

# **NCBRC's Quick Procedural Guide for Pro Bono Attorneys Prosecuting an Appeal from Bankruptcy Court<sup>1</sup>**

Filing an appeal from a bankruptcy court decision is like an appeal from a district court, with some exceptions. The following guide examines common questions and deadlines to consider when appealing an adverse bankruptcy court decision. It is important to check all citations and requirements with the applicable statutes and rules as these may change. Additionally, check the local rules of the appellate court for further requirements.

Read the Rules! Read the rules! Read the local rules.

## **Pre-Filing Considerations:**

### **1. Should you actually take this appeal?**

- **Potential for Creating Bad Precedent:** Assess whether an unfavorable appellate decision could establish a binding precedent that negatively impacts other debtors in similar situations or in the broader legal landscape. An adverse decision in an appellate court can create significant repercussions for other cases, particularly if it's in a federal circuit court that sets precedent for multiple states.
- **"Bad Facts Make Bad Law":** Evaluate if the facts of your case might lead to a problematic legal precedent. If the specific facts are unsympathetic or unrepresentative of the broader issue, appealing might risk codifying an unfavorable interpretation of the law that extends beyond the individual case.
- **Strength of Legal Arguments and Appellate Standards of Review:** Determine if the legal arguments you intend to make have strong support in case law, statutes, or policy. Additionally, consider the standard of review that the appellate court will use; some standards, such as "abuse of discretion," may make it difficult to overturn the lower court's decision.
- **Costs of the Appeal:** Appeals can be expensive and time-consuming, often requiring extensive briefing, record preparation, and potential oral argument. Consider the

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<sup>1</sup> This Quick Procedural Guide for Prosecuting an Appeal from Bankruptcy Court is provided by the National Consumer Bankruptcy Rights Center (NCBRC) as a general informational resource. It is intended solely to offer an overview of procedural aspects related to bankruptcy appeals and is not a substitute for individualized legal advice.

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financial implications for your client and weigh them against the potential benefits of a successful appeal.

- **Likelihood of Success:** Evaluate the chances of prevailing on appeal. This requires a realistic assessment of the legal grounds, the panel composition of the appellate court, and any precedent that might influence the court's decision.
- **Public Policy Considerations:** Consider if the appeal might promote or hinder broader policy objectives that align with your client's or your organization's goals. For instance, if an appeal could clarify or strengthen protections for debtors, it might align with policy goals, even if the chance of winning is not certain.
- **Impact on Client's Situation:** Think about the immediate effect on your client. Some appeals processes can delay the resolution of a case, potentially prolonging financial uncertainty or hardship for the client. It's essential to balance the broader legal strategy with your client's personal and financial well-being.
- **Client's Willingness and Resources to Proceed:** Ensure the client fully understands the stakes, including the possible outcomes, costs, and duration of the appellate process. An appeal might be strategically sound, but if the client is unwilling or unable to commit to it, reconsidering other legal options might be necessary.
- **Possibility of Settlement or Alternative Resolutions:** Assess if negotiating a settlement or alternative resolution might be more favorable than the uncertainty of an appeal. Sometimes the prospect of an appeal can provide leverage to reach a compromise with the opposing party.
- **Reputation and Ethical Considerations:** Consider the potential impact on professional reputation and ethical duties. Appealing may expose you to scrutiny if the case is weak, or it could reflect a commitment to fight for important issues. Moreover, if the appeal is largely unviable, there may be ethical considerations around pursuing a low-probability case at additional cost to the client.
- **Weighing these factors can help make a well-informed decision on whether an appeal is in the best interest of the client and whether it serves the broader legal and policy interests in similar cases.**

## 2. Does the party have standing to appeal?

- **Statutory Basis:** The basis for standing in federal courts, including bankruptcy appeals, is rooted in Article III of the U.S. Constitution. The statute specifically addressing bankruptcy appeals, 28 U.S.C. § 158, does not specifically address standing. Courts reviewing standing in bankruptcy appeals generally adopt a "person aggrieved" test to determine if standing exists.
- **Person Aggrieved Doctrine:** The "person aggrieved" standard is narrower than the general Article III standing requirements. Under this standard, a party has standing to appeal a bankruptcy decision only if they are directly and adversely affected pecuniarily by the order of the bankruptcy court.

*Due to the nature of bankruptcy proceedings, which often involve numerous creditors dissatisfied with compromises that jeopardize the full payment of their outstanding claims against the bankrupt, special rules govern which parties may appeal a bankruptcy court order. Id. (internal quotation marks omitted). Although the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, does not include a similar provision limiting who can appeal, courts continue to apply the person aggrieved standard because "Congress [did not] intend to alter the definition set forth in the prior law." In re Westwood Cmty. Two Ass'n, 293 F.3d at 1334; see also Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3d Cir. 1995); Depoister v. Mary M. Holloway Found., 36 F.3d 582, 585 (7th Cir. 1994); Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989); Kane v. Johns-Manville Corp., 843 F.2d 636, 641-42 (2d Cir. 1988); In re El San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987); Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983). Like our sister circuits, we have adopted the person aggrieved doctrine as our standard for determining whether a party can appeal a bankruptcy court's order. In re Westwood Cmty. Two Ass'n, 293 F.3d at 1335.*

*The person aggrieved doctrine limits the right to appeal a bankruptcy court order to "those parties having a direct and substantial interest in the question being appealed." Id. at 1335 (internal quotation marks omitted). We have held that this doctrine defines aggrieved persons as those individuals who are "directly, adversely, and pecuniarily affected" by a bankruptcy court's order. Id. at 1337-38. "An order will directly, adversely, and pecuniarily affect a person if that order diminishes their property, increases their burdens, or impairs their rights." (Citation omitted.)*

*Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.), 764 F.3d 1321, 1324-25 (11th Cir. 2014).*

### **3. Is there a final appealable order?**

- Any "final judgment, order, or decree of a bankruptcy judge" may be appealed. 28 U.S.C. § 158(a), Fed. R. Bankr. P. 8001(a) (district courts from bankruptcy courts); 28 U.S.C. §§ 158(d), 1291 (circuit courts from district courts).
- In general an order is "final" for appeal purposes when a decision has been entered that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). [consult NCLC Manual for long list of examples of final and nonfinal orders]
- In bankruptcy proceedings, finality does not require the entire case to be concluded; rather, due to the extended nature and large number of parties involved in a bankruptcy case, finality is applied to discrete disputes that arise within the larger case. Most courts look at contested matters and adversary proceedings as "stand-alone units of litigation" and determine whether the order appealed from disposes of all the claims of all the parties. For example, in the case of *Bullard v. Blue Hills Bank*, 575 U.S. 496, 135 S. Ct. 1686 (2015), the court held that a denial of confirmation of a chapter 13 plan was not final until the amended plan was confirmed. Also, in *Ritzen Grp., Inc. v. Jackson*

*Masonry, LLC*, 140 S. Ct. 582 (2020) the court concluded that an order granting relief from the automatic stay was a final order.

4. **Are there any exceptions that allow an interlocutory appeal?**

- Yes. Pursuant to 28 U.S.C. §158(a)(3) and Fed. R. Bankr. P. 8004, a party may file a motion for leave to appeal an interlocutory order. See below for further details.

5. **What is the immediate deadline to file a notice of appeal?**

- The notice of appeal must be filed within 14 days.

Fed. R. Bankr. P. 8002(a)(1) states, “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.” NOTE: This deadline is different than the 30-day deadline in most civil cases. See Fed. R. App. P. 4(a)(1).

**Exceptions:**

- **Post-Trial Motions:** Under Rule 8002(b), the time to appeal runs from the entry of an order disposing of these timely filed motions: (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.
- **Inmates:** Pursuant to Rule 8002(c), for an inmate confined in an institution, the date of filing is the date the appeal is deposited in the institution's internal mail system. Additionally, the inmate must submit an affidavit or evidence to support that the appeal was so deposited on the specific date.
- **Extensions:** Under Rule 8002(d), the deadline to file a notice of appeal may be extended if a motion to extend is filed within the original deadline, or within 21 days after that deadline if the party shows excusable neglect.

No extension can be longer than 21 days after the original deadline or 14 days after the order granting the extension, whichever is later.

Extensions cannot be granted if the appeal: (A) grants relief from an automatic stay under §362, 922, 1201, or 1301 of the Code; (B) concerns 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.

6. **What constitutes a “notice of appeal”?**

- **Appeal from a Final Order:** Pursuant to Fed. R. Bankr. P. 8003(a)(3), the notice of appeal from a final judgment must: (A) conform substantially to the appropriate Official Form (see Official Form 417A at [https://www.uscourts.gov/sites/default/files/form\\_b417a.pdf](https://www.uscourts.gov/sites/default/files/form_b417a.pdf)); (B) be accompanied by the judgment or the appealable order or decree from which the appeal is taken; and (C) be accompanied by the prescribed fee. Or IFP motion.<sup>i</sup>
- After the notice of appeal is filed, the bankruptcy clerk must serve the parties. The bankruptcy clerk also transmits the notice of appeal to the reviewing court, which docket the appeal.
- **Appeal from an Interlocutory Order:** Pursuant to Rule 8004(a) a notice of appeal of an interlocutory order must include the notice of appeal (see above), timely filed pursuant to Rule 8002, be accompanied by a motion for leave to appeal, and served electronically.

A motion for leave to appeal under 28 U.S.C. §158(a)(3) 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 leave to appeal should be granted; and (E) a copy of the interlocutory order or decree and any related opinion or memorandum.

*Response.* A party may file with the district or BAP clerk a response in opposition or a cross-motion within 14 days after the motion is served.

## 7. What court should hear the appeal?

When a party is dissatisfied with a bankruptcy court's decision, they have multiple appellate avenues: appeal to the District Court, Bankruptcy Appellate Panel (BAP) in some districts, or in some instances, a direct appeal to the Circuit Court. Each route has its unique advantages and drawbacks, which are crucial to consider for an effective appeal strategy.

### Section 1: Opting for the District Court

#### Advantages:

1. **Familiar Environment:** The District Court, being a more conventional and recognizable setting, offers comfort to many attorneys and parties involved.
2. **Wide-Ranging Authority:** This court has the capability to handle a diverse array of issues, advantageous in multifaceted cases.
3. **Influential Decisions:** Rulings in the District Court often hold significant sway and may shape future legal scenarios.
4. **Know your judges** – may be more inclined or less inclined to disagree with b.ct.
5. ARE YOU IN A DISTRICT WITH ONLY A HANDFUL OF DISTRICT COURT JUDGES
6. IF MAKING A TEXTUAL ARGUMENT MAY BE LESS INURED TO BK COURT PERCEPTION OR IF BAP GOT IT WRONG.

#### Disadvantages:

1. **Potential for Delays:** With a substantial volume of cases, the District Court might experience slower decision-making processes.
2. **Generalist Judges:** Unlike specialized tribunals, judges here may lack in-depth expertise in specific fields like bankruptcy law. This may be good – fresh eyes on text.

## Section 2: Opting for the Bankruptcy Appellate Panel (BAP)

### Advantages:

1. **Expertise in Bankruptcy:** Judges in BAP possess specialized knowledge, ensuring a nuanced understanding of complex bankruptcy matters.
2. **Possibly Faster Resolution:** Focusing solely on bankruptcy, BAPs can potentially provide quicker outcomes.
3. **Enriching Bankruptcy Jurisprudence:** Decisions from BAPs may contribute to the evolution of bankruptcy legal principles.

### Disadvantages:

1. **Limited Reach:** BAPs are not available across all judicial districts.
2. **Reduced Precedential Impact:** Their decisions might have less influence compared to those from District or Circuit Courts. [I'd omit this]
3. **May be less likely to buck “conventional wisdom”**
4. **May have to travel for argument**

## Section 3: Direct Appeals to the Circuit Court

### Advantages:

1. **Authoritative Stance:** Circuit Court rulings are highly impactful and set substantial legal precedents.
2. **Definitive Resolution:** These decisions generally represent the concluding judgement, offering finality.
3. **Comprehensive Legal View:** Circuit Courts consider a broader range of legal principles, extending beyond bankruptcy law.

### Disadvantages:

1. **Strict Admission Criteria:** Only cases of major public interest or lacking clear precedent are typically accepted for direct appeal.
2. **Increased Complexity and Expense:** Preparing for an appeal here demands more intricate legal work and resources. See Fed. R. Bankr. P. 8006 for the requirements for requesting a direct appeal.

3. **Generalist Approach:** Judges might not possess the specialized bankruptcy law knowledge found in BAP judges. Can be an advantage.

### Post-Filing Procedures and Timelines

1. **Deadlines for Appellants and Appellees:** The appellant must submit specific items within 14 days following the effective appeal notice or the order granting appeal permission. This includes a record designation and issue statement, along with transcript arrangements. The appellee has similar deadlines for additional record items and transcripts. These actions are governed by Rules 8009(a) and (b) of the Federal Rules of Bankruptcy Procedure.
2. **The Record on Appeal must include the following:**
  1. Docket entries kept by the bankruptcy clerk;
  2. Items designated by the parties;
  3. The notice of appeal;
  4. The judgment, order, or decree being appealed;
  5. Any order granting leave to appeal;
  6. Any certification required for a direct appeal to the court of appeals;
  7. Any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings;
  8. Any transcript ordered under subdivision (b);
  9. Any statement required by subdivision (c); and
  10. Any additional items from the record that the court where the appeal is pending orders.
3. **Briefing Requirements in BAP or District Court:** Once the appeal record is complete, parties are notified of the deadlines to submit their briefs. [may only get notice that record is transmitted or available] These documents must adhere to detailed content guidelines as outlined in Rules 8014(a) and (b), including jurisdictional statements, content tables, argument summaries, and compliance certifications. The appellant may also file a reply brief.
4. **Citing Additional Authorities:** Both parties can inform the court about new relevant legal authorities, subject to specific word limits and response requirements, as per Federal Rules of Bankruptcy Procedure 8014(f) and Federal Rules of Appellate Procedure 28(j).

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<sup>i</sup> Check the fee schedule for any recent changes. As of the publication of this article and pursuant to the Bankruptcy Court Miscellaneous Fee Schedule located at [Bankruptcy Court Miscellaneous Fee Schedule | United States Courts \(uscourts.gov\)](https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule) <https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule>:

For filing an appeal or cross appeal from a judgment, order, or decree, \$293.

This fee is collected in addition to the statutory fee of \$5 that is collected under 28 U.S.C. § 1930 (c) when a notice of appeal is filed.

Parties filing a joint notice of appeal should pay only one fee.

If a trustee or debtor-in-possession is the appellant, the fee must be paid only by the estate, to the extent there is an estate.

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Upon notice from the court of appeals that a direct appeal or direct cross-appeal has been authorized, an additional fee of \$307 must be collected.