

Bankruptcy Appellate Panel for the Sixth Circuit: A Helpful MAP for Understanding BAP

Chief Judge Alan C. Stout

A Bankruptcy Appellate Panel, or “BAP,” is authorized by 28 U.S.C. § 158 (b) to hear, with consent of all the parties, appeals from bankruptcy courts that otherwise would be heard by district courts, but only in those districts in which the district judges authorize appeals to BAPs. BAPs were originally created by the Bankruptcy Reform Act of 1978, and the first BAP was established in the Ninth Circuit in 1979.

Currently, only the First, Sixth, Eighth, Ninth and Tenth Circuits have BAPs. In the Sixth Circuit, there are six bankruptcy judges currently sitting on the BAP: Chief Judge Randal S. Mashburn (Middle District of Tennessee), Judge Jimmy L. Croom (Western District of Tennessee), Chief Judge Suzanne H. Bauknight (Eastern District of Tennessee), Judge Alan C. Stout (Western District of Kentucky), Judge John P. Gustafson (Northern District of Ohio) and Judge John T. Gregg (Western District of Michigan).

The Sixth Circuit BAP’s case administration, from filing to oral arguments, typically goes as follows. First, the clerk’s office docket the appeal or motion for leave to appeal once it is filed. An appellant may elect at the time of filing to have the appeal heard by the appropriate district court. The ap-

pellee is allowed thirty days from service of notice of the appeal to elect to have the appeal heard by the district court (the opt-out period can be waived). 28 U.S.C. § 158(c)(1). Next, the clerk’s office sets the initial briefing schedule. This may include ruling on preliminary non-substantive motions, such as requests for briefing extensions. The BAP members (three per appeal) are then assigned by a blind draw after the appellant’s brief is filed, or a motion is filed which requires a Panel decision. To avoid conflicts, any judge sitting in the district where the appeal originated is excepted from the draw for that appeal.

Appeals may be mediated before the BAP ever needs to resolve the dispute. All appeals are referred for mediation, except those involving *pro se* parties and those in which there is no appellee. The mediation office can extend the briefing schedule without the Panel’s involvement. The mediation office also communicates the status of the mediation for the Panel’s information, particularly in cases fully briefed or where dispositive motions are pending.

Assuming mediation is unsuccessful, the parties may want to present oral arguments before the Panel. Oral arguments are scheduled four times a year. Typically, they are set on or near the second Tuesday of February, May, August and November. The time and place for holding oral arguments is decided one month prior to the next available date for scheduling oral arguments via conference call. The location is typically chosen during the prior BAP meeting session, if not earlier. Oral argument may be waived upon written stipulation of the parties unless the Panel orders otherwise.

Then comes the decision-making process.

The Panel agrees upon an authoring judge following oral argument or submission on briefs. On average, written opinions are published two to six months after oral argument or submission. These opinions may be deemed “RECOMMENDED FOR PUBLICATION” or “NOT RECOMMENDED FOR PUBLICATION.” The entire appeals process generally takes approximately six to nine months (or faster if oral argument is waived by the parties).

Statistically, in the Sixth Circuit as a whole, appellants choose the BAP approximately 65% of the time in first instance. Only approximately 8% of appellees opted out of the BAP and had their case transferred to the District Court. The Sixth Circuit BAP affirms the lower bankruptcy court’s decision approximately 65% of the time. Approximately 34% of BAP decisions are further appealed to the Sixth Circuit, which affirms the BAP’s rulings approximately 84% of the time.

There are several common problems that arise at the BAP appellate level:

- Failure to File Forms in the Bankruptcy Court: Appellants are required to pay the filing fee in the bankruptcy court, as well as file a statement of issues and a designation of record, which are then transmitted to the BAP from the bankruptcy court. Cases may be dismissed for failure to prosecute if these forms are not properly filed.
- Failure to Designate the District Court as Choice of Forum: Appellants must actively choose the District Court by selecting it on their Notice of Appeal, or the appeal will be heard by the BAP unless the Appellee opts out.
- Failure to Provide Transcripts or Designate a Complete Record: An appeal is less likely to succeed (and may be dismissed) if the Panel is not provided with all related documentation.

- Filing a Notice of Appeal and Motion for Reconsideration at the Same Time: Filing a motion to alter or amend a

judgment tolls the time for filing a notice of appeal. The bankruptcy court retains jurisdiction over the motion, and the notice of appeal is not effective until the motion for reconsideration is ruled upon. Therefore, filing both at the same time creates unnecessary confusion and possible delays.

- Corporate or Business Entities Attempting to File a *Pro Se* Appeal: Corporations and the like require representation by counsel. They cannot be *pro se*.
- Failure to Offer a Viable, or even Comprehensible, Argument: The BAP cannot make a party’s argument for them. Thus, parties should try to make their filings as clear as possible and include correct citations to recent case law.

For more information on BAP Rules and Regulations, please visit the following sources:

- Sixth Circuit United States Court of Appeals website (contains general BAP info, e.g. judges, calendar, opinions search, forms, procedures and rules) available at: <https://www.ca6.uscourts.gov/bankruptcy-appellate-panel>
- General information regarding BAP appeals PDF (contains details re: BAP filing fee, supporting documents, electronic filing) available at: <https://www.ca6.uscourts.gov/sites/ca6/files/documents/bap/General%20Information%20Regarding%20BAP%20Appeals.pdf>
- BAP Local Rules PDF (contains all local rules applicable to BAP cases) available at: <https://www.ca6.uscourts.gov/sites/ca6/files/documents/bap/BapLocalRules.pdf>

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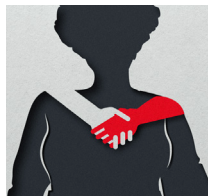
Judge Alan C. Stout was appointed U.S. Bankruptcy Judge for the Western District of Kentucky in 2011 and was appointed Chief Judge in 2020. Judge Stout holds court in Louisville and Paducah. In 2022, Judge Stout was appointed to the Sixth Circuit Bankruptcy Appellate Panel (BAP). He is a member of the National Conference of Bankruptcy Judges (NCBJ) and currently serves on the Legislative Committee. ■



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