Frontier Props., Inc.), 979 F.2d 1358, 1363 (9th Cir. 1992).

For a discussion of pragmatic finality in bankruptcy, see Saxman v. Educational Credit Management Corporation (In re Saxman), 325 F.3d 1168 (9th Cir. 2003)(and the dissent). But see Belli v. Temkin (In re Belli), 268 B.R. 851 (9th Cir. BAP 2001)(holding that, for purposes of jurisdiction over bankruptcy appeals under 28 U.S.C. § 158(a)(1), finality in adversary proceedings does not differ from finality in ordinary federal civil actions under 28 U.S.C. § 1291, and thus FRCP 54(b) applies).

Examples of orders held to be final include orders:

- Granting or denying relief from stay, Solidus Networks, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086, 1092-93 (9th Cir.

2007); Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters., Inc.), 96 F.3d 346, 351 (9th Cir. 1996);

- Regarding adequate protection, Kamai v. Long Beach Mort. Co. (In re Kamai), 316 B.R. 544, 547-48 (9th Cir. BAP 2004);

- Confirming a chapter 11 debtor's reorganization plan, Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374 (9th Cir. 1985);

- Allowing or disallowing an exemption, Preblich v. Battley, 181 F.3d 1048, 1056 (9th Cir. 1999);

- Substantively consolidating bankruptcy cases, Alexander v. Compton (In re Bonham), 229 F.3d 750 (9th Cir. 2000);

- Approving a final application for compensation of professional, Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K Corp.), 279 F.3d 669 (9th Cir. 2002); Leichty v. Neary (In re Strand), 375 F.3d 854, 858 (9th Cir. 2004);

- For sale of property to good-faith purchasers, Sw. Prods., Inc. v. Durkin (In re Sw. Prods., Inc.), 144 B.R. 100 (9th Cir. BAP 1992); Thomas v. Namba (In re Thomas), 287 B.R. 782 (9th Cir. BAP 2002);

- Orders approving settlement agreements, Goodwin v. Mickey Thompson Entm't Grp., Inc. (In re Mickey Thompson Entm't Grp., Inc.), 292 B.R. 415, 419-20 (9th Cir. BAP 2003); and

- Orders converting a chapter 13 bankruptcy case to chapter 7, Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 769 (9th Cir. 2008).

Examples of orders held to be interlocutory include orders:

- Denying a motion to dismiss a bankruptcy case or adversary proceeding, Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.), 894 F.2d 1136 (9th Cir. 1990)(bankruptcy case); Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc., 811 F.2d 1209, 1214 (9th Cir. 1987)(adversary proceeding);

- Granting a voluntary dismissal without prejudice of an adversary proceeding, Ditter v. Greenberg (In re Ditter), 205 B.R. 213 (9th Cir. BAP 1996);

- Granting a trustee's motion to employ a professional pursuant to 11 U.S.C. § 327, Sec. Pac. Bank Wash. v. Steinberg (In re Westwood Shake & Shingle, Inc.), 971 F.2d 387 (9th Cir. 1992);

- Denying a motion for summary judgment, Comsource Indep. Foodservice Cos., Inc. v. Union Pac. R.R. Co., 102 F.3d 438, 441-42 (9th Cir. 1996);

- Granting partial summary judgment without the certification required by FRCP 54(b), Belli v. Temkim (In re Belli), 268 B.R. 851, 856-57 (9th Cir. BAP 2001); a partial summary judgment certified without sufficient findings is arguably interlocutory. Janus v. Marco Crane & Rigging Co. (In re JWJ Contracting Co., Inc.), 287 B.R. 501, 506 n.7 (9th Cir. BAP 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004);

- Imposing monetary sanctions against an attorney, Cunningham v. Hamilton Cnty., Ohio, 527 U.S. 198 (1999); Cato v. Fresno City, 220 F.3d 1073, 1074 (9th Cir. 2000); but see Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1187 (9th Cir. 2003)(exercising jurisdiction over sanctions issue because immediate review might obviate the need for further fact finding on remand and because court was compelled to immediately review non-sanctions issues, thus avoiding piecemeal litigation); Golant v. Levy (In re Golant), 239 F.3d 931, 935 (7th Cir. 2001)("we were

unable to uncover any cases discussing how Cunningham might alter the long-held view that sanctions which completely eliminate the possibility of a decision on the merits--such as a default judgment or dismissal--are 'final' for the purpose of appeal."); Reorganized Solomat Enters., Inc. v. Ibar (In re Solomat Partners, L.P.), 231 B.R. 149, 151 (2d Cir. BAP 1999)(holding that denial of civil contempt motions was final and appealable);

- Granting a motion to reopen a bankruptcy case, Wilborn v. Gallagher (In re Wilborn), 205 B.R. 202 (9th Cir. BAP 1996);

- Dismissing a complaint with leave to amend, WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997); Barnes v. Belice (In re Belice), 461 B.R. 564, 571-72 (9th Cir. BAP 2011); and

- Denying confirmation of a Chapter 13 plan, Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).

2. Separate Document Rule

FRBP 7058 requires that the judgment appealed in an adversary proceeding must be entered on a separate document. FRBP 7058, making applicable FRCP 58; Corrigan v. Bargala, 140 F.3d 815, 817 (9th Cir. 1998); United States v. Schimmels (In re Schimmels), 85 F.3d 416, 420-21 (9th Cir. 1996). FRCP 58(c)(2) now deems judgments final after 150 days even if not set forth as separate judgments. Application of the separate document rule may be waived. See Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978); Sallie Mae Servicing, LP v. Williams (In re Williams), 287 B.R. 787, 791 n.10 (9th Cir. BAP 2002); Boggan v. Hoff Ford, Inc. (In re Boggan), 251 B.R. 95, 98 n.2 (9th Cir. BAP 2000).

The separate document rule does not apply to judgments or orders entered in contested matters. FRBP 9021 ("A judgment or order is effective when entered under Rule 5003.").

3. Minute Entries / Minute Orders

A minute entry is a final order if it states that it is an order, was mailed to counsel, is signed by the clerk who prepared it and is entered on the docket sheet. Kuan v. Lund (In re Lund), 202 B.R. 127, 130 (9th Cir. BAP 1996). To be a final order, a minute entry also must include "dispositive language sufficient to put the losing party on notice that his entire action -- and not just a particular motion or proceeding within the action -- is over and that his next step is to appeal." Brown v. Wilshire Credit Corp. (In re Brown), 484 F.3d 1116, 1121 (9th Cir. 2007).

4. Leave to Appeal

To appeal an interlocutory order, one must file a notice of appeal along with a motion for leave to appeal. FRBP 8004.

Although filed in the bankruptcy court, the leave motion is directed to the BAP. The BAP is the court that grants or denies leave. The motion for leave to appeal must contain:

(1) A statement of facts necessary to understand the question presented by the appeal;
(2) A statement of the question presented;
(3) A statement of the reasons why the appeal should be heard; and
(4) A copy of the judgment, order, or decree complained of and any opinion or memorandum relating to that order or judgment. FRBP 8004(b).

Depending upon the nature of the interlocutory order, appellant can also seek certification from the bankruptcy judge under FRCP 54(b), made applicable by FRBP 7054.

If the bankruptcy court makes an express determination that there is no just reason for delay in entry of a final judgment on a distinct claim or cause of action, the bankruptcy court may direct entry of a final judgment. The matter is

then final as to that claim for purposes of appeal. FRCP 54(b).

An order that purports to be a final order on fewer than all causes of action or parties will not be considered final absent such express determination and direction.

5. Standard for Granting Leave to Appeal

Leave to appeal is usually limited to situations that would avoid wasteful litigation, involve a controlling question of law as to which there is substantial ground for difference of opinion and would materially advance the ultimate termination of the litigation. Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995); Travers v. Dragul (In re Travers), 202 B.R. 624, 626 (9th Cir. BAP 1996).

The BAP's decision to deny leave to appeal is an exercise of discretion and generally is not open to review by the Court of Appeals. Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787-88 (9th Cir. 2003). See also Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976) (holding that appellant could not pursue an interlocutory appeal because it was untimely, but that interlocutory order would merge into the final judgment and could be challenged upon timely appeal from the final judgment). Accord United States v. 475 Martin Lane, 545 F.3d 1134, 1140-41 (9th Cir. 2008)(voluntary dismissal of interlocutory appeal did not preclude appellant from later appealing the final judgment).

VI. DESIGNATION OF THE RECORD

A. Perfection of the Appeal

Within 14 days after filing the notice of appeal, appellant must file with the clerk of the bankruptcy court and serve on appellee a designation of items to be included in the record on appeal ("DOR") and must file and serve a statement of issues on appeal ("SOI").

FRBP 8009(a)(1). For appeals pending before the BAP, a DOR is **not** a copy of every item to be included in the record. It is a **list** of the items that make up the record, usually identified by docket number and filing date, as well as a description of the item (e.g., "plaintiff's opposition to motion for fees," "declaration in support of motion to dismiss").[8] Within 14 days of service of appellant's DOR, appellee may file a designation of additional items to be included in the record. FRBP 8009(a)(2).

Items that were not before the bankruptcy court generally will not be allowed unless they pertain to mootness that arose after the order on appeal. See Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1119 (9th Cir. 2000); Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988). The BAP may take judicial notice of the bankruptcy court docket or of matters relevant to the appeal. FRE 201; O'Rourke v. Seabord Surety Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

If appellee has cross appealed, it may file an SOI to be presented on cross appeal and a DOR. FRBP 8006(a)(2). Otherwise, appellees do not file an SOI, even if they disagree with appellant's framing of the issues. Any such conflict should be addressed in appellee's brief.

The DOR should list all necessary transcripts. See FRBP 8009(a)(4). If the DOR identifies transcripts, the party designating the transcripts must immediately deliver to the court reporter and file with the bankruptcy court clerk a written request for the transcripts and make arrangements for payment. FRBP 8009(b)(1). If appellant is not ordering a transcript, appellant must file with the bankruptcy court a certificate so stating. FRBP 8009(b)(1).

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[8] For appeals pending before the district court, litigants should check the district court's local rules for requirements regarding the DOR.

If a tentative ruling is necessary to an understanding of the final ruling, it should be included in the DOR and in the excerpts of record. Welther v. Donell (In re Oakmore Ranch Mgmt.), 337 B.R. 222, 226 (9th Cir. BAP 2006); Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 169 (9th Cir. BAP 1999).

Appellant must serve and file excerpts of the record as an appendix when the opening brief is filed. FRBP 8018(b)-1. See Section VIII.A.10., below.

B. Completion of the Record

When the reporter completes the transcript, the reporter files it with the clerk of the bankruptcy court. FRBP 8010(a)(2)(B). The reporter is supposed to complete the transcript within 30 days but may ask the bankruptcy clerk for an extension. FRBP 8010(a)(2)(C).

When the record is complete, the clerk of the bankruptcy court transmits a certificate to the clerk of the BAP that the record is complete and available electronically. See FRBP 8010(b)(1); 9th Cir. BAP R. 8010-1.

C. Consequences of Incomplete Record

The burden of presenting a proper record to the appellate court is on appellant. Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). Unless the record before the appellate court affirmatively shows the matters on which appellant relies for relief, appellant may not argue those matters on appeal. 10 Collier on Bankruptcy ¶ 8009.06[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015); Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir. 1994).

The failure to provide an adequate record may result in dismissal of the appeal or a waiver of issues dependent upon the record. McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 416-17 (9th Cir. BAP 1999). When appellant challenges a factual finding, the failure to provide an adequate record may be grounds for

affirmance. Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991). But see Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport Entm't), 396 F.3d 1083, 1088 (9th Cir. 2005)(holding that it was inappropriate to dismiss an appeal for an inadequate record where omitted items were minimal and where the BAP neither considered alternative sanctions nor gave appellant advance warning and an opportunity to cure the procedural defect).

Appellee must police the record and take steps to assure that it is sufficiently complete to defend the bankruptcy court's ruling. Kyle v. Dye (In re Kyle), 317 B.R. 390, 394 (9th Cir. BAP 2004).

VII. MOTIONS

A. An aspect of appellate practice that is familiar to appellate lawyers, but not necessarily to trial lawyers and trial judges, is the sheer number of motions filed in appellate cases. The BAP receives approximately 60 motions a month. The BAP judges rotate sitting on monthly "motions panels." These panels consist of one to three judges who decide the motions. Motions that are not case dispositive (e.g., extension of time to file briefs) may be decided by one or two judges or by the BAP clerk, based on delegated authority. Typically, the progress of a motion is:

1. The motion is filed with the BAP. FRBP 8013(a)(1).[9] The motion must state with particularity the grounds for bringing the motion, the relief sought and the legal argument necessary to support the relief. FRBP 8013(a)(2)(A). Declarations and supporting materials must be attached. FRBP 8013(a)(2)(C).

[9] However, a motion for leave to pursue an appeal from an interlocutory order should be filed in the bankruptcy court with the notice of appeal. See FRBP 8004(a); 8003(a). For detailed information on interlocutory orders and leave motions, see section V.G., above.

On a substantive motion, the opposing party has seven days after service to file an opposition. FRBP 8013(a)(3)(A).

Motions for procedural orders may be acted upon at any time without an opportunity to respond. FRBP 8013(b).

2. The motion is reviewed and summarized by a staff attorney who transmits the motion, any responses or replies and the staff attorney's workup to the motions panel judges.

3. Motions panel judges review the paperwork and reach a decision. Motions are decided without a hearing unless the motions panel orders otherwise. FRBP 8013(c). Hearings on motions are extremely rare.

4. Once a decision has been reached, the BAP clerk issues the order on behalf of the motions panel and distributes it to the parties.[10]

5. Rulings by a motions panel are not binding on the merits panel. See Couch v. Telescope Inc., 611 F.3d 629, 632 (9th Cir. 2010).

B. Motions for Stay Pending Appeal

Requests for a stay pending appeal normally should be presented to the bankruptcy judge first. FRBP 8007(a)(1)(A). The bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal after a notice of appeal has been filed. In re Ho, 265 B.R. at 604-05.

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[10] Orders disposing of motions are rarely published except where an important point of law has been resolved. See, e.g., Jacobs v. Brain Power Am. Inc. (In re Jacobs), 528 B.R. 435, 436 (9th Cir. BAP 2015)(time for election of appeal under FRBP 8005); Ho v. Dai Hwa Elecs. (In re Ho), 265 B.R. 603, 604-05 (9th Cir. BAP 2001)(bankruptcy court retains jurisdiction to rule on motion for stay pending appeal after notice of appeal has been filed).

Parties may file a motion for stay pending appeal directly with the appellate court; but, in the motion, the party must: (1) show that moving for relief in the bankruptcy court would be impracticable; or (2) if a motion was already filed in the bankruptcy court, state whether the bankruptcy court has or has not ruled on the motion. FRBP 8007(b)(2). To the extent it has ruled on the motion, the party must state the reasons for the bankruptcy court's ruling. Id.

A motion for stay pending appeal must satisfy four elements: (1) appellant is likely to succeed on the merits; (2) appellant will suffer irreparable injury if no stay is granted; (3) no substantial harm will come to appellee as a result of a stay; and (4) the stay will not harm the public interest. Nken v. Holder, 556 U.S. 418, 426 (2009).

The bankruptcy court or BAP may require the posting of a bond as a condition of granting a stay pending appeal. FRBP 8007(c). If an appeal is from a money judgment in bankruptcy, the supersedeas stay is available as a matter of right. See Farmer v. Crocker Nat'l Bank (In re Swift Aire Lines, Inc.), 21 B.R. 12, 13-16 (9th Cir. BAP 1982). The bankruptcy court or BAP has discretion in determining the sufficiency of the bond and the adequacy of the surety. FRBP 8007(c); FRCP 62(d), made applicable in adversary proceedings by FRBP 7062; In re Swift Aire Lines, Inc., 21 B.R. at 14.

C. Motions to Dismiss for Lack of Jurisdiction

Appellants occasionally appeal an issue that the BAP does not have jurisdiction to consider for various reasons, including a lack of standing, untimeliness or mootness. Although the BAP must raise jurisdictional issues sua sponte, Kontrick v. Ryan, 540 U.S. 443, 455 (2004), it generally makes sense for appellee to file a motion to dismiss the appeal as early as possible to save the cost of briefing in a case that ultimately will be dismissed. Thus, it is important to recognize the following concepts of finality, standing and mootness in a bankruptcy context.

1. Untimeliness and Lack of Finality

Appeals can be either too early or too late (§§ V.A - V.C, V.G, above). Both defects can be the basis for a motion to dismiss for lack of jurisdiction.

2. Lack of Standing

Standing is a jurisdictional issue; it must exist and is open to review at all stages of the litigation. See Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013); Nat'l Org. For Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994). Questions of standing are reviewed de novo. Motor Veh. Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 879 (9th Cir. 2012). Because standing is a jurisdictional requirement, the BAP must dismiss an appeal when no standing exists.

Neither the Bankruptcy Code nor Title 28 lays out the requisites for appellate standing. See 1 Collier on Bankruptcy ¶ 5.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015). The Ninth Circuit Court of Appeals and the BAP follow the "person aggrieved" standard for determining whether standing exists in bankruptcy appeals. See Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983)(only parties who are directly and adversely affected pecuniarily by a bankruptcy court order or judgment have standing to appeal); Darby v. Zimmerman (In re Popp), 323 B.R. 260, 265 (9th Cir. BAP 2005).

Normally, only a bankruptcy trustee or a debtor-in-possession has standing on appeal to pursue or defend the rights of the bankruptcy estate. A chapter 7 debtor has standing to vindicate personal rights, such as in an appeal related to the discharge of a debt under 11 U.S.C. § 523(a) or his or her bankruptcy discharge under 11 U.S.C. § 727.

But, if a claim, right or interest belongs to the bankruptcy estate, a chapter 7 debtor typically does not have standing to challenge a bankruptcy court order or judgment. Exceptions to this rule exist; for example, a chapter 7 debtor may have standing where the bankruptcy estate's assets, if increased, would add to the amount paid on account of a nondischargeable debt. A chapter 7 debtor may also have standing when there exists or will likely exist a surplus bankruptcy estate. Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 778 n.2 (9th Cir. 1999); In re Fondiller, 707 F.2d at 442.

The United States Trustee ("UST") has statutory standing as conferred by 11 U.S.C. § 307 to appeal and to intervene in an appeal. Stanley v. McCormack, Barstow, Sheppard, Wayte & Carruth (In re Donovan Corp.), 215 F.3d 929, 930 (9th Cir. 2000).

Beyond appellate standing, there are other standing doctrines and considerations that may be grounds for a motion to dismiss the appeal. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)(injury in fact, causal connection, and likelihood injury will be redressed by a favorable decision); Mills v. U.S., 742 F.3d 400, 406-07 (9th Cir. 2014)(prudential standing); Veal v. Am. Home Mort. Servicing, Inc. (In re Veal), 450 B.R. 897, 906-08 (9th Cir. BAP 2011)(mortgage servicer standing for relief from stay); see also Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386-88 (2014)(zone of interest).

3. Mootness

There are generally two forms of mootness: (1) constitutional mootness and (2) equitable mootness. Constitutional mootness refers to the U.S. Constitution's Article III "case" or "controversy" requirement. Without a "case" or "controversy," the BAP lacks the power to hear the case. An appeal is not constitutionally moot if the BAP could "'give the appellant any effective

relief in the event that [the BAP] decide[s] the matter on merits in [appellant's] favor.'" Rev Op Grp. v. ML Manager LLC (In re Mortgs. Ltd.), 771 F.3d 1211, 1214 (9th Cir. 2014); see also Collect Access LLC v. Hernandez (In re Hernandez), 483 B.R. 713, 719 (9th Cir. BAP 2012)("An appeal is constitutionally moot when events occur during the pendency of the appeal that make it impossible for the appellate court to grant effective relief.").

Alternatively, equitable mootness may apply in an appeal "when there has been a 'comprehensive change of circumstances . . . so as to render it inequitable for [the] court to consider the merits of the appeal.'" In re Mortgs. Ltd., 771 F.3d at 1214. This type of mootness often arises in connection with a bankruptcy court order authorizing the sale of property and is premised on the particular need for finality of such orders. Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th Cir. 1988)("Bankruptcy's mootness rule 'developed from the general rule that occurrence of events which prevent an appellate court from rendering effective relief renders an appeal moot, and the particular need for finality in orders regarding sales in bankruptcy.'"); Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1419-20 (9th Cir. 1996), cert. denied, 519 U.S. 1054 (1997); Vista Del Mar Assocs., Inc. v. West Coast Land Fund (In re Vista Del Mar Assocs., Inc.), 181 B.R. 422, 424-25 (9th Cir. BAP 1995). Equitable mootness in relation to the sale of property operates only when a purchaser bought an asset in good faith. See 11 U.S.C. § 363(m).

Note, however, that in the Ninth Circuit, the BAP first considers "whether a stay was sought, for absent that a party has not fully pursued its rights." In re Thorpe Insulation Co., 677 F.3d at 881. In some circumstances, appellant's failure to move for a stay would not render an appeal equitably moot. See In re Mortgs. Ltd., 771 F.3d

at 1216. The better course of practice is for the party who disagrees with the bankruptcy court order or judgment to seek a stay so as to insulate the appeal from dismissal based on equitable mootness.

If appellant sought a stay but was unsuccessful in his or her request, the BAP then looks at whether substantial consummation of the order or judgment has occurred. See id.; see also Stokes v. Gardner, 483 F. App'x 345, 346 (9th Cir. 2012) (applying Thorpe two-part test in chapter 7 context).

Examples of Mootness

The following are common examples of mootness in the bankruptcy context:

- Where appellant failed to seek a stay pending appeal of a bankruptcy court order and it did not offer an "adequate reason" for its failure, consolidated appeals were equitably moot. In re Mortgs. Ltd., 771 F.3d at 1216-17;

- When funds have been disbursed to non-parties or when the failure to obtain a stay causes a change of circumstances to the point where it would be inequitable to consider the merits of the appeal. Ederel Sport, Inc. v. Gotcha Int'l L.P. (In re Gotcha Int'l L.P.), 311 B.R. 250, 253-55 (9th Cir. BAP 2004);

- Where a chapter 11 plan has "been so far implemented that it [would be] impossible to fashion effective relief for all concerned" and where reversal of the order confirming the plan "would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 797 (9th Cir. 1981). See In re Thorpe Insulation Co., 677 F.3d at 881, establishing a 4-part test for mootness:

(1) was stay sought; (2) if stay sought but not granted, has substantial consummation occurred; (3) impact on third parties; and (4) can bankruptcy court "fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court." But cf. Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.), 293 B.R. 489, 494 (9th Cir. BAP 2003)(concluding that chapter 11 plan was not so far consummated, or so exceedingly complex, as to render it impossible to fashion meaningful relief);

- Where real property subject to the appeal has been foreclosed upon and appellant lacks statutory rights of redemption. See Onouli-Kona Land Co., 846 F.2d at 1172-73; and

- Orders involving § 363(m), which approve a sale or lease of property. Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp., Inc.), 163 F.3d 570, 576 (9th Cir. 1998). But see Thomas v. Namba (In re Thomas), 287 B.R. 782, 786 (9th Cir. BAP 2002)(remanding for factual determination of good faith purchaser for the purposes of § 363(b) sale).

D. Emergency Motions

1. If the motion requests immediate action in order to avoid irreparable harm, the word "EMERGENCY" should appear in the title of the motion. FRBP 8013(d)(1). For non-electronic filers, an original of both the motion and the appendix, containing the items specified by 9th Cir. BAP R. 8013(d)-1(b), must be filed with the BAP clerk. **A courtesy call to the BAP Clerk's Office indicating that an emergency motion has been or will be filed is highly recommended.**

2. Always attach a declaration stating the nature of the emergency. FRBP 8013(d)(2)(A);

9th Cir. BAP R. 8013(d)-1(a). The motion should also state whether all grounds in support of the motion were submitted to the bankruptcy judge and, if not, why the motion should not be remanded to the bankruptcy judge for reconsideration. FRBP 8013(d)(2)(B).

3. Notify opposing counsel and state in a declaration when and how counsel was notified; there is a specific duty on the movant to "make every practicable effort to notify opposing counsel and any unrepresented parties in time for them to respond." FRBP 8013(d)(3). The motion papers must be accompanied by a proof of service showing service on all parties. FRBP 8013(d)(2)(D); 8011(d).

4. Include an appendix that contains a conformed copy of the notice of appeal and the entered judgment, order or decree from which the appeal was taken. 9th Cir. BAP R. 8013(d)-1(b)(1)-(2).

5. If the emergency motion concerns a stay pending appeal, the appendix must contain: (1) a conformed copy of the bankruptcy court's order denying or granting the stay and an explanation by the court of its ruling, or a declaration explaining why such a copy is unavailable; and (2) copies of all papers regarding the stay filed in the bankruptcy court. 9th Cir. BAP R. 8013(d)-1(b)(3).

VIII. BRIEFING THE ISSUES

A. Filing and Formatting

1. The BAP issues a briefing order in most appeals shortly after appellant files the notice of appeal. The BAP does this to encourage and facilitate the expeditious resolution of appeals.

2. Under the Administrative Order Regarding Electronic Filing in BAP cases, attorneys are required to electronically file briefs and excerpts. Briefs filed by pro se litigants are

deemed filed on the day of mailing. FRBP 8011(a)(2)(B).

3. Responsive Briefs. The briefing order also sets a due date for appellee's responsive brief, usually 21 days after service of appellant's opening brief. If appellee has filed a cross-appeal, the brief must contain the issues and argument pertinent to the cross-appeal, denominated as such, and the response to appellant's brief. FRBP 8016(c)(2); 9006(f)(three additional days when service is not by hand delivery).

4. Reply Briefs. If appellant elects to file a reply brief, it typically is due 14 days after service of appellee's brief. FRBP 9006(f) (three additional days when service is not by hand delivery). In a cross-appeal, appellant may respond to cross-appellant's brief (third brief), FRBP 8016(c)(3), and cross-appellant may reply (fourth brief). FRBP 8016(c)(4).

5. Contents of Briefs. Briefs must conform to FRBP 8015 and 9th Cir. BAP R. 8015(a)-1. Appellant's brief must contain under appropriate headings:

   (1) A corporate disclosure statement, if required by FRBP 8012;
   (2) A table of contents with page references and a table of authorities with references to the pages of the brief where the authorities are cited;
   (3) A statement of the basis of jurisdiction;
   (4) A statement of the issues presented and the applicable standard of review;
   (5) A statement of the case setting out the facts with appropriate references to the record;
   (6) A summary of the argument and the argument; and
   (7) A short conclusion stating the precise relief sought. FRBP 8014(a).

   Appellee's responsive brief must conform to the same requirements established for appellant's

opening brief except that statements of the basis of jurisdiction, the issues and applicable standard of review and the case need not be included. FRBP 8014(b).

6. Certifications. Appellant's opening brief must include certifications of (1) interested parties, and (2) related cases. Appellee's responsive brief must also include a certification of interested parties. 9th Cir. BAP R. 8015(a)-1.

7. Formatting of Briefs. Briefs must be produced in clear black on 8½ x 11 inch opaque, unglazed, white paper with one-inch margins, double spaced, with at least 14-point proportional type or 10.5-point monospaced type. FRBP 8015(a).

   Electronically filed briefs must comply with all provisions of FRBP 8015(a), except with respect to the requirements for the quality of reproduction and binding. FRBP 8015(b).

8. Length of Briefs. Except with leave of the BAP, appellant's and appellee's initial briefs must not exceed 30 pages and reply briefs must not exceed 15 pages, unless the parties comply with the type-volume limitations of FRBP 8015(a)(7).

   A motion for leave to file an oversize brief should be filed well in advance of the deadline for filing the brief. The party requesting the oversize brief should explain the need for going over the page limit (for example, if there are consolidated appeals or multiple issues).

9. Reference to Excerpts of Record (Appendix). The briefs must make specific references to the relevant portions of the record. FRBP 8014(a)(6), (8); see Dela Rosa v. Scottsdale Mem'l Health Sys., Inc., 136 F.3d 1241 (9th Cir. 1998); Mitchel v. Gen. Elec. Co., 689 F.2d 877, 878-79 (9th Cir. 1982).

Opposing parties and the court are not obliged to search the entire record, unaided, for error. Mitchel, 689 F.2d at 879.

An affirmance may be premised on the failure of appellant to provide an adequate record. Ashley v. Church (In re Ashley), 903 F.2d 599, 605-06 (9th Cir. 1990), abrogation on other grounds recognized by In re Denbleyker, 251 B.R. 891, 896 (Bankr. D. Colo. 2000).

An appellate court may dismiss an appeal for failure to provide adequate citations of the record to permit review. See Mitchel, 689 F.2d at 879; see also N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997)("By and large, we have been tolerant of minor breaches of one rule or another. Perhaps we are too tolerant sometimes. But there are times when our patience runs out. Then we strike an appellant's briefs and dismiss the appeal."); Perez, 30 F.3d at 1217 n.12 ("[T]he parties must comply with our rules sufficiently to enable us (and the BAP) to examine those materials that bear on their arguments.").

The BAP's imposition of sanctions for non-compliance with non-jurisdictional procedural requirements is reviewed by the Court of Appeals under an abuse of discretion standard. Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187, 1190 (9th Cir. 2003)(appropriate sanctions may include summary affirmance of the bankruptcy court's decision). But see Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport Entm't) 396 F.3d 1083, 1088 (9th Cir. 2005)(BAP abused its discretion by dismissing appeal based on deficient excerpts of the record, where it did not consider alternative sanctions and where the record before the BAP was sufficient to decide the merits of the appeal).

10. Appendix to Brief (Excerpts of the Record). Attorneys and all other electronic filers must file the appendix electronically. Any party not otherwise required to file electronically must

file the excerpts of record in paper format. 9th Cir. BAP R. 8018(b)-1(a).

i. Contents. Appellant's appendix must include copies of the following:

(A) the relevant entries in the bankruptcy docket;
(B) the complaint and answer, or other equivalent filings;
(C) the judgment, order, or decree from which the appeal is taken;
(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;
(E) the notice of appeal; and
(F) any relevant transcript or portion of it.

FRBP 8018(b)(1).

ii. Appellee may also serve and file an appendix that contains additional materials omitted by appellant. See FRBP 8018(b)(2).

iii. Form. Documents in a paper appendix must be divided by tabs. Documents in an electronic appendix must be divided into separate .pdfs. The appendix must contain a complete table of contents. For electronic appendices, each .pdf must be labeled so that it is identifiable from the table of contents. 9th Cir. BAP R. 8018(b)-1(b).

iv. Defective Appendix. The BAP is not obligated to examine portions of the record that are not included in the appendix, Kritt, 190 B.R. at 386-87; accord Bank of Honolulu v. Anderson (In re Anderson), 69 B.R. 105, 109 (9th Cir. BAP 1986); cf. Ashley, 903 F.2d at 605-06 (incomplete transcript in bankruptcy appeal to District Court), although it may do so and take judicial notice when appropriate. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.

1989); In re Bankr. Petition Preparers Who Are Not Certified Pursuant to Requirements of the Ariz. Supreme Court, 307 B.R. 134, 138 n.5 (9th Cir. BAP 2004).

v. Remedies for a Defective Appendix. The BAP sometimes exercises its discretion to take judicial notice of items from the bankruptcy court record, as reflected in the bankruptcy court docket. See, e.g., Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). Further, dismissal based on a deficient appendix may be inappropriate if the BAP has before it "everything needed in order to address the merits of the appeal." See Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport Entm't), 396 F.3d 1083, 1088 (9th Cir. 2005).

B. Standard of Review

Appellant's opening brief must state the appropriate standard of review for the appeal. FRBP 8014(a)(5). Both sides should be familiar with the standard under which the appellate court will review each issue. Findings of fact are reviewed for clear error. Legal issues are generally reviewed de novo, which means that the appellate court looks at the entire record before the bankruptcy court and gives no deference to the bankruptcy judge's legal conclusions. Mixed questions of law and fact are reviewed de novo. M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 851 (9th Cir. 2014). See also Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 378 (9th Cir. BAP 2011)(reviewing de novo mixed question of fact and law).

The abuse of discretion standard of review applies to many types of bankruptcy court orders. A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990), partially superseded by rule on other grounds, FRCP 11. In applying the abuse of discretion test, the BAP first determines de

novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)(en banc). If the bankruptcy court identified the correct legal rule, the BAP then determines whether the bankruptcy court's application of the correct legal standard to the facts was illogical, implausible or without support in inferences that may be drawn from the facts in the record. Id. If the bankruptcy court did not identify the correct legal rule, or if its application of the correct legal standard to the facts was illogical, implausible or without support in inferences that may be drawn from facts in the record, abuse of discretion occurred. Id.

The BAP does not reverse for harmless error, i.e., an error not affecting substantial rights of the parties, and may affirm for any reason supported by the record. 28 U.S.C. § 2111; FRCP 61, made applicable by FRBP 9005; Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999); Van Zandt v. Mbunda (In re Mbunda), 484 B.R. 344, 355 (9th Cir. BAP 2012), aff'd, 2015 WL 1619469 (9th Cir. Apr. 13, 2015).

C. Service

Copies of all papers filed by any party (and not required by the rules to be served by the clerk of the BAP) must, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel must be made on counsel. FRBP 8011(b).

D. Motions for Extension of Time

1. Procedure. If a party seeks to file a brief but is unable to do so within the time prescribed by the BAP's scheduling order, the party may move for an extension of time for filing a brief. 9th Cir. BAP R. 8018(a)-1(a). Requests for extensions should be limited to what is justified under the circumstances. A motion for an extension of time for filing a brief must be made within the time limit prescribed by the BAP Rules for the filing

of such brief and must be accompanied by a proof of service. Id.

2. Contents. The motion must be supported by a declaration stating when the brief was initially due; how many extensions of time, if any, have been granted; the reasons why such an extension is necessary; the amount of time requested; and the position of the opponent(s) in respect to the motion or why the moving party has been unable to obtain a statement of such position(s). Id.

3. No Automatic Extensions. The BAP has no obligation to consider a late brief and may impose sanctions such as waiver of oral argument, monetary sanctions or dismissal. 9th Cir. BAP R. 8018(a)-1(c).

E. Issues on Appeal

1. Generally, appellate courts do not consider arguments "that are not 'properly raise[d]' in the trial courts." Mano-Y & M, Ltd. v. Field (In re Mortg. Store, Inc.), 773 F.3d 990, 998 (9th Cir. 2014); Hasse v. Rainsdon (In re Pringle), 495 B.R. 447, 453 n.2 (9th Cir. BAP 2013).

2. Three narrow, discretionary exceptions to the general rule exist: (1) to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. In re Mortg. Store, Inc., 773 F.3d at 998.

3. In addition, the BAP must consider matters affecting its jurisdiction sua sponte even if not briefed by the parties. Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.), 81 F.3d 103, 105 (9th Cir. 1996)("Although both parties contend that we have jurisdiction over this appeal, we have an independent duty to examine the propriety of our subject matter jurisdiction.").

4. FRBP 8014(a)(5) requires appellant to include a statement of issues to be decided in the opening brief.

5. An appellate court generally will not consider an issue raised by appellant for the first time in a reply brief. Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 485 (9th Cir. 2010). However, an issue raised by appellant for the first time in a reply brief is not waived if appellee has briefed the issue. Cent. Delta Water Agency v. United States, 306 F.3d 938, 952 n.10 (9th Cir. 2002).

F. Developments while Appeal Pending

1. Duty of Attorneys. Attorneys have a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." Bd. of License Comm'rs v. Pastore, 469 U.S. 238, 240 (1985)(quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975)). See also Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997)("It is the duty of counsel to bring to the federal tribunal's attention, **'without delay**,' facts that may raise a question of mootness.").

2. Procedures for Informing the BAP. Although counsel has a duty to inform the court of a change in law or facts that may affect the appeal, neither the FRBP nor BAP Rules address the manner for doing so. It is likely that a party may simply provide (and serve on all parties to the appeal) a case citation with a short explanation why the new ruling, development or statute substantively affects the appeal. In addition, the BAP has sometimes permitted an appellant to supplement the appellate record. See Plaintiff's Class Claimants in N.J. Actions v. Elsinore Corp. (In re Elsinore Corp.), 228 B.R. 731, 733 n.1 (9th Cir. BAP 1998)(appellants permitted to supplement appellate record with a district court decision decided after the notice of appeal was filed because it was helpful in clarifying appellants'

claims against the debtor). But see Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1213 (9th Cir. 1989)(denying motion to supplement record with "newly discovered evidence" that was not shown to be in fact newly discovered and was neither probative nor added to the record).

3. Mootness. If a party is aware of any fact which may render the appeal moot, the party should file a motion to dismiss the appeal as moot. Any of the parties to the appeal may request equitable vacatur of the judgment or order on appeal in the event the appeal is dismissed as moot. United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950). Whether such vacatur is appropriate will depend on the individual facts and circumstances of the case. See, e.g. Camreta v. Greene, 131 S. Ct. 2020, 2035-36 (2011); U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25-29 (1994).

4. Once the appeal is set for oral argument, it is particularly important to advise the BAP if the parties have settled or are in the process of settling. If settlement requires approval of the bankruptcy court, any motion for continuance should be supported by a declaration regarding the status of the settlement discussions and indicating whether a hearing on approval has been set before the bankruptcy court.

G. Amicus Curiae Briefs

1. The BAP accepts amicus briefs on occasion. E.g., Parks v. Drummond (In re Parks), 475 B.R. 703, 705 n.2 (9th Cir. BAP 2012); Palmdale Hills Prop., LLC v. Lehman Commercial Paper, Inc. (In re Palmdale Hills Prop., LLC), 457 B.R. 29, 45 n.8 (9th Cir. BAP 2011); In re Bankr. Petition Preparers Who Are Not Certified Pursuant to Requirements of the Ariz. Supreme Court, 307 B.R. 134, 139 (9th Cir. BAP 2004).

2. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. FRBP 8017(a).

Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. Id. A motion for leave to file an amicus brief must be accompanied by the proposed brief and must state the movant's interest, why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal. FRBP 8017(b).

3. The cover of the amicus brief must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. FRBP 8017(c). The amicus brief must otherwise comply with briefing requirements as set forth in FRBP 8017.

IX. ORAL ARGUMENT

A. Scheduling

Oral argument is scheduled in nearly all fully-briefed cases as soon as possible after the briefs are filed. At the time they file their opening briefs, counsel should file a separate notice of unavailability advising the BAP clerk of known scheduling conflicts with BAP argument dates. The annual hearing calendar on the BAP's website, http://www.ca9.uscourts.gov/bap/, identifies the dates that the BAP judges have set aside for argument each year. **If counsel knows or suspects that he or she will be unavailable on one of the listed dates, counsel should file as soon as possible a notice of unavailability, as indicated above.**

Before a case is set for oral argument, the BAP clerk will consider any notices of unavailability and work with the parties to accommodate known scheduling conflicts and other matters concerning argument. All requests, such as a motion to submit on briefs, must be in writing. Prior to filing the request, the movant should contact the opposing counsel or unrepresented litigant and include the position of both sides in the motion. Once a case has been set for oral argument, continuances are rarely granted. 9th Cir. BAP R. 8019-1.

B. Submission Without Argument

Parties usually have the option of electing to submit the case on the briefs without attending oral argument. In that event, unless the BAP dispenses with oral argument entirely, the opposing party may appear and argue without opposition. Those choosing not to present oral argument must notify the BAP clerk and all other parties of that election as soon as practicable.

Upon party request or on the BAP's own motion, the BAP may determine that oral argument is not necessary and order the appeal submitted on the briefs without argument. FRBP 8019(b); 9th Cir. BAP R. 8019-1.

C. Location of Hearing

The BAP clerk provides notice of the time and place of argument. The BAP can sit at any location in the Ninth Circuit. When economical and feasible, the appeal will be set for hearing in the district from which the appeal originated. Parties who desire and agree to a different location should inform the BAP clerk in writing at the earliest possible date and not later than the time appellee's brief is filed.

D. Video and Telephone Conference Hearings

The BAP permits parties to request permission to appear and argue via video or telephone conference. Video is preferred. Such requests must be in writing and must demonstrate cause why personal attendance at argument should be excused. Additionally, the BAP may set an appeal for oral argument by video or telephone conference to expedite oral argument. In such instances, the parties normally have the option of appearing from the remote location or traveling to the site at which the BAP is sitting.

E. BAP Panel Preparation

The three judges review the briefs and the appendices to the briefs before oral argument. The judges usually discuss each case prior to oral argument to expound upon the issues.

F. Effective Oral Argument

1. Oral argument is typically limited to fifteen minutes per side. Parties aligned on the same side typically are asked to split their fifteen minutes. Appellants may reserve a portion of their fifteen minutes for rebuttal. Appellees usually are not allowed to reserve time for rebuttal. In cases of significant complexity or involving multiple parties, the presiding judge may grant additional time. Parties believing that more time is needed should file a motion requesting additional time once the notice of oral argument has been received from the clerk.

2. At oral argument do not attempt to address every fact and argument in the briefs; the BAP judges thoroughly review the briefs and the excerpts of record before oral argument. Rather, use the time to summarize the arguments and directly answer the judges' questions in order to clarify factual or legal issues or to address any concerns.

3. At oral argument, do not make the mistake of disregarding or sidestepping a judge's question. Your response may be the pivotal point in a judge's vote. Given the limited amount of time available, make every effort to satisfy the judges' concerns before moving on to the remainder of the argument.

4. Good appellate advocates are not wedded to their scripts. Be familiar with every aspect of the case, including the arguments of your opponent, pertinent facts, legal issues, controlling or persuasive case law and the current procedural posture of the bankruptcy case. Also be prepared to elaborate on legal or factual issues that may not have been emphasized in the briefs, to explore a narrow legal issue and to discuss the ramifications of a published decision. Using fewer than the allotted time is certainly acceptable if there are no questions from the judges.

G. New Matters or Matters Outside of the Briefs

Generally, an appellate court will not consider matters that are not specifically and distinctly argued in appellant's opening brief. See United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992); see also Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991) (issue raised in reply brief would not be considered, particularly since appellant's failure to properly brief the issue "clearly misled the appellee"); The Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 2004).

X. SANCTIONS

Sanctions for frivolous appeals, in the form of just damages and single or double costs, are awarded only upon a separately-filed motion or after notice from the BAP and reasonable opportunity to respond. FRBP 8020. This rule is strictly enforced. Tanzi v. Commerce-Comerica Bank-Cal. (In re Tanzi), 297 B.R. 607, 613 (9th Cir. BAP 2003). The BAP ignores requests for sanctions made in the briefs. Simpson v. Burkart (In re Simpson), 366 B.R. 64 (9th Cir. BAP 2007)(request for sanctions in a party's appellate brief insufficient to allow the imposition of sanctions).

XI. DECISIONS

A. After Oral Argument

The judges confer immediately after the hearing to reach a tentative decision. The judge assigned to write the disposition then circulates a draft for formal vote. Once all comments have been considered and any concurrences or dissents have been prepared, the disposition is transmitted to the BAP clerk who files it and serves the parties. Most BAP appeals are decided within ten months of filing of the notice of appeal.

B. Opinions and Memoranda

An "opinion" is a written, reasoned disposition of the case that is intended for publication. See 9th Cir. BAP R. 8024-1. A "memorandum" is a written, reasoned

disposition of a case that is not intended for publication. Both memoranda and opinions may be cited, see FRAP 32.1, but unpublished memoranda do not have any precedential value. About 20 percent of final BAP decisions are published as opinions in a typical year.

C. Publication

The criteria used to determine whether to publish a decision as an opinion are whether it: (1) establishes, alters, modifies or clarifies a rule of law; (2) calls attention to a rule of law which appears to have been generally overlooked; (3) criticizes existing law; or (4) involves a legal or factual issue of unique interest or substantial public importance. 9th Cir. BAP R. 8024-1(b).

D. Request for Publication

A request by a party for publication of any unpublished disposition may be made by letter addressed to the BAP clerk, stating concisely the reasons for publication. Such a request must be received by the clerk no later than 28 days after the filing of the memorandum. 9th Cir. BAP R. 8024-1(b)(3)(B).

E. Mandate

The mandate returns jurisdiction over the matter to the bankruptcy court. The BAP mandate is a certified copy of the BAP's judgment or final order that is sent to the bankruptcy court. It is issued in accordance with the time frame set forth in FRAP 41. Copies are not usually sent to the parties.

F. Motions for Rehearing - FRBP 8022

FRBP 8022 requires motions for rehearing to be filed within fourteen days after entry of the judgment of the BAP. A party seeking rehearing 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." FRBP 8022(a)(2). Motions for rehearing are designed to ensure that the appellate court properly considered all

relevant information in rendering its decision; they are not a means by which to reargue a party's case. Kosmala v. Imhof (In re Hessco Indust., Inc.), 295 B.R. 372, 375 (9th Cir. BAP 2003). Motions for rehearing are rarely granted.

If a timely motion for rehearing has been filed, the time for appeal to the Court of Appeals begins to run from the entry of an order disposing of the motion for rehearing. FRAP 6(b)(2)(A). Motions for rehearing typically delay issuance of the appellate court's mandate until seven days after the order is entered. FRAP 41(d)(1).

G. Appeals to the Court of Appeals from Decisions of the BAP - FRAP 6

A notice of appeal to the Court of Appeals must be filed within 30 days after the entry of a final judgment/order of the BAP (60 days if the United States or an officer or agency thereof is one of the parties). FRAP 4(a)(1) and FRAP 6. A timely motion for rehearing under FRBP 8022 tolls the time for filing the notice of appeal. See FRAP 6(b)(2)(A).

The notice of appeal is filed with the clerk of the BAP. A filing fee of $505 is required and should be made payable to the "Clerk of Court." The BAP is not set up to receive payments. Instead a check should be mailed to the U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939.

Unlike the district court and the BAP, the Court of Appeals does not ordinarily have jurisdiction to hear interlocutory appeals. See 28 U.S.C. § 158(d); Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787-88 (9th Cir. 2003). The order on appeal must be a final order of both the bankruptcy court and the district court or BAP. Alexander v. Compton (In re Bonham), 229 F.3d 750, 761 (9th Cir. 2000). However, if the underlying bankruptcy case was filed on or after October 17, 2005, a party might be able to obviate the need for a final order by petitioning for a direct appeal to the Court of Appeals. See 28 U.S.C.

§ 158(d)(2)(A); FRBP 8006. (For a discussion of direct appeals, see section V.F, above.)

Note: Although remand orders are generally interlocutory, in certain circumstances they may be considered final. See Virtual Vision, Inc. v. Praegitzer Indus., Inc. (In re Virtual Vision, Inc.), 124 F.3d 1140, 1143 (9th Cir. 1997); Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 890 (9th Cir. 1992). See also Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 980 (9th Cir. 2001).

Requests for stay pending appeal to the Court of Appeals are presented first to the BAP, in the same fashion as BAP appeal stay requests are initially made to the bankruptcy court. FRBP 8025; FRAP 8(a)(1)(A), made applicable by FRAP 6(b)(1). (For a discussion of stays pending appeal, see section VII.B, above.)

XII. INFORMATION AND STATISTICS

The BAP historically has handled between 49-60% of Ninth Circuit bankruptcy appeals under 28 U.S.C. § 158(a), with an "opt-out" rate between 40% and 51%.

In recent years approximately one-fourth of all BAP appeals have gone through the entire process of briefing, oral argument (if desired by the parties) and decision on the merits. Of the appeals that completed that process, the median time from commencement of the appeal to final disposition was approximately 10 months. The median time from submission to final disposition was about 30 days. Between 95 and 177 appeals were disposed of on the merits each year. The reversal rate ranged between 5% and 20%.

In recent years an average of 243 bankruptcy appeals were filed at the Court of Appeals for second-level appellate review: an average of 104 from decisions of the BAP and 139 from decisions of the district courts. Of the appeals closed by the BAP, 84% were fully resolved, with only about 16% seeking second-level review. Approximately 32% of district court bankruptcy decisions were appealed to the Court of Appeals.

The BAP's website, http://www.ca9.uscourts.gov/bap/, includes recently-published opinions, unpublished memoranda, the BAP's rules, oral argument calendars and other information for litigants.

XIII. CONCLUSION

This guide is merely an introduction to the sometimes arcane world of bankruptcy appeals. It is a procedural road map that should be of assistance but is no substitute for preparation and familiarity with the FRBP and the BAP Rules.

One of the main advantages of the BAP is that the BAP judges are seasoned bankruptcy judges who are experts in bankruptcy law. Additionally, the BAP is dedicated to producing the predictability that is a by-product of a uniform body of law based on carefully-reasoned decisions, rendered as promptly as possible.

APPENDIX I

Do's and Don'ts for an Effective Appeal

DO:

1. **Know what relief you want** (and why).

2. **Know your audience.** BAP judges generally possess a level of expertise in bankruptcy matters superior to that of most district court judges and their law clerks.

3. **Understand the role of the appellate court.** While its dominant role is to assess whether the trial court reached the correct result, the appellate court is also concerned with the overall impact of its ruling on the general body of bankruptcy law.

4. **Clarify the standard of review** and frame arguments around that standard.

5. **Simplify the story.** Write with punch - short, crisp, essential facts.

6. **Organize your brief with short headings,** rather than long sentence headings.

7. **Paraphrase quotes whenever possible.** Long block quotes are soporific.

8. **Focus your appellant's argument** on areas where the judge's ruling is most susceptible to being reversed.

9. **Provide an adequate record** and know what is in it. Follow the rules with respect to organizing, paginating and tabbing the record (appendix), so that the judges and law clerks can find pertinent excerpts quickly.

10. **Use a conversational tone** rather than a formally structured oral argument. This helps facilitate the transitions that are inevitable when interrupted with questions from the judges. Feel free to take less than your allotted time. Expect the most questions to be asked of the party with the weakest position and expect numerous questions about facts and procedure.

11. **Be honest and direct in answering the judges' questions.** Acknowledge the weaknesses of your case. Use policy arguments sparingly, if at all.

12. **Listen to the questions being asked of your opponent** and be ready to fill in the blanks on matters of concern to the judges.

DON'T:

1. Use many words when a few will do.

2. Make convoluted arguments.

3. Make grammatical or typographical errors.

4. Write in a disorganized and unintelligible manner.

5. Attack the trial judge or opposing counsel.

6. Use block quotes extensively.

7. Plagiarize/fail to attribute quoted sources

8. Overuse policy arguments or § 105.

9. Avoid direct answers to the judges' questions.

10. Deflect the question and distract the judge if it is not the question you wanted to hear.

11. Cut off the judge's question in mid-sentence.

12. Be ignorant of the record or mischaracterize the record.

13. Blame your unfamiliarity with the record on the fact that you did not handle the case at the trial level. (The "SODDI" excuse - "some other dude did it").

APPENDIX II

Potential Traps for the Unwary

1. 14-day appeal period. This refers to calendar days, not court days. FRBP 9006(a). The period begins from entry of the judgment or order to be appealed, not notice. Failure to receive notice or failure of the clerk to serve notice of the entry of the order will not excuse an untimely notice of appeal. It is the appealing party's responsibility to monitor the docket for entry of the order.

2. A motion to dismiss an appeal as untimely that is made before the time to request an extension has expired under FRBP 8002(d) alerts your opponent how to save the appeal.

3. An appeal from an untimely tolling motion under FRBP 8002(b) only raises the issue of the appropriateness of the order resolving the tolling motion, not the underlying order. Obtaining reversal of a denial of reconsideration is usually much harder than reversing the initial decision. File a timely appeal or move to extend the time to appeal if your tolling motion is not timely filed.

4. An appellant must elect to have the appeal heard by the district court at the time of the filing of the notice of appeal.

5. If the order on appeal is not final, appellant must obtain FRCP 54(b) certification from the trial court, made applicable via FRBP 7054, or move the BAP for leave to appeal.

6. Obtain a stay pending appeal, if necessary, to avoid mootness. Motions for stay ordinarily will not be considered unless they are first made to the bankruptcy court or the movant explains why the stay wasn't obtained from the bankruptcy court. FRBP 8007. "I didn't think the bankruptcy judge would grant my stay" is not usually a sufficient explanation. The BAP typically denies without prejudice stay requests where the movant does not bring the motion before the bankruptcy court in the first instance. If time is of the essence, make sure that your stay motion is made before the correct court. At the beginning of your

request for stay directed to the bankruptcy court, you may wish to cite Ho v. Dai Hwa Electronics (In re Ho), 265 B.R. 603, 605 (9th Cir. BAP 2001), to show that the bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal, even after a notice of appeal has been filed.

7. Understand the standard of review and what hurdles need to be overcome to obtain a reversal.

8. Separate judgment rule. Be aware that a separate judgment is usually required in adversary proceedings. Your appeal may be delayed until a separate judgment is entered.

9. Support your brief with your excerpts of the record. Do not expect that the judges will look at any supporting documents filed with intermediate motions. The excerpts of the record need to stand alone as support for your position. The excerpts may only contain items that are part of the record on appeal. FRBP 8009. Make sure that your excerpts include the items listed in FRBP 8018, each item is clearly tabbed or included in a separate .pdf and pages are consecutively numbered.

10. Arguments not made both before the bankruptcy court and in the opening brief may be considered waived. In re Bankr. Petition Preparers Who Are Not Certified Pursuant to Requirements of the Ariz. Supreme Court, 307 B.R. 134, 138 n.5 (9th Cir. BAP 2004).

11. Failing to participate in a BAP appeal may preclude an appeal to the Ninth Circuit Court of Appeals. Inv'rs. Thrift v. Lam (In re Lam), 192 F.3d 1309, 1311 (9th Cir. 1999). Arguments not made to the BAP, absent exceptional circumstances, are waived on appeal to the Court of Appeals. Burnett v. Resurgent Capital Serv. (In re Burnett), 435 F.3d 971, 976 (9th Cir. 2006).

12. Court of Appeals jurisdiction may differ from BAP or district court jurisdiction. The Court of Appeals generally has jurisdiction over final orders only. A district court or BAP decision on an interlocutory appeal is not reviewable by the Court of Appeals until the matter becomes final at the bankruptcy court level, unless the Court of Appeals grants a direct appeal petition.

13. Motions for reconsideration or rehearing must be made within 14 days after the BAP has rendered its decision. FRBP 8022. A timely motion for reconsideration or rehearing tolls the time to appeal to the Circuit. An untimely motion does not. The time to appeal to the Circuit is normally 30 days from the entry of the BAP decision; if the United States is a party, the time is 60 days. FRAP 4 and 6.

14. Requests for stay pending appeal to the Circuit are made to the BAP, the same way BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A), made applicable by FRAP 6(b)(1).

15. Requests for sanctions must be made in a separately-filed motion. FRBP 8020.

16. Appellees: supplement an inadequate record sparingly, as you may be inadvertently helping the appellant. File a motion to dismiss for inadequate record instead. See generally Kyle v. Dye (In re Kyle), 317 B.R. 390, 394 (9th Cir. BAP 2004).

APPENDIX III

NEW BANKRUPTCY APPEAL FILINGS FOR THE TWELVE MONTH PERIOD ENDING DECEMBER 31, 2015

District	BAP	District Ct[1]	Total
Alaska	0	1	1
Arizona	33	28	61
N. Cal.	39	73	112
E. Cal.	40	26	66
C. Cal.	163	184	347
S. Cal.	23	25	48
Hawaii	1	14	15
Idaho	4	6	10
Montana	2	4	6
Nevada	25	29	54
Oregon	7	13	20
E. Wash.	0	2	2
W. Wash.	11	24	35
TOTALS	**348 (45%)**	**429 (55%)**	**777**

[1] The numbers for bankruptcy appeals to the district courts are taken directly from a statistical caseload table prepared by the Administrative Office of the United States Courts. The numbers for bankruptcy appeals to the BAP are calculated based on data from AOUSC Tables and on data from the BAP's CM/ECF docketing system. The district court numbers include all appeals in which a timely election was made to have the appeal heard in the district court (both appellant and appellee elections) as well as other cases transferred in the interest of justice. The BAP numbers exclude all such appeals.

Appendix IV

Rules Governing Post-Trial Motions Determined by Bankruptcy Judge That Affect Appeals Process

Event	Fed. R. Bankr. P.	Time Limit (if any)
Motion to Extend Time to Appeal	8002(d)	Must be filed within 14 days after entry of judgment. Exception for "excusable neglect" – Must be filed not later than 21 days after the expiration of the 14-day period.
Motion to Stay Pending Appeal	8007	
Motion to Voluntarily Dismiss Appeal	8023	
Motion to Extend Time in which to File Objections to Proposed Findings of Fact/Conclusions of Law in Non-Core Proceeding	9033 (b)&(c)	Must be served and filed within 14 days after being served with a copy of the proposed Findings of Fact/Conclusions of Law. Exception for "excusable neglect" - Must be made no more than 21 days after expiration of the 14-day period.
Motion for Amended Findings	7052	To be a tolling motion under FRBP 8002(b), must be filed no later than 14 days after entry of judgment. See Federal Rule of Civil Procedure 52.
Motion for New Trial or Amendment of Judgement	9023	To be a tolling motion under FRBP 8002(b), must be filed no later than 14 days after entry of judgment. See Federal Rule of Civil Procedure 59.
Motion for Relief from Judgement or Order	9024	To be a tolling motion under FRBP 8002(b), must be filed no later than 14 days after entry of judgment. See Federal Rule of Civil Procedure 60.

United States Bankruptcy Appellate Panel
for the Ninth Circuit

Administrative Order Regarding Electronic Filing in
BAP Cases
[February 2, 2015]

The United States Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") adopts the following provisions to govern the electronic filing of documents in cases before the BAP. These provisions may be amended from time to time, with or without prior notice, by further order of the BAP. The BAP may deviate from these procedures in specific cases if deemed appropriate in the exercise of its discretion.

Questions concerning electronic filing should be directed to the Clerk's office at 626-229-7220 or 626-229-7225, or can be emailed to:

cmecf_bapca9@ca9.uscourts.gov

Rule 1 - Electronic Registration and Filing Mandatory for Attorneys

(a) Unless the BAP grants a request to be exempted from these requirements,

(1) all attorneys appearing, participating, or wanting to receive notices in appeals before the BAP must register with the BAP's Case Management/Electronic Case Filing (CM/ECF) docketing system; and

(2) electronic filing using the BAP's CM/ECF docketing system is mandatory for all attorneys.

(b) An attorney who seeks exemption from the requirement of mandatory electronic filing may file a motion which states the reasons why the attorney should be exempted from electronic filing. The BAP Clerk shall have the authority to grant or deny such motions.

Rule 2 - Registration and Training

(a) Registration is required to obtain a login and password for use of CM/ECF.

(b) Registration is required specifically for the BAP, and this registration is separate from registration for PACER or ECF in other courts.

(c) Licensed attorneys authorized to practice before the BAP may register without leave of court at:

www.pacer.gov

(d) Any litigant who is not a licensed attorney authorized to practice before the BAP may file a motion requesting leave to register for CM/ECF.

(e) The Ninth Circuit Court of Appeals has computer-based training modules explaining CM/ECF, PACER reports, and electronic filing. These training modules can be accessed by logging into the court of appeals website (www.ca9.uscourts.gov) and selecting "Electronic Filing - CM/ECF". The BAP strongly encourages all filers to review these training materials, as the BAP's electronic filing system is very similar to that of the court of appeals.

Rule 3 - Excerpts of Record

(a) Excerpts of Record. For all cases opened at the BAP beginning February 1, 2015, all excerpts of record must be filed electronically.

(1) A table of contents must be included in a separate .pdf which is the first attachment to the excerpts of record docket event. Each subsequent item in the excerpts of record must be contained in a separate .pdf and labeled so that it is identifiable from the table of contents. Every effort should be made to attach all .pdf's to the same docket event.

(b) Excerpts of Record. For cases opened before February 1, 2015, electronic filing of the excerpts of record is optional. If excerpts are filed electronically, no paper copies are required. If excerpts are not filed electronically, the form, content and number of paper copies of a party's excerpts of record must continue to comply with the requirements of Federal Rule of Bankruptcy Procedure 8018 and Ninth Circuit BAP Rule 8018(b)-1.

(c) Service. All parties must serve a paper copy of the excerpts of record on any party not registered for BAP cm/ecf on the same day the excerpts of record are electronically filed.

Rule 4 - Documents Which Can Not Be Filed Electronically

(a) Sealed Documents & Motions to File Documents Under Seal. Sealed documents must be filed in paper format and must be accompanied by an electronic version of the document on either CD or DVD. This includes motions for permission to file a document under seal. The motion should state whether the filing party believes the motion to seal itself may be made available to the public or should remain sealed.

Rule 5 - Signature

(a) All electronic filings must be signed.

(b) A signature consists of an "/s/" immediately followed by the typed name of each signatory, or by some substantially similar method effectively demonstrating the signatory's intent to sign the filing.

Rule 6 - Service

(a) A Certificate of Service is required for all electronic filings, and filers must comply with the provisions of Federal Rule of Bankruptcy Procedure 8011(b), (c) and (d) when filing electronically.

(b) Sample Certificates of Service for documents electronically filed are attached to this Order.

(c) The CM/ECF system will generate a Notice of Docket Activity when any document is electronically filed. This notice constitutes service of the document on all parties who have registered as BAP electronic filers pursuant to Rule 2, above. Such registration constitutes consent to service via the Notice of Docket Activity.

(I) A filing party may obtain the names and addresses of parties who have not registered for BAP electronic filing by logging into

CM/ECF, then selecting "Reports", then selecting "Service List", and then typing in the case number.

(ii) A filing party is not required to serve a paper copy of any electronically-filed document on any party who has registered as a BAP electronic filer.

(iii) Except as provided in the BAP's fax filing rule (9th Cir. BAP Rule 8011(a)-2), or unless otherwise agreed in writing between the parties, a filing party must serve a paper copy of any electronically-filed document on any party who has not registered as a BAP electronic filer, and must comply with Federal Rule of Bankruptcy Procedure 8011 (b), (c) and (d).

(iv) Unless otherwise ordered, a Notice of Docket Activity generated after close of business (5:00 p.m. Pacific Time), or on a weekend or holiday will be deemed served on all registered BAP electronic filers at the start of the next business day.

(d) For any document filed in paper format, the filer must comply with Federal Rule of Bankruptcy Procedure 8011 (b), (c) and (d).

Rule 7 - Filing Deadlines

(a) Electronic filing is permitted at all times, except when the system is temporarily unavailable due to routine or emergency maintenance.

(b) Unless otherwise ordered, an electronic filing will be considered filed as of the date and time the filing is successfully completed. The BAP's CM/ECF system determines the date and time a filing is completed. A filing is timely only if it is accomplished in accordance with the deadlines set by all applicable court notices, orders, rules and statutes.

(c) If a technical failure prevents timely electronic filing of any document, the filing party should promptly seek relief from the BAP.

Rule 8 - Technical Requirements

(a) All electronic filings must be in Portable Document Format (also known as .pdf or Adobe Acrobat Format).

(b) Except as otherwise specified in this Rule, or as otherwise ordered, the text of all electronic filings must be searchable using Adobe Acrobat's text search function.

(c) For some documents, primarily exhibits, a text-searchable version might not be available. If so, the electronic filer may upload a version that is not text searchable.

(d) Until further notice, the maximum size for a single attachment is 50 megabytes. Attachments exceeding 50 megabytes must be divided into multiple attachments.

Rule 9 - Hyperlinks

(a) Electronic filings may contain hyperlinks to statutes, rules, regulations, and opinions.

(b) Hyperlinks do not replace citations to the appendix, record, or legal authority. Documents must contain standard citations in support of statements of fact or points of law, in addition to any hyperlink. Hyperlinks are simply mechanisms for accessing material cited in a filed document and are not considered part of the appellate record. The BAP accepts no responsibility for the availability or functionality of any hyperlink and does not endorse any organization, product, or content at any hyperlinked site.

Rule 10 - Privacy

(a) In compliance with Fed. R. App. P. 25(a)(5) and Fed. R. Bankr. P. 9037, parties must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the BAP:

- Minors' names (use initials only);
- Social Security numbers (use last four digits only);
- Dates of birth (use year of birth only);
- Financial account numbers (identify the type of account and institution and provide the last four digits of the account number).

(b) The filer bears sole responsibility for redacting documents.

Rule 11 - Other limitations and restrictions concerning Electronic Filing

(a) Except as otherwise specified in this Rule, or as otherwise ordered, an electronic filer duly registered pursuant to Rule 2, above, may only file documents in BAP appeals where he or she is counsel of record, or where he or she is a party of record appearing pro se.

(b) Except as otherwise specified in these Rules, or as otherwise ordered, an electronic filer may not submit (by US Mail or by fax or by email) additional copies of any documents filed electronically through CM/ECF.

(c) A party seeking to appear as an Amicus Curiae in a BAP appeal should contact the BAP Clerk's Office for guidance if they desire to file electronically.

Rule 12- What is Attached to the Docket available on PACER

(a) Unless otherwise ordered, all documents that are filed electronically will be attached to the PACER docket.

(b) Unless otherwise ordered, when the BAP receives a document only in paper format, the BAP will scan the document and attach it to the PACER docket.

SAMPLE CERTIFICATES OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on _____*[date]*_____, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

_____/s/_____

****

Certificate of Service When <u>Not</u> All Case Participants Are CM/ECF Participants

I hereby certify that on _____*[date]*_____, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following parties:

_____

_____

_____

_____/s/_____

AMENDED ORDER CONTINUING THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

JUDICIAL COUNCIL OF THE NINTH CIRCUIT AMENDED ORDER CONTINUING THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

1. Continuing the Bankruptcy Appellate Panel Service.

(a) Pursuant to 28 U.S.C. § 158(b)(1) as amended by the Bankruptcy Reform Act of 1994, the judicial council hereby reaffirms and continues a bankruptcy appellate panel service which shall provide panels to hear and determine appeals from judgments, orders and decrees entered by bankruptcy judges from districts within the Ninth Circuit.

(b) Panels of the bankruptcy appellate panel service may hear and determine appeals originating from districts that have authorized such appeals to be decided by the bankruptcy appellate panel service pursuant to 28 U.S.C. § 158(b)(6).

(c) All appeals originating from those districts shall be referred to bankruptcy appellate panels unless a party elects to have the appeal heard by the district court in the time and manner and form set forth in 28 U.S.C. § 158(c)(1) and in paragraph 3 below.

(d) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders and decrees entered by bankruptcy judges and, with leave of bankruptcy appellate panels, appeals from interlocutory orders and decrees entered by bankruptcy judges.

(e) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders, and decrees entered after the district court from which the appeal originates has issued an order referring bankruptcy cases and proceedings to bankruptcy judges pursuant to 28 U.S.C. § 157(a).

2. Immediate Reference to Bankruptcy Appellate Panels.

Upon filing of the notice of appeal, all appeals are immediately referred to the bankruptcy appellate panel service.

3. Election to District Court.

A party desiring to transfer the hearing of an appeal from the bankruptcy appellate panel

service to the district court pursuant to 28 U.S.C. § 158(c)(1) shall timely file a written statement of election expressly stating that the party elects to have the appeal transferred from the bankruptcy appellate panel service to the district court.

(a) Appellant: If the appellant wishes to make such an election, appellant must file a written statement of election with the clerk of the bankruptcy court at the time of filing the notice of appeal. See Bankruptcy Rule 8005(a). When such an election is made, the clerk of the bankruptcy court shall forthwith transfer the case to the district court. The clerk of the bankruptcy court shall give notice to all parties and the clerk of the bankruptcy appellate panel of the transfer at the same time and in the same manner as set forth for serving notice of the appeal in Bankruptcy Rule 8003(c).

(b) All Other Parties: In all appeals where appellant does not file an election, the clerk of the bankruptcy court shall forthwith transmit a copy of the notice of appeal to the clerk of the bankruptcy appellate panel. If any other party wishes to have the appeal heard by the district court, that party must, within thirty (30) days after service of the notice of appeal, file with the clerk of the bankruptcy appellate panel a written statement of election to transfer the appeal to the district court. Upon receipt of a timely statement of election filed under this section, the clerk of the bankruptcy appellate panel shall forthwith transfer the appeal to the appropriate district court and shall give notice of the transfer to the parties and the clerk of the bankruptcy court. Any question as to the timeliness of an election shall be referred by the clerk of the bankruptcy appellate panel to a bankruptcy appellate panel motions panel for determination.

4. MOTIONS DURING ELECTION PERIOD

All motions relating to an appeal shall be filed with the bankruptcy appellate panel service unless the case has been transferred to a district court. The bankruptcy appellate panels may not dismiss or render a final disposition of an appeal within thirty (30) days from the date of service of the notice of appeal, but may otherwise fully consider and dispose of all motions.

5. PANELS

Each appeal shall be heard and determined by a panel of three judges from among those appointed pursuant to paragraph 6, provided however that a bankruptcy judge shall not participate in an appeal originating in a district for which the judge is appointed or designated under 28 U.S.C. § 152. In addition, the panel may hear and determine appeals en banc under rules promulgated by and approved as provided in section 8 of this order.

6. MEMBERSHIP OF BANKRUPTCY APPELLATE PANELS

The bankruptcy appellate panel shall consist of seven members serving seven-year terms (subject to reappointment to one additional three-year term). The judicial council shall periodically examine the caseload of the bankruptcy appellate panel service to assess whether the number of bankruptcy judges serving should change. Appointment of regular and pro tem bankruptcy judges to service on the bankruptcy appellate panel shall be governed by regulations promulgated by the Judicial Council.

(a) When a three-judge panel cannot be formed from the judges designated under subparagraph (a) to hear a case because judges have recused themselves, are disqualified from hearing the case because it arises from their district, or are otherwise unable to participate, the Chief Judge of the Ninth Circuit may designate one or more other bankruptcy judge(s) from the circuit to hear the case.

(b) In order to provide assistance with the caseload or calendar relief, to constitute an en banc panel, or otherwise to assist the judges serving, or to afford other bankruptcy judges with the opportunity to serve on the bankruptcy appellate panels, the Chief Judge of the Ninth Circuit may designate from time to time one or more other bankruptcy judge(s) from the circuit to participate in one or more panel sittings.

7. CHIEF JUDGE

The members of the bankruptcy appellate panel service by majority vote shall select one of their number to serve as chief judge.

8. RULES OF PROCEDURE

(a) Practice before the bankruptcy appellate panels shall be governed by Part VIII of the Federal Rules of Bankruptcy Procedure, except as provided in this order or by rule of the bankruptcy appellate panel service adopted under subparagraph (b).

(b) The bankruptcy appellate panel service may establish rules governing practice and procedure before bankruptcy appellate panels not inconsistent with the Federal Rules of Bankruptcy Procedure. Such rules shall be submitted to, and approved by, the Judicial Council of the Ninth Circuit.

9. PLACES OF HOLDING COURT.

Bankruptcy appellate panels may conduct hearings at such times and places within the Ninth Circuit as it determines to be appropriate.

10. CLERK AND OTHER EMPLOYEES.

(a) Clerk's Office. The members of the bankruptcy appellate panel service shall select and hire the clerk of the bankruptcy appellate panel. The clerk of the bankruptcy appellate panel may select and hire staff attorneys and other necessary staff. The chief judge shall have appointment authority for the clerk, staff attorneys and other necessary staff. The members of the bankruptcy appellate panel shall determine the location of the principal office of the clerk.

(b) Law Clerks. Each judge on the bankruptcy appellate panel service shall have appointment authority to hire an additional law clerk.

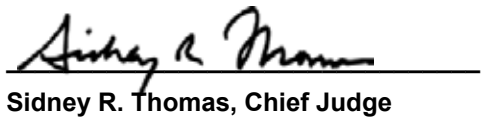
11. EFFECTIVE DATE

This Order shall be effective as to all appeals originating in those bankruptcy cases that are filed after the effective date of this Order. For all appeals originating in those bankruptcy cases that were filed before October 22, 1994, the Judicial Council's prior Amended Order, as revised October 15, 1992, shall apply. This Order, insofar as just and practicable, shall apply to all appeals originating in those bankruptcy cases that were filed after the effective date of the Bankruptcy Reform Act of 1994, October 22, 1994, but before the date of this Order.

IT IS SO ORDERED.

DATE: April 28, 1995; amended May 9, 2002, amended May 4, 2010, amended February 18, 2015.

For the Judicial Council:



Sidney R. Thomas, Chief Judge
U.S. Court of Appeals

APPELLATE JURISDICTION: A COMPARISON OF APPEALS TO THE BAP AND THE DISTRICT COURT

ABI Bankruptcy Battleground West
March 21, 2017

Materials Prepared By
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The determination of whether to appeal to the BAP or the District Court usually focuses on the attorney's analysis of which venue provides the greater chance of success with respect to the substantive dispute. However, with respect to appeals of interlocutory orders, the venue decision may be determined by an overriding issue, which is appellate jurisdiction. Unbeknownst to many practitioners, the jurisdiction of the Courts of Appeals differs depending on whether the appeal is from the BAP or the District Court.

1. Jurisdiction Of District Courts And BAPs With Respect To Bankruptcy Appeals.

The jurisdiction of the District Courts over bankruptcy appeals is governed by 28 U.S.C. § 158(a), which provides that the District Courts have jurisdiction to hear appeals (1) from final judgments and orders, (2) from interlocutory order decrees increasing or reducing the exclusivity period set forth in section 1121 of the Bankruptcy Code, and (3) with leave of the court, from other interlocutory orders and decrees.

The jurisdiction of the BAPs over bankruptcy appeals is governed by 28 U.S.C. § 158(b), which provides that a BAP, if established by the judicial council of the circuit, may hear and determine, with the consent of the parties, appeals under 28 U.S.C. § 158(a).

Read together, the appellate jurisdiction of the District Courts and the BAPs is identical and all-encompassing. Each has the jurisdiction to hear and determine appeals of both final orders and, at its discretion, interlocutory orders. Accordingly, when choosing a venue for a bankruptcy appeal, there is no jurisdictional difference between the District Court and the BAP.

2. Jurisdiction Of The Circuit Courts Of Appeals

For many bankruptcy appeals, the process is two-step. First to the District Court or the BAP, and then on to the Circuit Court of Appeals. Pertinently, the bankruptcy appellate jurisdiction of the Circuit Courts of Appeals is conferred by two independent statutes.

a. 28 U.S.C. § 158(d)(1)

The jurisdiction of the Circuit Courts of Appeals over bankruptcy appeals is generally governed by 28 U.S.C. § 158(d)(1), which provides that the Courts of Appeals "shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsection (a) and (b) of this section." This means that while the District Courts and BAPs have the jurisdiction to hear the appeal of an interlocutory order under 28 U.S.C. § 158(a) and (b), the Courts of Appeals do not have jurisdiction under section 158(d)(1) to hear a further appeal of the interlocutory order.[1]

For the BAP or District Court decision to be final for purposes of section 158(d)(1), both the appellate decision and the underlying bankruptcy court decision must be final. "If the underlying bankruptcy court decision is interlocutory, the BAP order affirming or reversing it is also interlocutory." *Lievsay v. W. Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 662 (9th Cir. 1997).

Determining whether the BAP or District Court decision is final is somewhat complicated if the BAP or District Court reverses and remands. In that scenario, the Ninth Circuit Court of Appeals engages in a balancing test that considers "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm." *Latman v. Burdette*, 366 F.3d 774, 780 n.5 (9th Cir. 2004). Generally, if the remand is based on a need for a factual finding, the decision is not final, but if the remand is rooted in a legal issue, the decision may be deemed final. *In re Bonner Mall Partnership*, 2 F.3d 899, 904 (9th Cir. 1993).

b. 28 U.S.C. §§ 1291 and 1292

Does this mean that the Courts of Appeals can never hear a bankruptcy appeal of an interlocutory order? Notwithstanding 28 U.S.C. § 158(d), the answer is that the Courts of Appeals can hear certain interlocutory appeals, because section 158(d) is not the only source of appellate jurisdiction. While section 158(d) provides that the jurisdiction of the Courts of Appeals is limited to appeals from final bankruptcy orders, the statutes governing the general jurisdiction of the Courts of Appeals are 28 U.S.C. §§ 1291 and 1292, which provide for jurisdiction over certain interlocutory orders.

Section 1291 provides that the Courts of Appeals "have jurisdiction of appeals from all final decisions of the district courts." Section 1292(a)(1) provides that the Courts of Appeals shall have jurisdiction of appeals from "[i]nterlocutory orders of the district courts . . . granting,

[1] Pursuant to 28 U.S.C. § 158(d)(2), the Courts of Appeals may hear an interlocutory appeal in the rare situation justifying a direct appeal from the bankruptcy court to the Court of Appeals. The rules governing direct appeals are beyond the scope of these materials.

continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ." Section 1292(b) provides that the Courts of Appeals have jurisdiction over interlocutory orders if the District Court determines that the order involves a controlling question of law, there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the litigation.

Section 158(d) was added as part of the 1984 amendments to the Bankruptcy Code, so there was a question whether section 158(d), which specifically addresses bankruptcy appellate jurisdiction, entirely displaced sections 1291 and 1292 with respect to bankruptcy appeals. Several courts, trying to reconcile the competing statutes, held that section 158(d) governed bankruptcy appeals from the District Court sitting as an appellate court, while sections 1291 and 1292 were limited to bankruptcy appeals from the District Court sitting as the bankruptcy court. This meant for example, that some courts treated an appeal from an order entered by a bankruptcy court in a core proceeding as governed by section 158(d), while an appeal from an order in a non-core proceeding as governed by sections 1291 and 1292.

In *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992), the Supreme Court addressed the issue head on and held that section 158(d) did not displace sections 1291 and 1292 at all. While section 158(d) grants jurisdiction over bankruptcy appeals from a final order, it does not include any language specifically limiting the jurisdiction that might otherwise exist under sections 1291 and 1292. Therefore, the Courts of Appeals have jurisdiction over bankruptcy interlocutory appeals under section 1292 to the same extent they have jurisdiction over any other interlocutory appeal.

3. The Courts Of Appeals Do Not Have Jurisdiction Under Section 1292 Over Appeals From A BAP

Here is the twist. Section 158(d) governs appeals from orders entered under sections 158(a) or (b), which means orders entered by either the District Court or the BAP. However, section 1292 only references appeals from the District Court and makes no reference to the BAP. Therefore, do the Courts of Appeals have jurisdiction under section 1292 over an interlocutory appeal from a BAP?

The answer, according to the Ninth Circuit Court of Appeals, is no. In *In re Vylene Enterprises, Inc.*, 968 F.2d 887 (9th Cir. 1992), the Court of Appeals stated the following in a footnote:

> Section 1292(b), by its plain language, affords us jurisdiction only over orders made by a district judge. Our decision today recognizes that a party to a bankruptcy court proceeding who foresees the need for an interlocutory appeal must forgo the speedier appellate process afforded by the bankruptcy appellate panel.

Id. at 890 n.4. As the case dealt with an appeal from the District Court, the statement was *dicta*. However, several years later, in *Lievsay v. Western Fin. Sav. Bank (In re Lievsay),* 118 F.3d 661 (9th Cir. 1997), the Court of Appeals *sua sponte* dismissed an interlocutory appeal from the BAP for lack of jurisdiction. After concluding that the underlying bankruptcy court order was

interlocutory, and for that reason appellate jurisdiction did not exist under section 158(d), the Court of Appeals held that section 1292 had no applicability because the appeal was from the BAP and not the District Court:

> Jurisdiction is also not conferred on this court by either 28 U.S.C. §§ 1291 or 1292. Neither section 1291 nor 1292 applies to appeals from the BAP.

Id. at 663.

4. The Difference In Finality For Purposes Of Sections 158(d) And 1291

Both sections 158(d) and 1291 provide appellate jurisdiction from final orders. Are there some orders that are final for one statute but not another?

The Ninth Circuit Court of Appeals has held on multiple occasions that the finality standard for section 158(d) is different than the finality standard for section 1291. Section 158(d) incorporates a "flexible standard of finality" that takes into consideration the unique nature of bankruptcy cases, while section 1291, the general statute, does not. *See, e.g., In re Vylene Enterprises, Inc.*, 968 F.2d 887 (9th Cir. 1992). This means that even if an appeal would be considered interlocutory for purposes of sections 1291 and 1292, the appellant is not necessarily required to appeal to the District Court instead of the BAP to preserve the right to further appeal to the Court of Appeals. If the otherwise interlocutory order is deemed final as a result of the "flexible standard of finality," the Court of Appeals will have jurisdiction over an appeal from the BAP.

Note that the unique "flexible standard of finality" with respect to bankruptcy appeals is ordinarily limited to appeals arising from orders issued in the main bankruptcy case that concern uniquely bankruptcy issues. The flexible standard does not ordinarily apply to appeals from orders entered in adversary proceedings, in which the finality standard does not differ from finality in ordinary federal civil actions. *Belli v. Temkin (In re Belli)*, 268 B.R. 851, 854-55 (BAP 9th Cir. 2001).

5. The Scope Of Appellate Jurisdiction Over Interlocutory Appeals From Injunction Orders Pursuant To Section 1292(a)(1)

Section 1292(a)(1) provides that the Courts of Appeals have jurisdiction over appeals from interlocutory appeals "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Section 158(d) has nothing comparable, so an appellant appealing an interlocutory injunction order may be compelled to appeal to the District Court in order to preserve the right to further appeal to the Court of Appeals.

a. Is The Injunction Order Final Or Interlocutory?

Before committing to the District Court, the appellant should analyze whether the injunction order is interlocutory or final for appellate purposes. As stated above, section 158(d) incorporates a "flexible standard of finality" based upon the unique nature of bankruptcy cases, and that flexible standard impacts injunction orders. For example, the Ninth Circuit Court of

Appeals has held that orders granting or denying relief from the stay are final for purposes of appellate jurisdiction. *In re American Mariner Indus.*, 734 F.2d 426, 429 (9th Cir. 1984), *overruled in part on other grounds by United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).

Assume a debtor filed a motion for a preliminary injunction enjoining prosecution of claims against the debtor's principals pending confirmation of a plan, and the motion is granted. Is the order final or interlocutory for purposes of appellate jurisdiction?

In *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1092-1093 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that such an order was final, even though characterized by the bankruptcy court as a preliminary injunction. The Court analogized the injunction order to an order granting or denying relief from the stay, and emphasized that "nothing in the record indicates that the bankruptcy court contemplated further proceedings on the injunction." *Id*. at 1092.

Assume the motion is denied. Same result? Analogizing to the relief from stay cases, in which the Ninth Circuit Court of Appeals has held that an order granting or denying relief is a final order, the result should be the same and the order deemed final. However, a different result may be compelled by the Supreme Court decision in *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015), which addressed whether an order denying confirmation of a plan is final. Acknowledging an asymmetry, the Supreme Court held that an order confirming a reorganization plan is final, but an order denying confirmation is not final. The asymmetric analysis would appear to have applicability to the determination of whether an order denying relief from the stay, or denying a third-party injunction, is final, as opposed to orders granting such relief.

b. Is The District Court Decision Within The Scope Of Section 1292(a)(1)?

While the language of section 1292(a)(1) is very broad, not all District Court orders relating to injunctions are within its scope. Assume the bankruptcy court enters a preliminary injunction and the order is appealed to the District Court. The order will be interlocutory, so the appellant will have to file a motion for leave to appeal. The District Court denies the motion for leave to appeal. Does the Court of Appeals have appellate jurisdiction under section 1292(a)(1)? The answer is no, because the District Court's decision is not an order "granting, continuing, modifying, refusing or dissolving" an injunction. *Gibson v. Kassover (In re Kassover)*, 343 F.3d 91 (2d Cir. 2003). Similarly, if the District Court remands to the bankruptcy court for further findings or explanation concerning an injunction, there is no appellate jurisdiction under section 1292(a)(1). *Conroe Office Bldg. v. Nichols (In re Nichols)*, 21 F.3d 690 (5th Cir. 1994).

Practitioners should be aware that Rule 3-3 of the Federal Rules of Appellate Procedure for the Ninth Circuit provides for expedited briefing of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving" preliminary injunctions. If the appellant captions the notice of appeal with the words "PRELIMINARY INJUNCTION APPEAL," the clerk will treat the appeal as subject to Rule 3-3 regardless of whether the appeal is actually within the scope of Rule 3-3 (and section 1292(a)(1)), and the burden will shift to the appellee to file a motion disputing the applicability of the Rule.

6. Difference Between Finality For Appellate Jurisdiction And Finality For Purposes Of Preclusion

While an order may be interlocutory for purposes of appellate jurisdiction, the order may be final for purposes of preclusion. In *Luben Industries, Inc. v. U.S.*, 707 F.2d 1037 (9th Cir. 1983), a party argued that an interlocutory decision issued in another case should be given preclusive effect in its case. The Ninth Circuit held that it was no bar to preclusion that the decision was interlocutory and not final for purposes of appellate jurisdiction:

> To be "final" for collateral estoppel purposes, a decision need not possess "finality" in the sense of 28 U.S.C. § 1291. A "final judgment" for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be 'sufficiently firm' to be accorded conclusive effect.

Id. at 1040.

NOTICES OF APPEAL AND THE AUTOMATIC STAY

ABI Bankruptcy Battleground West
March 21, 2017

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The intersection between appeals and the automatic stay is counter-intuitive and, if the practitioner is not familiar with the intricacies, can lead to real problems.

Assume the following hypothetical. A creditor sues a debtor, and the debtor counter-claims against the creditor. Judgment is entered by the trial court on both the claims and counter-claims, and neither party likes the judgment and both intend to appeal. Before notices of appeal are filed, the debtor files for bankruptcy. How are the notices of appeal impacted by the automatic stay?

Section 362(a)(1) of the Bankruptcy Code stays the commencement or continuation of actions against a debtor, but does not stay the commencement or continuation of actions by a debtor. Whether an action is against or by a debtor is determined by who is asserting the underlying claim and not by which party intends to take action at any point in the litigation. For example, if a creditor sues a debtor, and then the debtor files for bankruptcy, the litigation is a stayed action against the debtor and the debtor is stayed from filing a motion to dismiss the complaint. *Dean v. Trans World Airlines, Inc.*, 72 F.3d 754 (9th Cir. 1995). Comparatively, if a debtor sues a creditor, and then the debtor files for bankruptcy, the litigation is not a stayed action against the debtor and the creditor is not stayed from filing a motion to dismiss. *In re White*, 186 B.R. 700, 705 (BAP 9th Cir. 1995).

If claims and counter-claims are asserted in the same action, they must be "disaggregated" for purposes of the automatic stay, which means that the claims asserted by the non-debtor will be stayed but the claims asserted by the debtor will not be stayed. *In re Miller*, 397 F.3d 726, 732 (9th Cir. 2005); *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995).

This concept is applicable to appeals. If a creditor sues a debtor, judgment is entered in favor of the debtor, and then the debtor files for bankruptcy, the creditor is stayed from filing a notice of appeal. *Ellison v. Northwest Engineering Co.*, 707 F.2d 1310 (11th Cir. 1983). Does

this mean that the creditor should be concerned about the jurisdictional time limit to file a notice of appeal? As a practical matter, no. If the creditor is stayed from filing the notice of appeal, the creditor's time to file the notice of appeal is extended by section 108(c) of the Bankruptcy Code, which effectively extends the time for the creditor to file the notice of appeal to 30 days after termination of the stay.

What if a creditor sues a debtor, judgment is entered in favor of the creditor, and then the debtor files for bankruptcy. Is the debtor stayed from filing a notice of appeal? The answer is yes, the debtor is stayed. *Parker v. Bain*, 68 F.3d 1131,1135-36 (9th Cir. 1995). A somewhat counter-intuitive result, but consistent with the doctrine.

Here is where it gets interesting. Should the debtor be concerned about the jurisdictional time limit to file the notice of appeal? If section 108(c) applies, then no need for concern, but does section 108(c) apply to a notice of appeal filed by a debtor?

Section 108(c) governs the time for taking action "on a claim against the debtor," which most courts and practitioners assume means action taken by a creditor against a debtor and not actions taken by a debtor. *See generally*, S. Rep. No. 95-989, at 30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5816 (section 108(c) has the effect of "extending the statute of limitations for creditors"); *Shamus Holdings, LLC v. LBM Fin., LLC (In re Shamus Holdings, LLC)*, 642 F.3d 263, 266 (1st Cir. 2011) (section 108(c) "extends state statutes of limitations for creditors who are barred by the automatic stay from taking timely action against the debtor").

The time for a debtor to take action is normally assumed to be governed by section 108(b), which provides that the time for the debtor to file any pleading or perform any act is the later of (a) the end of such period, and (b) 60 days after the order for relief.

Imagine a worst case scenario if section 108(b), and not 108(c), applies. A creditor sues a debtor, judgment is entered in favor of the creditor, the debtor files for bankruptcy, and then, without obtaining relief from the stay, files a notice of appeal. After 60 days go by, the creditor argues that the debtor's filing of the notice was a violation of the stay, was void, and the appeal must be dismissed for lack of appellate jurisdiction.

Faced with this quandary, the Eighth Circuit Court of Appeals held that section 108(c), and not section 108(b), applies if the debtor is stayed from filing a notice of appeal because the appeal is rooted in "a claim against the debtor." *In re Hoffinger Industries, Inc.*, 329 F.3d 948 (8th Cir. 2003). The *Hoffinger* decision has been followed by several lower federal courts and state courts, including *In re Ingeniero*, 2007 Bankr. LEXIS 1836 (Bankr. N.D. Cal. May 17, 2007). No other Courts of Appeals have addressed the issue.