Six Steps to Consider if Filing ~~Consumer~~ Bankruptcy Appeal~~s~~ in the Ninth Circuit

By ~~Roger L. Cohen and~~ Kathi M. Sandweiss[1] and Roger L. Cohen
Jaburg & Wilk, P.C.

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What is an Appeal and How do I Decide Whether to Appeal?

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The bankruptcy appellate process is a somewhat unique species of appeal. Civil appellate lawyers, even those with years of experience, may be surprised at the shortened deadlines for filing the notice of appeal, the availability of Bankruptcy Appellate Panel review and rules regarding stays pending appeal. However, in ~~Introduction~~
~~In~~ certain respects, bankruptcy appeals are no different than appeals in any other area of the law. Guiding principles of sound appellate practice, including the importance of preserving the record for appeal, identifying appealable issues, analyzing the issues in terms of the applicable standard of review and presenting coherent legal arguments, apply with equal force in bankruptcy appeals. ~~At the same time, certain aspects of the bankruptcy appellate process, including the shortened deadlines for filing the notice of appeal, the availability of Bankruptcy Appellate Panel review and rules regarding stays pending appeal, are unique and require specific knowledge.~~ This article presents ~~ese materials present~~ an overview of both sides of the equation, highlighting both the similarities and differences between bankruptcy appeals and other types of appeals, while setting forth a nuts and bolts summary of the bankruptcy appellate process.

While the procedural aspects below focus on Ninth Circuit bankruptcy appeals, certain aspects of appeals are universal. For example, judicial decisions (and bankruptcy cases are no different) are appealed because judges sometimes make mistakes. That does not mean that in any given case the judge is wrong, it just means that because judges are not infallible, the appellate courts exist as a safety valve, available to "set the record straight." To the extent a decision rests upon a factual determination, or a matter involving the exercise of the bankruptcy or trial judge's discretion, the opportunity for a successful appeal is remote, as the standard of review will require a showing – typically "clearly erroneous" or "abuse of discretion" – going well beyond "wrong" in the abstract. That is, there is no automatic "do-over" in the judicial system. Conversely, purely legal decisions (including the granting of summary judgment) are typically reviewed under a "de novo" standard, meaning that the reviewing court considers the issue from a clean slate, without giving deference to the ruling of the bankruptcy or trial court.

The first level of analysis for an appellate practitioner, in this context, is to determine what kind of ruling led to the (presumably) unfavorable outcome of the underlying proceedings. While clients rarely, if ever, comprehend the difference, the ability to distinguish among various types of errors, and identify the appropriate standard of review, is crucial to a successful appeal. Where the bankruptcy or trial court's ruling involves factual findings, or a weighing of various factors – as, for instance, in deciding a motion for stay relief – the opportunity for a successful appeal is remote, and the best, and most merciful thing to do may well be to advise the client to save the cost of an appeal, and make do with the present ruling, no matter how unpalatable. Conversely, however, where the bankruptcy or trial judge's decision is premised on an identifiable issue of law – such as the interpretation of a statute, or the criteria to be considered as the basis for a

[1] With gratitude to Jeffrey A. Silence for his assistance in preparing these materials.

discretionary determination, the odds of a successful appeal are significantly increased, and the client again should be advised accordingly.

We find that clients always want to know the odds of success on appeal; while no lawyer can predict the likelihood of success on appeal to a mathematical certainty, the advice that we give to an aggrieved litigant will depend, in large part, on a proper consideration, and understanding of the nature of the decisions giving rise to the decision, and the strength of available arguments challenging the correctness of those decisions.

~~Reasons and Basis for Appeal~~

~~*"Appeal in law: to put the dice into the box for another throw."*~~
~~–Ambrose Bierce, American journalist and satirist~~

~~Determine Standard of Review~~
~~Factual determination, or matter involving exercise of bankruptcy judge's discretion: standard of review requires showing of "clearly erroneous" or "abuse of discretion" – going well beyond "wrong" in the abstract.~~
~~Purely legal decisions (including granting of summary judgment): typically reviewed under a "de novo" standard, no deference ruling of the bankruptcy court.~~

~~Determine whether decision is wrong.~~

~~Look for and identify decisions that are contrary to law.~~

~~Carefully review and analyze both the challenged decision and the briefs and other materials submitted by the parties in the underlying proceedings.~~
~~Clients want to know the odds of success on appeal.~~

~~Preparing the Record for Appeal~~

~~*"Bankruptcy is a sacred state, a condition beyond conditions, as theologians might say, and attempts to investigate it are necessarily obscene, like spiritualism.*~~
~~*One knows only that he has passed into it and lives beyond us, in a condition not ours."*~~
~~–John Updike~~

- **"The best way to win an appeal is to win in the court below."**

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We didn't make up the line in the heading above, but we wish we had. It is a truism that is repeated among appellate lawyers and judges. The importance of winning in the court below is the reason why we spend ~~Important to spend~~ time studying alternatives and adjuncts to appeal. When a client comes into our offices wanting to appeal an adverse decision, the first order of business is to discuss post judgment motions. There are two reasons for this: (1) we may be able to convince the bankruptcy or trial judge to change his or her mind; but, if not, (2) we may be able to create a more favorable record from which to perfect the appeal, particularly in cases where another lawyer represented the client in the bankruptcy or trial court. Much of what we discuss regarding ~~post trial~~post-trial motions applies in District Court, bankruptcy court and even

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some state courts, the exceptions being references to particular rules, the specifics involving Bankruptcy Appellate Panels (BAP) and the concept of finality in bankruptcy appeals.

~~Post Judgment Motions~~

~~*"If I owe you a pound, I have a problem;*~~
~~*but if I owe you a million, the problem is yours."*~~
~~John Maynard Keynes~~

~~Motion for New Trial, Motion to Amend Judgment: Fed. R. Bankr. P. 9023, F.R.Civ. P. 59~~

With ~~Bankruptcy Rule 9023: with~~ certain exceptions, Rule 59, Fed.R.Civ.P. applies in bankruptcy cases. ~~See Fed~~See Fed. R. Bankr. P. 9023.
Rule 59 permits a ~~–~~ new trial on all or part of the issues, at the discretion of bankruptcy court~~)~~. *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33 (1980). It will be g~~G~~ranted only for manifest error of fact or law, or newly discovered evidence, *In re Basham*, 208 B.R. 926, 934 (Bankr. 9th Cir. 1997); *In re Jess,* 169 F.3d 1204 (9th Cir. 1999)(Where no new evidence has been presented in the Motion for New Trial, Bankruptcy Court's denial of the Motion is affirmed). If you remember nothing else from this article (a statement repeated ~~several times~~several times below!) remember that the time limit for filing a motion for new trial under Rule 9023 is ***f*** ***~~F~~ourteen days***. By comparison, a Motion for New Trial under Rule 59 F. R. Civ. P., must be filed within thirty days after entry of judgment. ~~Rule 9023. Cf 59 F. R. Civ. P., 30 days.~~

A m~~Supporting affidavits filed with Motion.~~
~~Fourteen days to file opposing affidavits.~~
~~M~~otion for new trial or a motion to alter or amend judgment under Rule 9023 extends the time to appeal and preserves the bankruptcy court's jurisdiction. See Rule 8002, Fed. R. Bankr. P. See *In re Branding Iron Steak House*, 536 F.2d 299, 301 (9th Cir. 1976)(~~-~~In ~~e~~considering whether a motion for reconsideration under Bankruptcy Rule 307 (the predecessor of current Rule 3008) tolled time for appeal, "We conclude that a motion to reconsider is a motion to "alter or amend the judgment" within the meaning of Rule 802(b)(3) [footnote omitted] and that its filing extends the ordinary time limitation for appeal. [citation and footnote omitted]. It would be a waste of judicial resources to require that an appeal be filed when the granting of a pending motion to reconsider might eliminate the need for an appeal.").

~~A Rule 9023/Rule 59 motion essentially constitutes a plea to reconsider. Policy of liberally construing appellate rules to carry out desire of Congress to promote fairness and a just determination. *Bordallo v. Reyes,* 763 F.2d 1098, 1102 (9th Cir. 1985). See *In re Edelman*, 237 B.R. 146 (9th Cir.BAP 1999)(motions for reconsideration traditionally treated as motions to alter or amend under Rule 59(e), if the motion draws into question correctness of trial court's decision).~~

~~Alternative amendment under Rule 9023. Federal court may amend under inherent power when original judgment obtained through fraud on the court. *In re Levander*, 180 F.3d 1114 (9th Cir. 1999)(phrase "fraud on the court" read narrowly, in the interest of preserving the finality of judgments).~~

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~~Rule 9023 Motion tolls the appeals period once only. Subsequent motion to reconsider will not toll the time for appeal. 9 Collier on Bankruptcy ¶9023.04 at 9023-5 (15th ed. 1993).~~
~~Motion denied – time to appeal underlying order and/or the denial begins as of the date of entry of the order denying the Motion for Reconsideration.~~
~~Notice of appeal must specify which order is the subject of the appeal.~~

~~Motion for Relief from Judgment: Fed R. Bankr. P. 9024, F.R.Civ. P. 60.~~

~~Bankruptcy Rule 9024:~~ Fed. R. Civ. P. 60 applies in bankruptcy cases, with certain exceptions. ~~cases under the Code except that~~
~~1. a motion to reopen a case under the Code or for reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation period described in the Rule,~~
~~2. a complaint to revoke discharge in a Chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and~~
~~3. a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230 or §1330.~~

~~Fed. R. Civ. P. 60 – "relief" rather than "reconsideration."~~
Whether to apply Rule 59 or Rule 60 is determined by nature of decision and the timing: if the issue involves a collateral attack on the judgment, or if the time for filing a Rule 59 Motion has run, then look to Rule 60. Otherwise, Rule 59 applies. Under

Rule 60, there are ~~:~~ two general bases for relief.
Rule 60(a) applies to ~~–~~ "c~~C~~lerical mistakes" - errors in judgment, order, or other parts of the record arising from oversight or omission. *Korea Exchange Bank v. Hanil Bank Ltd.,* 799 F.2d 532, 535 (9th Cir. 1986)(bankruptcy court has "very wide latitude" to correct clerical errors.
Rule 60(b) on the other hand, seeks r~~- R~~elief from a judgment or order on grounds of:
1. mistake, inadvertence, surprise, or excusable neglect;
2. newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59;
3. fraud, misrepresentation, or other misconduct of an adverse party;
4. the judgment is void;
5. the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is ~~not longer~~no longer equitable that the judgment should have prospective application; or
6. any other reason justifying relief from the operation of the judgment.

Be aware of the time periods. ~~Time periods –~~ Motions brought under subsections (4), (5), and (6) of Rule 60(b) must be made within a "reasonable time," which is a factual determination. Motions brought under subsections (1), (2), and (3) must be brought within one year after the entry of judgment.

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Unless clearly intended, an appeal from denial of motion under Rule 60(b) does not also appeal the underlying bankruptcy order or judgment. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 (1978) (appeal from denial of a Fed. R. Civ. P. 60(b) Motion "does not bring up the underlying judgment for review"). Rather, review is limited to an inquiry as to the correctness of the bankruptcy court's denial of the Motion for Relief From Judgment.

- Bankruptcy v. Non-Bankruptcy Distinction: In non-bankruptcy cases, a crucial distinction between Rule 60 and Rule 59 is that a Rule 60 Motion does not extend the time to appeal the underlying judgment. In bankruptcy cases, however, the time for appeal is extended by the filing, within fourteen days after entry of judgment, of a motion for relief under Rule 9024 (which again, applies Rule 60 to certain cases under the Code). See Fed. R. Bankr. P. 8002(B)(4). If not filed within that time period, a Rule 60 Motion does not extend the time for appeal and the effect of such a Motion is essentially similar to that of a Rule 60(b) motion in a non-bankruptcy case.

~~**I. HHow do I stop the Train?Motion for Reconsideration: Fed. R. Bankr. P. 3008.**~~

~~**II.**~~

~~***III.* Party may move for reconsideration of an order allowing or disallowing a claim against the estate. The Advisory Committee Note – reconsideration of such claim is discretionary.**~~

~~***IV.***~~

~~**V. Motion for reconsideration of order allowing or disallowing claim against the estate, filed under Fed. R. Bankr. P. 3008, is not one of the enumerated motions that would extend the time for appeal. See Fed. R. Bankr. P. 8002(b).**~~

~~**VI.**~~

~~**VII. Stay Pending Appeal: Supersedeas Bond, Fed. R. Bankr. P. 8005 and 7062**~~

~~*"His lack of education is more than compensated for by his keenly developed moral bankruptcy."*
~~Woody Allen.~~

Fed. R. Civ. P. 62 is – applicable in adversary proceedings. Thus, the fourteen day automatic stay of execution of judgments, orders and proceedings applies, subject to the following exceptions: 1. an interlocutory or final judgment in an action for an injunction or a receivership; or 2. a judgment or order that directs an accounting in an action for patent infringement.

- A stay ~~Stay~~ beyond the fourteen day automatic period requires a —Motion for Stay Pending Appeal. Fed. R. Bankr. P. 8005. While such a stay is not mandatory, it must be kept in mind that the purpose of a stay is to maintain the status quo, which can be crucial to a successful

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resolution of the client's case. For ~~Purpose - maintain status quo. Example:~~ if a sale of assets has already consummated it may be too late to stay, or enjoin enforcement of the order, thereby rendering an appeal moot. See *Ewell v. Diebert*, 958 F.2d 276 (9th Cir. 1992)(an appeal may become moot where assets are sold before the debtor seeks a stay).

- A Motion for Stay Pending Appeal, for approval of a supersedeas bond, or for other relief pending appeal must typically be presented first to the bankruptcy judge. Fed. R. Bankr. P. 8005. Certain exceptions have been granted in emergency situations, but the appellant must demonstrate why the relief was not sought first from the bankruptcy judge. ~~Certain exceptions in emergency situations.~~

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What are Basics I need to Know?

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~~**VIII. (Hint: The most important point to take away from this article is 14 days). Discretionary or as a matter of right.**~~

~~**IX.**~~

~~**X. What Orders are Appealable - Finality**~~

~~**XI.**~~

~~***XII. "[F]inality for bankruptcy purposes is a complex subject***~~

~~***XIII. and courts deciding appealability questions must take into account***~~

~~***XIV. the peculiar needs of the bankruptcy process."***~~

~~**XV. *In re Koch*, 109 F.3d 1285, 1287 (8th Cir.1997).**~~

~~**XVI.**~~

~~**XVII. Bankruptcy v. non-bankruptcy finality.**~~

~~**XVIII. Finality requires that the order leave the bankruptcy court with nothing to do but execute the order; that the delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and that a later reversal on the issue would require recommencement of the entire proceeding.**~~

~~**XIX. "Appeal early and often" - premature notice of appeal effective upon the entry of a final order or can be amended. Fed. R. Bankr. P. 8002(b)). No penalty for appealing order before it becomes final; conversely** *failure to file timely notice of appeal from an appealable order is an incurable jurisdictional defect.*~~

~~**XX.**~~

~~**XXI. The Appeal Process**~~

~~*"At the end of every seven years you must cancel debts. This is how it is to be done:*~~
~~*Every creditor shall cancel the loan he has made to his fellow Israelite.*~~
~~*He shall not require payment from his fellow Israelite or brother,*~~
~~*because the Lord's time for canceling debts has been proclaimed."*~~
~~Deuteronomy 15:1-2.~~

~~Timing and Requirements of Notice of Appeal: Fed. R. Bankr. P. 8002(a)~~

The notice of appeal must be filed within ***14 days*** of the date of the entry of the judgment, order or decree. The time limit is substantially shorter than the limit under Rule 4(a)(1)(A), Fed. R. Civ. App. P., providing thirty days to file the Notice (and is most likely shorter than the appeal period under any state rules you may be familiar with). ~~***Fourteen days***. Cf Rule 4(a)(1)(A), Fed. R. Civ. App. P. (30 days).~~
~~Notice filed after announcement of decision or order but before entry of judgment, order or decree, treated as filed after entry.~~
~~Notice mistakenly filed with the district court or BAP, deemed filed as of the date actually filed, but transmitted to the clerk of the bankruptcy court.~~
Again, ~~Note above,~~ certain post judgment motions toll the time for appeal, and the time starts to run after entry of order disposing last such motion. See Fed. R. Bankr. P. 8002.

Timely filing of the notice of appeal is jurisdictional and mandatory. Accordingly, the failure to file a notice of appeal deprives the appellate courts of jurisdiction, and bars a party from relying on forfeiture or waiver to excuse a lack of compliance.

~~Statutory procedure for extension of time to appeal. See Rule 8002(c).~~ The bankruptcy judge may extend the time for filing the notice of appeal, with certain exceptions set forth in See Rule 8002(c).
~~unless the judgment, order, or decree appealed from: (1) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301; (2) authorizes the sale or lease of property or the use of cash collateral under § 363; (3). authorizes the obtaining of credit under § 364; (4) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365; (5)approves a disclosure statement under § 1125; or (6)confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.~~

Once the notice of appeal is filed, the bankruptcy court is divested of jurisdiction. *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56 (1982).

~~The Notice must comply with Fed. R. Bankr. P. 8001: (1) substantial conformity to the appropriate Official Form, (2) names of all parties to the judgment, order, or decree and the names, addresses and telephone numbers of their respective attorneys, and (3) accompaniment of the prescribed fee.~~
~~Separate statement of election.~~

~~A.~~ **What is a BAP and Where do I find One?** ~~**Bankruptcy Appellate Panel (BAP)**~~

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The district courts, by statute, have jurisdiction to hear bankruptcy appeals. 28 U.S.C. § 158(a). However, the Bankruptcy Reform Act of 1978, amended by the Bankruptcy Reform Act of 1994, created a separate system of bankruptcy appellate panels, or BAPs. Under this statute, the judicial council of each federal circuit is required to establish a bankruptcy appellate panel service, composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council to hear and determine appeals with the consent of all parties to the proceeding. Excepted from the statute are those circuits whose judicial councils find that there are insufficient judicial resources available in the circuit; or establishment of such service would result in undue delay or increased cost to parties in cases under Title 11. See 28 U.S.C.A. § 158.

Fewer than one-half of the federal circuits have established Bankruptcy Appellate Panels. The Ninth Circuit, of course, has a BAP, which was established in 1979. The Ninth Circuit BAP tries to set hearings in the district where the bankruptcy was filed. Hearings are generally held during the third week of the month. Although the BAP is located in Pasadena, California, hearings are often conducted telephonically or through video conferencing to save litigants time and money.

E filing is required for all BAP appeals filed on or after March 31, 2010. Most BAP appeals are fully resolved within 10 months from the time the notice of appeal was filed. Six bankruptcy judges are appointed to serve on the Ninth Circuit BAP: Judges Pappas, Dunn, Jury, Markell, Hollowell, and Kirscher. All six judges are from different states; Judge Hollowell is an Arizona judge. When a Judge serves the BAP, that judge is precluded from hearing any matters that arise from his or her home court.

You should carefully review the Local BAP Rules, which include, among other things, specific provisions for e-filing, excerpts of the record, and taxation of costs. ~~for yourself, but provided below are a few important things you should know about the Local Ninth Circuit BAP Rules.~~

~~If appellant moves for leave to appeal pursuant to FRBP 8003, and fails to file a separate notice of appeal concurrently with filing the motion for leave, the motion for leave shall be treated as if it were a notice of appeal for purposes of calculating the time period for filing an election. 8001(e)-1(b).~~

~~The BAP does not accept documents transmitted by fax, except in emergency circumstances. 8009(a)-3.~~

~~A party filing briefs shall file an original and four copies with covers, bound separately from the excerpts of the record. 8009(a)-1(a). Note that pro se litigants may apply to register for e-filing, but their applications may be denied, and if any parties to the appeal are pro se, you must mail those litigants a copy of the briefs.~~

~~A party filing excerpts of the record shall file an original and four copies bound separately from the briefs. Each copy shall be bound with a white cover, and the cover of the excerpts shall contain the caption. 8009(b)-1(a). . Documents in the appendix must be divided by tabs, and the appendix must have a table of contents identifying both the tab and page number where each document is located. Excerpts of the record and sealed documents cannot be filed electronically, but must be mailed to the BAP.~~

Appellants must make explicit references to the parts of the record that support their arguments because courts are not obliged to search the entire record unaided for error. See *Dela Rosa v. Scottsdale Memorial Health Systems, Inc.*, 136 F.3d 1241 (9th Cir. 1998); FRAP Rule 10(b)(2); 8009(b)-1.

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- ~~A decision may be designated as an Opinion if it (A) Establishes, alters, modifies or clarifies a rule of law; (B) Calls attention to a rule of law which appears to have been generally overlooked; (C) Criticizes existing law; or (D) Involves a legal or factual issue of unique interest or substantial public importance. 8013-1.~~
- ~~Opinions shall bind the Panel as precedent unless they are modified or reversed in an Opinion issued by the Panel sitting en banc, or unless they no longer are precedent due to changes in the law, whether by act of Congress or by decision of the Ninth Circuit Court of Appeals or the Supreme Court. 8013-1.~~
- ~~Costs under FRBP 8014 are taxed by filing a bill of costs with the clerk of the bankruptcy court. 8014-1.~~
- ~~In cases where Part VIII of the Federal Rules of Bankruptcy Procedure and the Local BAP rules are silent as to a particular matter of practice, a Panel may apply the Rules of the United States Court of Appeals for the Ninth Circuit and the Federal Rules of Appellate Procedure.~~
- ~~To enable the judges of a Panel to evaluate possible disqualification or recusal, all parties, other than governmental parties, shall attach to the inside back cover of their initial briefs, a list of all persons, associations of persons, firms, partnerships and corporations that have an interest in the outcome of the case. 8010(a)-1.~~

There is d~~D~~isagreement as to the binding precedent of BAP decisions. *In re Proudfoot,* 144 B.R. 876 (9th Cir.BAP 1992); *In re Windmill Farms, Inc.,* 70 B.R. 618 (9th Cir.BAP1987), reverse'd on other grounds, 841 F.2d 1467 (9th Cir.1988)(BAP decisions are binding precedent on all bankruptcy courts within the Circuit); but see *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir.1990), where the 9th Circuit Court of Appeals declined to decide whether BAP decisions are binding on bankruptcy courts, but expressly held that such decisions cannot bind the district courts: "As article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction." *See, also, In re Roetman* 405 B.R. 336, 339 (Bkrtcy.D.Ariz.,2009)("bankruptcy courts generally should follow the circuit's BAP decisions that are 'on point' and not 'meaningfully distinguishable' even when the bankruptcy court disagrees with the BAP's analysis"); *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1252 (9th Cir. 2010)(BAP rulings "are persuasive but not binding authority in this court").

Over the years, we have developed a list of c~~C~~onsiderations in electing between District Court and the ~~v.~~ BAP. The list seems to ebb and flow depending upon our last experience with each, the circumstances of the particular case, and our mood at the time. One factor is the pre~~-Pre~~cedential effect of BAP or lack thereof. If you are aware of adverse ~~Adverse~~ authorities in reported BAP decisions, you may want the appeal heard by the district court, which may not be bound by the BAP decisions. Another factor is the relative expertise of the judges. Because the BAP is comprised of ~~-BAP –~~ bankruptcy judges, they would presumably ~~who~~ have greater expertise in bankruptcy matters. This may or may not be a benefit depending upon your perspective and the issues in the case. Conversely, you may want to have your case heard by a district court judge who has superior expertise in a particular area of federal law. A corollary is that, while BAP judges may have greater respect for a fellow bankruptcy judge, a district judge is likely to have no qualms about reversing a bankruptcy court, which, once again, is not made up of Article III judges. But the opposite factor may also be in play: A district judge may have a tendency to leave bankruptcy issues to bankruptcy judges and thus be inclined to affirm a bankruptcy judge's

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ruling. One significant factor, for those of us who tend to be verbose, is the somewhat extreme difference in page limits. The bankruptcy rules permit a principal brief of 50 pages; the 9th Circuit BAP limit is 30 pages; and the limit for District Court for the District of Arizona is only 17 pages in a bankruptcy appeal. ~~, v. District Court – non-bankruptcy judges.~~With the requirements of jurisdictional statement, course of proceedings, factual statement, issues, standard of review, and argument, those 17 pages are eaten up pretty quickly.

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~~Filing and Significance of Issues Statement and Record~~

~~To perfect the appeal, the Appellant must file a statement of issues on appeal and designate the record. Fed. R. Bankr. P. 8006. The Rule provides that statement of issues and designation of record be filed with the clerk and served on the appellee within fourteen days after filing the notice of appeal, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later. Within 14 days after service of designation of the record and statement of issues, the appellee may file and serve a designation of additional items to be included in the record and, if appellant has filed a cross appeal, a statement of appellee's issues on cross appeal. The appellant/cross appellee may thereafter, within fourteen days, file and serve a designation of additional items.~~

~~The record on appeal includes~~

~~the items designated by the parties,~~
~~the notice of appeal,~~
~~the judgment or order, and~~
~~any opinion, findings of fact, and conclusions of law.~~

~~A party designating a transcript must deliver to the reporter and file with the clerk a written request for the transcript.~~

~~The requirements of Rule 8006 are procedural, not jurisdictional.~~

~~Failure to list an issue on the issues statement does not automatically preclude the party from urging that issue. *In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 104 F.3d 1147 (9th Cir. 1997). However, at least one district court declined to consider on appeal several issues not included in the Designation of the Record on Appeal. See *In re Freeman*, 124 B.R. 840, 841 (N.D.Ala.,1991). Accordingly, you should file an amended statement of issues immediately upon realizing that an important issue is missing from the statement of issues.~~

~~Appellate record should include all documents necessary to afford the reviewing court a complete understanding of the case. Any item not part of the record below will not be considered on appeal. *In re Yepremian*, 116 F.3d 1295 (9th Cir. 1997)~~

~~If no transcript is ordered, a certificate to that effect must be filed. Fed. R. App. P. 10. However, Fed. R. Bankr. P. 8006 does not require such a certificate. It is a good practice to file and serve a notice that no transcript is ordered, so that the Clerk can better monitor the record.~~

When the appellate record is complete, the clerk will transmit a copy to the appropriate court, which will then enter the appeal in the docket and give notice to all parties.

Briefs and Appendices

Unless otherwise stated, the opening brief must be filed within fourteen days after entry of the appeal on the docket; appellee must file an answering brief within fourteen days after service of the opening brief; and the appellant may serve and file a reply brief within fourteen days thereafter. Fed. R. Bank. P. 8009.

Some BAP Rules permit the filing of a motion for an extension to file a brief and appendix.

Fed. R. Bankr. P. 8010 provides that the appellant's brief contain the following items, in the following order:

Table of contents, with page references and table of cases alphabetically arranged, statutes and other authorities cited, with references to the pages of the brief where they are cited.
Statement of the basis of appellate jurisdiction.
Statement of issues presented and applicable standard of appellate review.
Statement of the case, indicating the nature of the case, the course of the proceedings and the disposition in the court below, then a statement of the relevant facts.
Argument, which may be preceded by summary.
Short conclusion stating the precise relief sought.

Appellee is not required to include a jurisdictional statement or statement of issues unless appellee challenges the statements of appellant.

Generally, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material. Fed. R. Bankr. P. Rule 8010.

A bankruptcy court's findings of fact are reviewed under the clearly erroneous standard. Its conclusions of law are subject to de novo review. *In re Schwarzkopf* , 626 F.3d 1032, 1035 (9th Cir. 2010).

Every reference to a fact or other matter in the record must be supported by an accurate reference to the page and document number in the record.

Obtain a copy of The Bluebook (19th ed. 2010).

Rule 32.1, Fed. R. Civ. App. P., a newer rule, a court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as unpublished so long as decision was issued on or after January 1, 2007.

If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that

~~opinion, order, judgment, or disposition with the brief or other paper in which it is cited. Rule 32.1.~~

~~XXII.~~ ~~"~~Appeal Early and Often~~", Key Takeaways~~

We didn't make up that line either, but a wise judge or two must have said it. We are certainly aware of the potential for confusion and hand-wringing in this process. Despite our combination of more than 55 years of appellate practice, we continually review all relevant rules and, in the case of bankruptcy appeals, repeatedly review and consult the Federal Rules of Civil Appellate Procedure, the Bankruptcy Rules of Procedure, and the relevant BAP Rules during the entire drafting process. But remember this: the most critical error is jurisdictional; thus, we repeat the refrain of appellate judges and practitioners: "appeal early and often."

About the authors: Kathi M. Sandweiss is an attorney at the Phoenix law firm of Jaburg Wilk. She is the head of the appellate law department and has represented many clients at the Arizona appellate courts. Kathi may be reached at 602.248.1000 or kms@jaburgwilk.com.

Roger Cohen has over 30 years' experience as a business attorney, representing clients in both litigation and transactions. He has a deep knowledge and understanding of commercial law and the litigation process and is a forceful and effective advocate for his clients. He can be reached at the Phoenix based law firm of Jaburg Wilk at 602.248.1040 or rlc@jaburgwilk.com.

~~Pay attention to deadlines and page limits.~~

~~Make a proper record because anything not in the record does not exist for appellate purposes.~~

~~Bankruptcy Appeals Panels (BAPs) were formed to streamline the bankruptcy appeals process and lighten the load on the Circuit Courts.~~

~~Focus on details in appellate briefs – small errors can be costly.~~

~~Keep an eye on all applicable sets of rules; in a bankruptcy appeal, you may be required to navigate the Federal Rules of Appellate Procedure, the Federal Rules of Civil Procedure, the Bankruptcy Rules, the Rules of the United States Bankruptcy Appellate Panel for your Circuit, as well as substantive law under the Bankruptcy Code and applicable cases – all at once.~~

~~The most critical error is jurisdictional, so "appeal early and often." If the order is found to be non-appealable, the negative consequences will be minimal.~~

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