



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Delaware Views from the Bench

Preparing for an Appeal: How to Prepare at the Trial Level to Ensure a Successful Bankruptcy Appeal

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Appeal Granted; Decision Reversed

This panel will offer practical advice and best practices and strategies related to preserving, presenting and winning bankruptcy appeals. The panelists will also discuss some of the most demanding legal and subject matter challenges confronting appellants as they seek to reverse unfavorable bankruptcy court rulings.

MODERATOR:

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PANELISTS:

JUDGE RICHARD ANDREWS, U.S. DISTRICT COURT FOR THE
DISTRICT OF DELAWARE

JUDGE MARJORIE RENDELL, U.S. COURT OF APPEALS FOR THE
THIRD CIRCUIT

JUSTICE COLLINS SEITZ, DELAWARE SUPREME COURT

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- Special thanks to Sarah Primrose, King & Spalding LLP, for her assistance in preparation of the panel materials.

SELECTED RELEVANT RULES

Federal Rule of Bankruptcy Procedure 8002. Time for Filing Notice of Appeal

(a) In General.

(1) *Fourteen-Day Period.* Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) *Filing Before the Entry of Judgment.* A notice of appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.

(4) *Mistaken Filing in Another Court.* If a notice of appeal is mistakenly filed in a district court, BAP, or court of appeals, the clerk of that court must state on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so stated.

(5) Entry Defined.

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) Fed. R. Civ. P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

- the judgment, order or decree is set out in a separate document; or
- 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) Fed. R. Civ. P. does not affect the validity of an appeal from that judgment, order, or decree.

(b) Effect of a Motion on the Time to Appeal.

(1) *In General.* If a party timely files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

(2) *Filing an Appeal Before the Motion is Decided.* If a party files a notice of appeal after the court announces or enters a judgment, order, or decree—but before it disposes of any motion listed in subdivision (b)(1)—the notice becomes effective when the order disposing of the last such remaining motion is entered.

(3) *Appealing the Ruling on the Motion.* If a party intends to challenge an order disposing of any motion listed in subdivision (b)(1)—or the alteration or amendment of a judgment, order, or decree upon the motion—the party must file a notice of appeal or an amended notice of appeal. The notice or amended notice must comply with Rule 8003 or 8004 and be filed within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

(4) *No Additional Fee.* No additional fee is required to file an amended notice of appeal.

(c) Appeal by an Inmate Confined in an Institution.

(1) *In General.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

(2) *Multiple Appeals.* If an inmate files under this subdivision the first notice of appeal, the 14-day period provided in subdivision (a)(3) for another party to file a notice of appeal runs from the date when the bankruptcy clerk docket the first notice.

(d) Extending the Time to Appeal.

(1) *When the Time May be Extended.* Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion that is filed:

(A) within the time prescribed by this rule; or

(B) within 21 days after that time, if the party shows excusable neglect.

(2) *When the Time May Not be Extended.* The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

(3) *Time Limits on an Extension.* No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later.

Federal Rule of Bankruptcy Procedure 8006. Certifying a Direct Appeal to the Court of Appeals

(a) *Effective Date of a Certification.* A certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when:

(1) the certification has been filed;

(2) a timely appeal has been taken under Rule 8003 or 8004; and

(3) the notice of appeal has become effective under Rule 8002.

(b) *Filing the Certification.* The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought. A matter is pending in the district court or BAP thereafter.

(c) *Joint Certification by all Appellants and Appellees.*

(1) *How Accomplished.* A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(2) *Supplemental Statement by the Court.* Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

(d) *The Court That May Make the Certification.* Only the court where the matter is pending, as provided in subdivision (b), may certify a direct review on request of parties or on its own motion.

(e) *Certification on the Court's own Motion.*

(1) *How Accomplished.* A certification on the court's own motion must be set forth in a separate document. The clerk of the certifying court must serve it on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(2)(A)–(D).

(2) *Supplemental Statement by a Party.* Within 14 days after the court's certification, a party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(f) Certification by the Court on Request.

(1) *How Requested.* A request by a party for certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) applies—or a request by a majority of the appellants and a majority of the appellees—must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order or decree.

(2) *Service and Contents.* The request must be served on all parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1), and it must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) applies; and

(E) a copy of the judgment, order, or decree and any related opinion or memorandum.

(3) *Time to File a Response or a Cross-Request.* A party may file a response to the request within 14 days after the request is served, or such other time as the court where the matter is pending allows. A party may file a cross-request for certification within 14 days after the request is served, or within 60 days after the entry of the judgment, order or decree, whichever occurs first.

(4) *Oral Argument Not Required.* The request, cross-request, and any response are submitted without oral argument unless the court where the matter is pending orders otherwise.

(5) *Form and Service of the Certification.* If the court certifies a direct appeal in response to the request, it must do so in a separate document. The certification must be served on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(g) *Proceeding in the Court of Appeals Following a Certification.* Within 30 days after the date the certification becomes effective under subdivision (a), a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with Fed. R. App. P. 6(c).

Federal Rule of Appellate Procedure 6. Appeal in a Bankruptcy Case

(a) *Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.* An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) *Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.*

(1) *Applicability of Other Rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. §158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to “Form 1 in the Appendix of Forms” must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, “district court,” as used in any applicable rule, means “appellate panel”; and

(D) in Rule 12.1, “district court” includes a bankruptcy court or bankruptcy appellate panel.

(2) *Additional Rules.* In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) *Motion for Rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) *The Record on Appeal.*

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant’s designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and

- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Making the Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the Record.

When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

- (A) Rules 3–4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply;
- (B) as used in any applicable rule, “district court” or “district clerk” includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk; and
- (C) the reference to “Rules 11 and 12(c)” in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

- (A) The Record on Appeal. Bankruptcy Rule 8009 governs the record on appeal.
- (B) Making the Record Available. Bankruptcy Rule 8010 governs completing the record and making it available.
- (C) Stays Pending Appeal. Bankruptcy Rule 8007 applies to stays pending appeal.
- (D) Duties of the Circuit Clerk. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) Filing a Representation Statement. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Writing Tips

- **Review the Rules:** Know what you need to write and how much space you have to write it. Don't forget all the necessary parts to a brief.
- **Be Candid:** Don't play fast and loose with the facts or the law. Maintain your integrity.
- **Write Well:** Practice makes perfect—don't expect to produce a filing-ready brief on your first, or even 8th draft.
- **Do Your Homework:** Read good briefs, especially from the courts where your appeal is pending, to assist in preparation of your own.
- **Know Your Audience:** Study what previously worked well with the judges who might be hearing your appeal.
- **Keep it Simple:** Verbosity, pomposity, and exaggeration are discouraged.
- **Tell a Story:** Don't forget to tell a clear story that your judges can follow; don't forget that you know way more about your case than they do and you need to be able to boil your appeal down to its essential facts and arguments.
- **Use the Bluebook.**
- **Check; Don't Guess:** Use a dictionary or a thesaurus.
- **Review, Review, Review:** Take a break and come back to your brief. Revise and rewrite – multiple times. Make your brief concise.
 - Leave time for proofreading. Print out a hard copy and review line by line. Don't lose credibility due to sloppy writing.

Oral Argument Tips

Prepare, Prepare, Prepare

- Know your briefs inside and out. Know your opponent's briefs as well and take an objective approach when reviewing. Consider the strengths of your opponent's legal arguments.
- Monitor developments in the law during pendency of the appeal. Set alerts through Westlaw or Lexis to monitor and report on principal cases cited in the briefs.
 - Consider submission of a letter covering recent developments if appropriate and permitted.
- Monitor the docket.
- Think about the theory of your case and how you can transmit that in a simple and concise way. Be mindful about returning to the theory of your case during the course of your argument.
- Know how the result you want will affect future cases. Be prepared to show that this is not only the right result for your client, but for the rule of law.
- Know your judges. Check whether the judge assigned to the hearing panel participated in a decision of any case cited in the briefs.
- Know your cases. Don't assume that judges won't press you on the facts and holdings of the cases cited in your – and your opponent's – briefs.
- If it is your first argument, go to the court in advance and watch oral arguments. Know your way around the building and get comfortable.
- Have an outline.
 - Decide the critical points that you want to make. Focus on a handful of key issues and on your theory of the case.
 - Two pages—max. No small print—14-point font or larger will likely work best.
 - Don't be too detailed—you do not want to be looking down constantly while speaking.
 - Have record references ready to go and short quotations from key cases.
 - Know the legal standards and emphasize them if they are to your benefit.
- Practice makes perfect.
 - Have a two-minute drill of what you need to tell the court in order to prevail. Being able to boil down your argument is helpful.
 - Be able to present concepts in a clear manner, but don't have an entire argument memorized—questions may change your path.

- Try a mock argument. If possible, practice with attorneys at your firm who have clerked for the court that you will be appearing before.
- Think about the kind of questions that you would ask if you were the judge. Consider having flashcards with potential questions and a short answer on the back to practice and prepare with.

The Argument

- Start with “May it please the Court.” Give your name and who you represent.
- Begin an argument with a clear and persuasive statement explaining the essence of the case. This statement should be confident, succinct, and, to the extent possible, slanted in favor of your version of the case.
 - Get to the heart of your case quickly and showcase your best arguments. Maintain your theme.
- Listen to the judges’ questions. Don’t interrupt. Answer, but keep a sense of direction.
- Maintain eye contact.
- Be confident.
- Be prepared to turn your case weaknesses into strengths—but don’t oversell.
- Maintain a conversational tone and a steady pace. Don’t yell, but don’t be a mouse. Don’t talk too fast, but don’t bore the court.
- Limit shifting around and excessive hand gestures while at the podium.
- Address the judges as “Your Honor.”
- Stop when the red light goes on.
- Be respectful of your opponent.
- Be professional the entire time. Law clerks often sit in the audience and hear everything.
- Remember that you know your case better than anyone else.
- Know when to stop talking—don’t turn a potential victory into defeat.
- Don’t be afraid—judges are people too.