

INTERNAL OPERATING PROCEDURES MANUAL

OF THE

UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE EIGHTH CIRCUIT

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*Revised February 2021*

# INTERNAL OPERATING PROCEDURES MANUAL

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## I. Court Administration

### A. Establishment of the Bankruptcy Appellate Panel

Pursuant to 28 U.S.C. §158(b)(1), as amended by the Bankruptcy Reform Act of 1994, Pub.L. 103-394, October 22, 1994, 108 Stat. 4106, the Judicial Council of the Eighth Circuit established the Bankruptcy Appellate Panel. The Court began its work on January 1, 1997.

The six judges of the Court are appointed for terms of seven years. The Judicial Council may also appoint bankruptcy judges to sit as pro tem members of the court as the need arises. The chief judge of the Court is designated by the Chief Judge of the Court of Appeals. The chief judge of the Court serves as the chief judicial officer of the Court.

The members of the Court are:

Chief Judge Charles L. Nail, Jr. (Sioux Falls, South Dakota)

Judge Barry S. Schermer (St. Louis, Missouri)

Judge Thomas L. Saladino (Omaha, Nebraska)

Judge Anita L. Shodeen (Des Moines, Iowa)

Judge Dennis R. Dow (Kansas City, Missouri)

Judge Michael E. Ridgway (Minneapolis, Minnesota)

The Court was authorized to establish and promulgate rules, subject to the review and approval of the Judicial Council. The Court's first rules were approved by the Council on December 30, 1996 and became effective January 1, 1997. The rules were revised on July 20, 2010, July 21, 2014, December 1, 2014 and November 1, 2016.

### B. Clerk's Office

The Court's administrative office is located in the United States Court of Appeals for the Eighth Circuit's Clerk's office, and the Clerk of the Court of Appeals serves as the Clerk for the Bankruptcy Appellate Panel. Correspondence may be addressed to the Court, care of the Clerk, at 111 S. Tenth Street, 24<sup>th</sup> Floor, St. Louis, Missouri, 63102.

The Clerk of Court receives, processes and disseminates to the judges and the parties, case filings and official court actions. The Clerk is assisted by a deputy clerk, Ms. Cindy Harrison, who serves as the coordinator for the court's cases, pleadings,

calendar and opinions. The Clerk's Office is open from 8:00 a.m. to 4:30 p.m., Monday through Friday. The phone number is 314-244-2430.

The Clerk and the Coordinator welcome questions concerning court policies and procedures, case status, and the federal and local rules. The Clerk will also assist counsel and pro se litigants in resolving procedural problems which arise during the appellate process. All communications with the Court should be through the Clerk's Office; counsel and parties should not contact the Court members directly about any pending matter.

#### C. Electronic Access to Court Information

Opinions, statistical reports, calendar of cases scheduled for oral argument and rules are available on the court's website. Docket sheets, pleadings and pending case information are available on this site through PACER. The court's web site address is <http://www.ca8.uscourts.gov>

#### D. Electronic Filing

The court requires filings to be made by means of the Court's electronic case filing system (CM/ECF). Use of the system is mandatory for all filers in this court, unless they are granted an exemption. Registration shall be required to obtain a login and password for use of the electronic case filing system.

To register, go to:

<http://www.ca8.uscourts.gov/CMECF-Information>

and click on "ECF Registration".

Computer-based training modules explaining CM/ECF, PACER reports and document filing in the Eighth Circuit are available on the court's website. **The court strongly encourages all filers to review these training materials.**

A form for exemptions to electronic filing is available from the clerk's office and from the "Forms" Section of the court's website. Exemptions will only be granted for good cause. The clerk is authorized to determine when to grant an exemption and whether and when to allow a non-exempt attorney or party to file a document in paper format.

A filing in electronic format constitutes the official record in the appeal. Filers should not submit paper copies of any documents filed through CM/ECF.

Questions concerning the system, attorney registration and attorney exemptions should be directed to the clerk's office.

## II. Geographic Composition and Facilities

The Bankruptcy Appellate Panel for the Eighth Circuit hears appeals from bankruptcy court decisions from the ten federal districts of the Eighth Circuit.

The Court sits regularly in St. Louis, St. Paul, Kansas City, and Omaha and may conduct sessions in other cities in the circuit as the case load requires.

### III. Outline of Appeal Processing and Timeline for Appeals

#### A. Notice of Appeal

The notice of appeal from the decision of the bankruptcy court is filed with the bankruptcy court clerk. Pursuant to Fed.R.Bank.P.8002(a), the notice of appeal must be filed within 14 days of the entry of the judgment, order or decree appealed from. A cross-appeal (or other appeal) from the order must be filed within the original 14-day period or within 14 days of the first notice of appeal, whichever period expires last. Please note that certain timely post-judgment motions postpone the time for filing the notice of appeal. See Fed.R.Bankr.P.8002(b). U n d e r Fed.R.Bankr.P. 8002(b), a notice of appeal filed before disposition of the post-judgment motions listed in Fed.R.Bankr.P.8002(b) is ineffective until the entry of the order disposing of the last such motion. An amended notice of appeal must be filed after the bankruptcy court rules on such a motion if a party intends to challenge the order disposing of the post-judgment motion.

Upon receipt of the notice of appeal, the bankruptcy court clerk will promptly notify the Clerk of the Bankruptcy Appellate Panel of the filing. The Clerk of the Bankruptcy Appellate Panel will open an appeal file, assign a new case number, set a briefing schedule and notify the parties and the bankruptcy court of all of these actions. See L.R.BAP 8th Cir.R 8010 A(a), (c) and (d).

Other provisions in Fed.R.Bankr.P.8002(d) deal with late notices of appeal and extensions of time to file a late appeal. Please note that all requests for leave to file a late notice of appeal are directed to the bankruptcy court from which the appeal is taken.

#### B. Briefing Schedule

Upon receipt of the notice of appeal from the bankruptcy court, the Clerk of the Bankruptcy Appellate Panel will open a new appeal and enter a briefing schedule order for the case. In preparing their case, counsel should take note of the following points:

1. Transcripts. If a transcript of proceedings before the bankruptcy court is required for the appeal, appellant's counsel must order the transcript within 14 days of filing the notice of appeal. See Fed.R.Bankr.P. 8009 . Counsel should make a written or electronic request for preparation of the transcript and serve the request on the reporter, opposing counsel and the Clerk of the Bankruptcy Appellate Panel. If a transcript will not be ordered,

counsel should notify the Bankruptcy Appellate Panel Clerk in writing. Unless counsel show that the transcript was ordered on a timely basis and that proper arrangements were made for payment, extensions of time for filing the brief grounded on lack of a transcript may be denied. Counsel will not be allowed to buy additional time to prepare their brief by delaying the preparation of the transcript.

Fed.R.Bankr.P.8010 (a) provides that the court reporter shall complete the transcript within 30 days of receipt of the order. If the transcript cannot be completed within 30 days, the court reporter must file a motion with the Clerk of the Bankruptcy Appellate Panel asking for an extension of time. If the extension of time is granted, the Clerk will also amend the due dates for the parties' briefs.

2. The Record on Appeal. The Court will review the case through the bankruptcy court's electronic docket instead of the appendix required by Fed.R.Bankr.P. 8015 and 8018; accordingly, neither side should prepare an appendix.

3. Exhibits. Original exhibits which are not available electronically through the bankruptcy court's docket must be scanned by counsel and filed electronically on the Bankruptcy Appellate Panel's CM/ECF system.

4. Briefing Schedules. For the purpose of establishing a briefing schedule in the appeal, the Bankruptcy Appellate Panel considers the record to be complete when the Clerk of the Bankruptcy Appellate Panel receives the notice of the appeal. At the time the new appeal is opened on the court's docket, the Clerk will routinely establish a briefing schedule.

If a transcript is required in the appeal, the transcript will be due approximately 30 days from the date the new appeal is opened. Appellant's brief will be due 30 days after the transcript due date. Appellee's brief will be due 30 days from the date of service of the appellant's brief. Appellant's reply brief will be due within 14 days of the service of the appellee's brief.

In the event of a cross-appeal, the appellant/cross-appellee's reply brief will be due 30 days from service of the appellee/cross-appellant's brief. Appellee/cross-appellant's reply brief will be due 14 days from the date of service of the appellant/cross-appellee's brief. In cross-appeals, the Bankruptcy Appellate Panel Clerk will designate which party will be the appellant and which party will be the cross-appellant.

In cases where no transcript is required, the appellant's brief will be due 30 days from the date of the issuance of the briefing schedule order. Appellee's brief will be due 14 days thereafter, and appellant's reply brief will be due 14 days after service of appellee's brief.

#### C. Disposition

The Court has made a commitment to decide every case within 60 days of submission. The Clerk will transmit notice of all judgments and orders on the day of their entry.

#### D. Rehearing

All motions for rehearing must be filed within 14 days of the date of the Court's opinion and judgment. The three-judge panel which issued the decision in the appeal will rule on the motion for rehearing.

#### E. Timelines

The following sample timelines are intended to serve as examples of the time it will take to complete the various phases of the appellate process. Please note that many dates may be advanced either because counsel act more promptly or because the Court is able to reach the case for hearing and decision more quickly. Likewise, in the event of extensions or requests for continuances, a case may take longer to complete the appellate process.

##### 1. Sample Timeline for an appeal with transcript:

Day 1 - Notice of Appeal filed.

Day 3 - Bankruptcy Appellate Panel Clerk enters briefing schedule.

Day 14 - On or before this day, appellant must order the transcript and notify the court reporter, opposing counsel and the clerk of the Bankruptcy Appellate Panel that the transcript has been ordered.

Day 30 - The transcript is filed with the Clerk of the bankruptcy court and transmitted to the Clerk of the Bankruptcy Appellate Panel.

Day 60 - Appellant's brief is filed.

Day 90 - Appellee's brief is filed.

Day 104 - Appellant's reply brief is filed.

Day 160 - The case is argued.  
Day 210 - The Court issues its opinion.  
Day 224 - Motion for rehearing is filed.  
Day 230 - Motion for rehearing is decided.

2. Sample timeline for an appeal without a transcript:

Day 1 - Notice of appeal filed.  
Day 3 - Bankruptcy Appellate Panel Clerk enters briefing schedule.  
Day 33 - Appellant's brief is filed.  
Day 63 - Appellee's brief is filed.  
Day 77 - Appellant's reply brief is filed.  
Day 133 - The case is argued.  
Day 183 - The Court issues its opinion.  
Day 197 - Motion for rehearing is filed.  
Day 203 - Motion for rehearing is decided.

#### IV. Motion Practice

Eighth Circuit Bankruptcy Appellate Panel Local Rule 8013A governs motion practice before the Bankruptcy Appellate Panel. The following information is provided to assist counsel in presenting motions to the Court.

All motions should be filed with the Clerk's Office in St. Louis. Motions must be filed electronically on the court's CM/ECF site. Requests for extensions of time to file briefs and motions for rehearing may be submitted in letter form. However, the letter must comply with the requirements of L.R.BAP 8th Cir.8013A(c).

Most extension requests will be processed within 48 hours of receipt. Responses to motions for an extension of time are discouraged; as L.R.BAP 8th Cir.8013A(c) indicates, the Clerk will not wait for a response before processing a request for an extension of time. If counsel intend to oppose the motion, they should contact the Clerk by phone and indicate that they are filing a response. When such a call is received, the Clerk will hold the motion. If no response is filed within two days of the filing of the motion, the motion will be processed without further delay.

Extensions of time to file a brief will be limited to fourteen days. Longer extensions will rarely be granted and then only for exceptional cause. The press of other business, vacations, and complexity of the case will generally not be considered exceptional cause for a longer extension. The Clerk has delegated authority to rule on first requests for extensions of time to the Court Coordinator. Subsequent requests for extension of time may be referred to the Clerk.

Motions for relief and memoranda in support may be combined into a single document.

## V. Briefs

### A. Scheduling Orders

When an appeal is docketed, the Bankruptcy Appellate Panel Clerk will notify the parties and issue a briefing schedule to all counsel establishing the time for filing briefs. Generally, if no transcript is required, the schedule will call for appellant's brief to be filed within 30 days of the date of the docketing notice; appellee's brief will be due 30 days after service of appellant's brief. Appellant's reply brief is due 14 days after service of appellee's brief. See Fed.R.Bankr.P.8018(a) .

If a transcript is required, the schedule will include a date for completion of the transcript. Appellant's brief will be due 30 days after the due date set for completion of the transcript.

Please refer to Section III, "Outline of Appeals Processing and Timelines for Appeals", for further information on schedules and for sample timelines.

### B. Form, Content and Number

1. General Information. The requirements concerning the form, content and length of briefs are set out in Fed.R.Bankr.P.8014 and 8015 and L.R.BAP 8th Cir. 8014A and 8015A . The Clerk will check briefs at the time of filing for compliance with the Rule, and in the event a brief is not in compliance, the Clerk will notify counsel and ask for corrections to be made.

2. Covers. Briefs should not have colored covers. The cover should contain the following information to assist in proper filing and case identification:

- case number assigned by the Bankruptcy Appellate Panel; the name of the court (i.e., Bankruptcy Appellate Panel for the Eighth Circuit);
- the title of the case;
- the bankruptcy court from which the case is appealed;
- the title of the document (e.g., Appellant's Brief);
- the name, office address and telephone number of counsel representing the party for whom the document is filed.

3. Type and other style elements:

- Use a standard font. Courier and Times New Roman are the two fonts most commonly used in legal documents, and either typeface produces clear, easily-read documents.

- Type size should be 14 point. Footnotes should be the same size and type as the text of the brief.
- Brief text should be double-spaced, while headings and footnotes should be single-spaced. Longer quotations may also be single-spaced.
- Number each page, preferably at center bottom.
- Hand written briefs should be prepared with dark ink on white paper. Hand-written briefs which are illegible may be stricken, so print or write clearly.

4. Electronic filing of briefs. File all briefs electronically through CM/ECF. Serve one paper copy of the brief on any party not a CM/ECF participant; include a proof of service on such briefs.

5. Sample briefs. The Bankruptcy Appellate Panel Clerk will provide sample briefs upon request.

#### C. Function

The brief serves two main purposes. First, it prepares the Court for oral argument and decision by outlining the case and presenting the arguments. Second, the brief is an important source of information for the Court; as such, factual statements and other references should be properly documented with appropriate record citations.

#### D. Form of Record References

References to transcripts should be in the form "TR(volume number)(page number)", e.g. TR. Vol. II, p.157. Reference to the bankruptcy court docket should be in the form "(name of document)(document number)", e.g. First Amended Complaint, #42.

## VI. Screening

Upon filing of a brief, counsel will be given an opportunity to request that either oral argument be held in the case or that it be submitted on the briefs and record without oral argument.

The Clerk of Court will then screen the case to determine whether or not oral argument should be granted, and, if so, how much time should be assigned for presentation of the argument. Cases may be screened for disposition without oral argument, for abbreviated argument or for full argument. Cases screened for full argument will be allotted 15 minutes per side. Extended arguments of 20 minutes or more per side may occasionally be granted. The panel of judges assigned to hear the case may alter the initial time assignment made by the Clerk or may classify the case for submission without oral argument. The Clerk will notify counsel of all reclassification decisions. Counsel's decision to waive oral argument is only one factor in determining whether oral argument is granted. While significant weight will be given to a waiver of argument (particularly if both sides waive argument), counsel's waiver is not determinative.

In order to expedite the submission of appeals to the Court, cases will normally be screened upon the filing of appellee's brief. The Clerk will review the briefs, the bankruptcy court decision and such parts of the record as may be required to determine the procedural posture of the case and the nature and complexity of the issues presented. If a case is screened for oral argument, the Clerk will make a time allocation and direct that the case be placed in the pool of cases ready for oral argument.

As soon as a case is screened for oral argument, the Clerk will begin work on assigning a tentative date for the hearing. As a result, it is essential that all counsel notify the Clerk's Office of any conflicts as soon as the appellant's brief has been filed.

Oral argument will be allowed unless the three-judge argument panel, after examining the briefs and record, determines one of the following factors applies:

- the case is frivolous;
- the dispositive issue or set of issues has been decided authoritatively; or
- the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the decision-making process.

The Clerk will notify counsel when a case has been classified as suitable for disposition without oral argument. Any party may ask the Court to reconsider the decision and grant oral argument by filing a written request for reclassification.

## VII. Panels of the Bankruptcy Appellate Panel

Panels of three judges will decide most matters brought before the Bankruptcy Appellate Panel. There are three types of panels: argument panels, nonargument panels and administrative panels.

### A. Argument Panels

Three-judge panels, sometimes referred to as hearing panels, hear argued appeals. The members of these panels are assigned by the Clerk. In addition to the six judges of the Bankruptcy Appellate Panel, bankruptcy judges who received pro tem assignment to the Court may also serve on the hearing panels. Judges will not sit on cases arising from their home districts. The Clerk selects the members of the argument panel and designates one of the judges to serve as the presiding judge of the panel. In addition to presiding at the hearing, the presiding judge also performs certain administrative duties, such as coordinating votes on motions filed before or after the argument.

The Court will strive to hear oral argument within 60 days of the filing of the appellee's brief. The Clerk's Office will notify counsel that a case is to be argued approximately two months in advance of the actual argument date. The judges do not participate in the case-assignment process. The judges receive the briefs and record materials before the argument. After reading the briefs, the argument panel, by unanimous agreement, may decide that a case can be decided on the briefs and record without oral argument. In such an event, the Clerk will notify counsel that the case is to be submitted without oral argument. Counsel may object to the no-argument classification by sending a letter to the Clerk. The objection will be presented to the argument panel for review.

Composition of the argument panels changes constantly, making rescheduling of cases difficult. Once appellant's brief has been filed, all counsel should notify the Clerk of potential conflicts and excluded dates. If the Clerk receives timely notice of conflicts, every effort will be made to accommodate counsel's schedule.

The number, timing, and location of the argument sessions will be based on the pending case load. The Bankruptcy Appellate Panel has instructed the Clerk that arguments are to be scheduled promptly. In most instances, the argument panel will travel to the district from which the case arises to hear the argument.

## B. Nonargument Panels

Not every case which comes before the Bankruptcy Appellate Panel will be argued. In some cases, counsel may waive argument; in other instances, the Court may determine the issues are well-developed and the record clear and that the case would not benefit from an oral argument. The Clerk will make the initial determination as to whether oral argument is necessary (see Section VI, "Screening"). Counsel will be notified of the decision to classify a case for submission without oral argument and may object to the classification by sending a letter to the Clerk. All objections to no-argument classification will be referred to the three-judge panel assigned to the case.

When a case has been screened for submission without oral argument, it will be referred to a three-judge panel randomly selected by the Clerk for the preparation of an opinion and judgment. After review of the record and briefs, any judge on the panel may overrule the Clerk's initial determination and direct that the case be scheduled for oral argument. In the event a case is re-designated for oral argument, the nonargument panel to which the case was initially assigned will usually be the argument panel. In the event the panel reclassifies the case for oral argument, the Clerk will notify counsel of the change. If the screening panel accepts the Clerk's nonargument classification, or if it denies the objection to nonargument classification, the panel will proceed to prepare and issue an opinion based on the briefs and record.

## C. Administrative Panels

Three-judge administrative panels decide pre-submission motions and other preliminary issues (such as jurisdiction over the appeal) the Clerk is not authorized to handle. See L.R.BAP 8th Cir.8013A. Stay motions and other emergency matters will also be submitted to three-judge panels in accordance with the local rule.

## VIII. Oral Argument

Once a case is fully briefed, the Clerk refers it to the three judges designated to hear the case. All judges on the argument panel will read the briefs and review the record before the argument. Counsel should be prepared to answer questions (as opposed to delivering a monologue) because all of the members of the argument panel are familiar with the case by the time of the oral argument.

When the Clerk sends counsel notice of the scheduled argument, the calendar notice will contain the names of the judges assigned to hear the case. The calendar notice will also contain an acknowledgment form for counsel to return to the Clerk; this form verifies receipt of the calendar and confirms the attorney information for each party. Counsel should promptly return the calendar acknowledgment form. Counsel should also carefully check the date, time and location of the argument.

On the day of the argument, counsel must report to the designated court location at least 30 minutes before court convenes. At the time of check-in, counsel must advise the courtroom deputy of the name of the attorney or attorneys who will argue for each party and the apportionment of time. Appellants are allowed to apportion their time between opening argument and rebuttal. In the event of multiple parties, counsel must apportion their time among themselves so that the total time taken does not exceed that allotted for that side of the case. Prompt check-in allows an opportunity to resolve any problems concerning apportionment of time. It also permits the courtroom deputy to prepare the daily docket for the argument panel before court begins, give last-minute directions, and answer questions.

When court convenes, the courtroom deputy will call the calendar of cases scheduled for argument and submission. Counsel should be present at the call of the docket so that they are aware of any changes in the order of the cases to be presented. Counsel for the first case on the docket should take their places at counsel table before the docket is called. The Court does not designate tables as appellant's side or appellee's side.

Each judge will be identified by a nameplate on the bench. The presiding judge will be seated in the center seat of the bench and will control the presentation of the cases and give directions concerning recesses and other procedural or administrative matters.

The Court records all oral arguments digitally. Anyone wishing to obtain a copy of the tape may download it from the Eighth Circuit's website.

The Court utilizes a lighting system to signal when argument is complete. Generally, counsel may request a white light as a warning that the allotted time is nearing expiration. Appellant may request a white light as a notice that the time reserved for opening argument has expired. Any time appellant uses after the white light is turned on will be deducted from the time reserved for rebuttal. When a red light comes on, all of the time allotted for argument has expired. Counsel should promptly finish speaking and be seated, unless invited to continue by the presiding judge.

When counsel approach the podium to present argument, it is appropriate to wait for the acknowledgment of the presiding judge before beginning the presentation. Attorneys should introduce themselves and indicate the name of the party they represent before they begin their presentation.

Counsel should minimize multiple attorney presentations. Reading from briefs or decisions and reciting long portions of the record are strongly discouraged.

## IX. Deciding the Appeal

### A. Case Conference

The Court will rarely rule from the bench. The argument panel ordinarily takes the cases argued under submission and holds a conference at the conclusion of the day's oral arguments, reaching a tentative decision in each case. The presiding judge of the panel assigns each case for preparation of a signed opinion, a per curiam opinion, or a dispositive order. The judge to whom the case is assigned circulates a proposed opinion or order to the other two members of the argument panel who may approve, offer suggestions or circulate a concurring or dissenting opinion. When at least two members of the argument panel approve the proposed opinion or order and the third judge either joins or prepares a separate opinion, the decision is sent to the Clerk for issuance and distribution. The Court is committed to issuing all of its opinions and orders within sixty days after argument.

### B. Publication of Opinions

The panel which issues an opinion or order will determine whether its opinion will be published or unpublished. Generally, all opinions will be published, although a panel retains the discretion to designate one as unpublished. Counsel may ask the Court to reclassify an unpublished opinion for publication by sending the Clerk of the Court a letter setting forth the grounds for publication.

### C. Access to Opinions

On the day the opinion is issued, the Clerk will send a copy of the opinion to all attorneys who have entered an appearance and to parties proceeding pro se. Opinions will be issued at 10:00 a.m. The Eighth Circuit's branch libraries have copies of all opinions available for inspection and copying. Copies of all published opinions are also forwarded to West Publications.

Additionally, the Court offers access to its opinions through the Eighth Circuit's website. Opinions are downloaded daily at approximately 10:15 a.m.

## X. Attorneys

### A. Admission to Practice

The Court will not maintain a separate roll of attorneys admitted to practice before it. Any attorney admitted to practice before the United States Court of Appeals for the Eighth Circuit may practice before the Court. Counsel not currently admitted to the Eighth Circuit's bar may obtain an enrollment form from the Clerk's office by calling (314)244-2400 or writing to the Clerk and requesting an admission form. Counsel may also download admission enrollment forms from the Court's website. Counsel may file pleadings without being a member of the bar, but membership in the bar will be required to present oral argument before the Court.

### B. Entry of Appearance

The Clerk must be informed of the names, addresses, and phone and facsimile numbers of the attorneys participating in the case in order to assure that all counsel receive timely notice of the Court's actions. Counsel who represent a party on appeal must enter an appearance with the Clerk, either on the form provided on the court's website or by letter.

Counsel should complete the appearance form and immediately file it; early filing of the form ensures prompt communications throughout the appellate process. Individual rather than firm names should be listed on the form.