

APPEALS

Timely filing of an appeal is critical. An appellate court lacks jurisdiction to consider a late-filed appeal.

- Be sure to correctly calculate the time for appeal. It varies by court and jurisdiction (federal and among the states), and the appeal period from a bankruptcy court decision is short.

If you miss a deadline, you have a short window of time to ask for leave to file a tardy notice of appeal in some cases. See FRBP 8002(d); FRAP 4(a)(5). See FRBP 8002(d)(2) for instances where at time extension is not available. The standard is excusable neglect. But don't assume that a last-minute computer problem is going to get you an extension. Never file at the last minute!

- If in doubt – file early – but be careful.

On an appeal from the bankruptcy court, carefully consider your three options:

- Bankruptcy appellate panel;
- District court; and
- Direct appeal to Ninth Circuit.

Carefully assess your chances on appeal before you commit your client to a costly battle.

- What is the standard of review? Legal issues generally allow for de novo review, this offers a good opportunity to reargue a critical point of law. But abuse of discretion determinations or alleged error in factual findings may present an uphill battle. Make sure you have a theory beyond healthy chagrin. And even clear error may not get you a reversal if the error is harmless.

Make sure you actually argued the issue in the initially deciding court. (And argue it again in your opening brief). Appeal is not a good place to attempt a sneak attack.

- Having said the above, you may be successful raising a new legal issue in your opening brief.

Certain motions toll the time for appeal. See FRBP 8002(b); FRAP 4(a)(4). But they should not be filed reflexively. And while a Rule 60 motion may provide an additional option for appeal, an appeal from a denied rule 60 motion isn't going to get the merits of the matter before an appellate court in most (any) cases.

Make sure that you are appealing where you should - or have a reason for asking for immediate appellate review.

- The order should be final. Except in rare circumstances an oral ruling or minute order is not a final judgment. Orders aren't final if a judgment is to follow.
- In bankruptcy cases "flexible finality" is a concept that may have applicability especially in the main case context.(Ritzen)
- The order should not be interlocutory. But you can ask for leave to appeal.

Have an appellate strategy before you argue the critical motion (or develop one quickly after defeat).

Additional Resources: Ninth Circuit Appellate Practice Guide, at <https://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf>

Ninth Circuit Standards of Review, at https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000368

Ninth Circuit FAQs, at <https://www.ca9.uscourts.gov/content/faq.php>

California Court of Appeal, 4th District (including San Diego) Practices and Procedures, at <https://www.courts.ca.gov/2834.htm>