



AMERICAN
BANKRUPTCY
INSTITUTE

Northeast Bankruptcy Conference & Consumer Forum

Consumer Track

Appeals

Hon. Peter G. Cary

U.S. Bankruptcy Court (D. Maine) | Portland

Prof. Christopher D. Hampson

University of Florida Levin College of Law | Gainesville, Fla.

Leslie C. Storm

U.S. Bankruptcy Appellate Panel (1st Cir.) | Boston

Hon. Eugene R. Wedoff (ret.)

Oak Park, Ill.

**BANKRUPTCY
APPEALS FOR
CONSUMER AND
SMALL BUSINESS
PRACTITIONERS**

**Northeast Bankruptcy
Conference & Northeast
Consumer Forum**

July 9, 2024 | North Falmouth, MA

Hon. Eugene R. Wedoff

U.S. Bankruptcy Court for the Northern District
of Illinois (Ret.)

Prof. Christopher D. Hampson

University of Florida Levin College of Law

Leslie Storm

Clerk of Court, U.S. Bankruptcy Appellate Panel
for the First Circuit

**How many bankruptcy appeals have
you previously filed?**

- a) none**
- b) 1-3**
- c) more than 3**



How many times have you represented an appellee in a bankruptcy appeal?

- a) none**
- b) 1-3**
- c) more than 3**



If you previously filed a bankruptcy appeal, where did you file it?

- a) District Court**
- b) BAP**
- c) Court of Appeals**

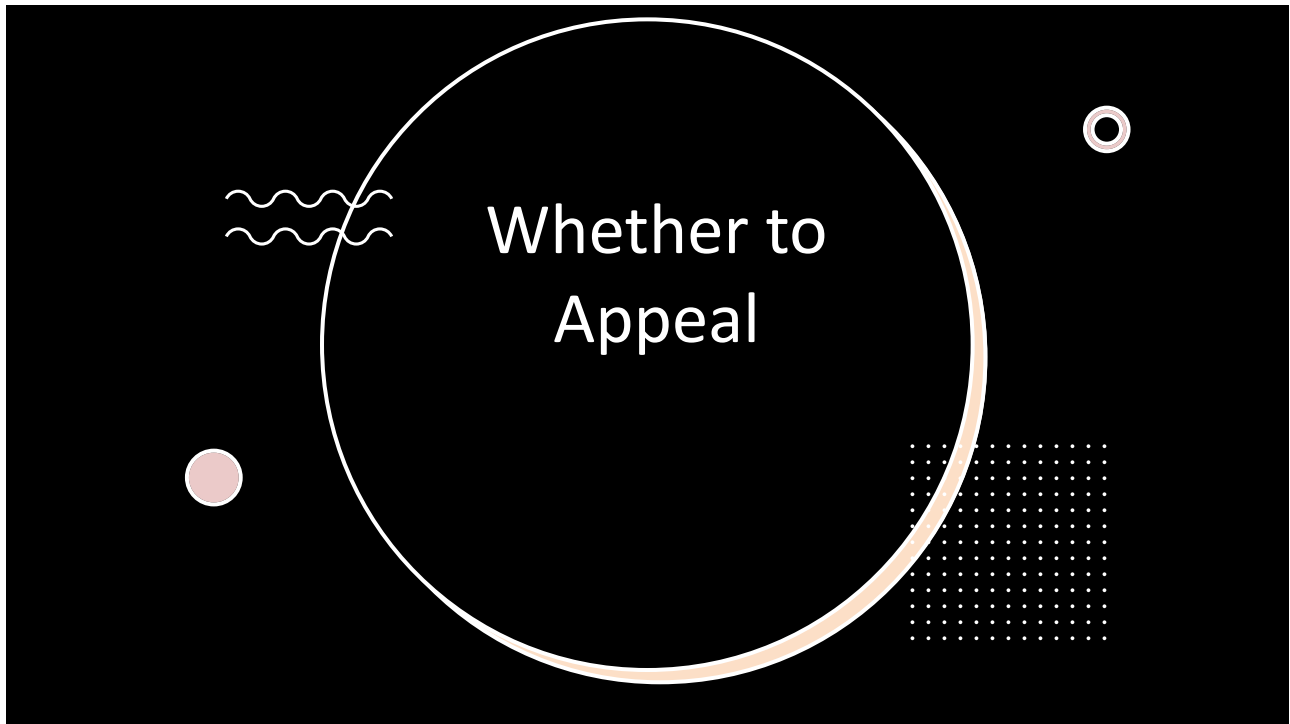
If you previously filed an appeal and elected to file at the district court, what was the reason:

- a) location of the courthouse**
- b) considerations relating to judges**
- c) considerations relating to timing**
- d) considerations relating to state law**
- e) other**

THE LIFESPAN OF AN APPEAL:

- 1). Whether to Appeal**
- 2). Traps to Avoid During Every Stage of the Life of Your Appeal**
- 3). Successful Briefing and Argument**





Should You Take an Appeal?



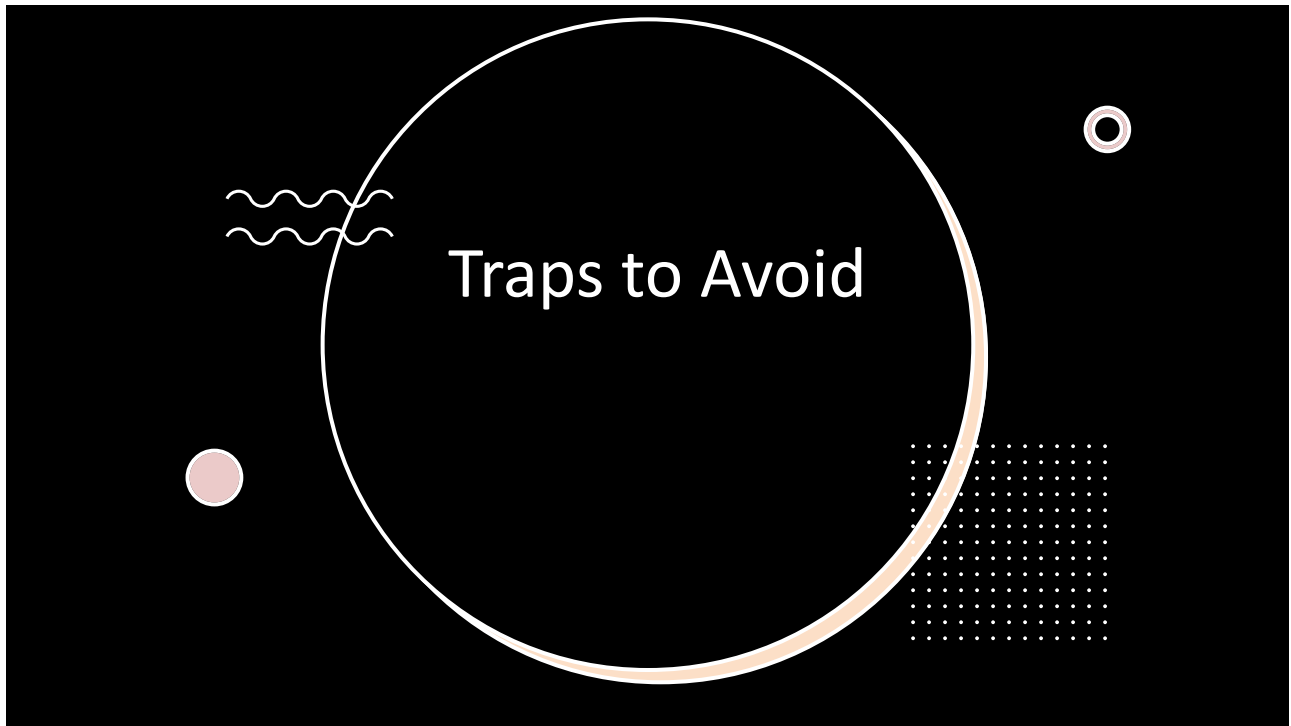
Likelihood of success: a particular concern when resources are tight. Weigh up the timing of the appeal, the merits, and the standard of review (*e.g.*, de novo, clear error, abuse of discretion).



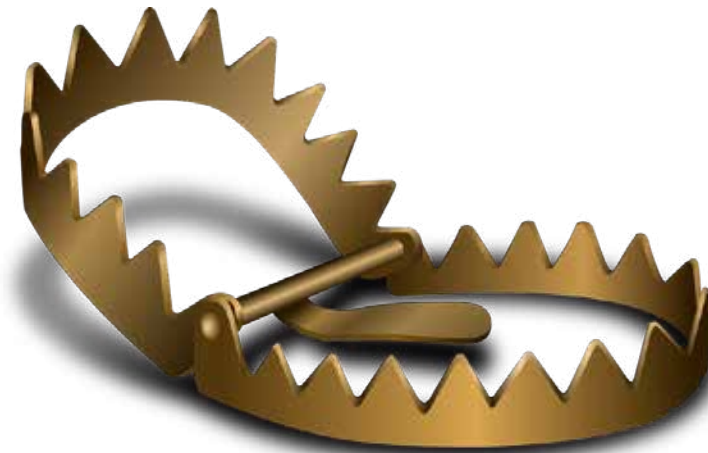
For *pro bono* appeals, consider whether (a) factual disputes will justify the work required; and (b) whether your appeal will result in wider application of an unfavorable interpretation of the law.



Effect on settlement: the client's interest must be paramount. Weigh up the length of the appeal and where the client's interests will be by the time the appellate court rules.



What Do We Mean By “Traps”?



Sample “Trap”

After entry of the bankruptcy court order, I must file my notice of appeal within:

7 days
14 days
30 days

Definition of “Traps”



Issues that can result in an unwanted complication or negative outcome on appeal that have nothing to do with the substantive merits of your case.



The unwanted complication or negative outcome can range from waiver of an issue to dismissal of the entire appeal.

Four Categories of Procedural Challenges

Bankruptcy Proceedings: It's never too early to start thinking about your possible appeal

The NOA

Navigating Jurisdictional Hurdles

Fulfilling Appellate Obligations: SOI, DOR, Briefing

Preserving Issues During Litigation in the Bankruptcy Court



When a party makes an argument for the first time in a motion for reconsideration, the argument is not preserved for appeal.



Arguments made for the first time on appeal are waived.

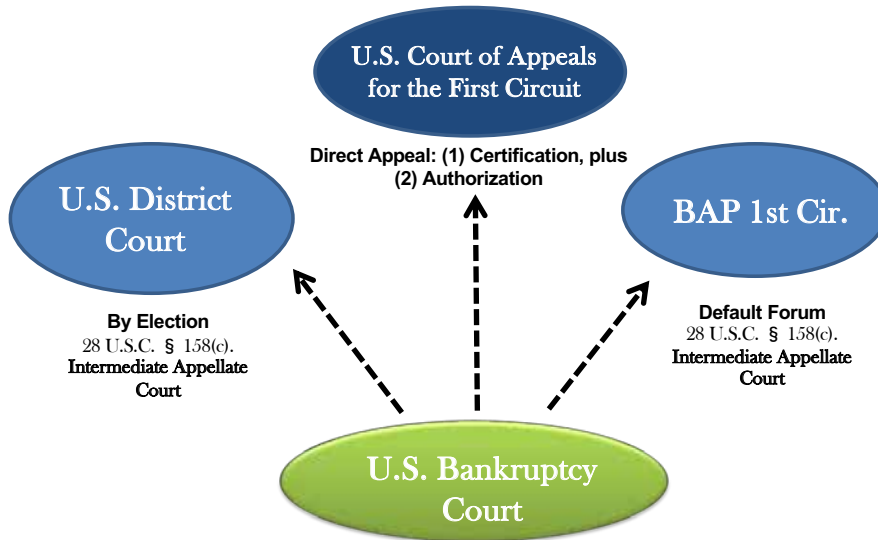


The reviewing court will not consider documents that were not presented to the bankruptcy court.



Practice Pointer: Strategize early! Failure to do so can result in the loss of rights.

Forum Selection



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Getting Started on the Right Foot: The NOA

Craft your notice of appeal with care.

Case Law says the reviewing court is not required to rescue a poorly drafted NOA by supplying orders the appellant intended to appeal but omitted, but amendments to Rule 8003 offer some relief.

Unlisted orders will be deemed waived.

List the underlying order and the order denying reconsideration in your notice of appeal.

Separate orders get separate NOA's (except for orders denying reconsideration).

Official Form 417A (12/21)

(Caption as in Form 416A, 416B, or 416D, as appropriate)

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s): _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding:	For appeals in a bankruptcy case and not in an adversary proceeding:
<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Debtor
<input type="checkbox"/> Defendant	<input type="checkbox"/> Creditor
<input type="checkbox"/> Other (specify): _____	<input type="checkbox"/> Trustee
	<input type="checkbox"/> Other (specify): _____

Part 2: Identify the subject of this appeal

1. Describe the judgment—or the appealable order or decree—from which the appeal is taken: _____

2. State the date on which the judgment—or the appealable order or decree—was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment—or the appealable order or decree—from which the appeal is taken and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary).

1. Party: _____ Attorney: _____

2. Party: _____ Attorney: _____

Official Form 417A Notice of Appeal and Statement of Election page 1

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Official Form 417A (12/21)

(Caption as in Form 416A, 416B, or 416D, as appropriate)

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List the names of all parties to the judgment—or the appealable order or decree—from which the appeal is taken and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary).

1. Party: _____ Attorney: _____

2. Party: _____ Attorney: _____

Official Form 417A Notice of Appeal and Statement of Election page 1

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JURISDICTIONAL HURDLES



Timeliness

Finality

Mootness

Standing

TIMELINESS 14-day Deadline for Filing NOA

- NOTE: the deadline is **not 30 days**, as when filing an appeal from a federal district court order.
- A late appeal will be **dismissed** for lack of jurisdiction
- If you need more time to file your NOA, file a motion for extension of time with the Bankruptcy Court *before* expiration of the deadline. Reference Fed. R. Bankr. P. 9006.



NAVIGATING FINALITY REQUIREMENT

By statute, the BAP and district courts have jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court.

Interlocutory orders may be heard only with leave of court.

Practice Pointer: If appealing an interlocutory order, file the NOA with a motion for leave to appeal. See Fed. R. Bankr. P. 8004(a). Otherwise: OSC or dismissal will result!

FINAL OR NOT?

- Order Extending the Deadline for Completing Discovery
- Order Granting Motion for Summary Judgment
- Order Sustaining or Overruling Objection to Proof of Claim
- Order Granting Motion for Relief from Stay
- Order Denying Motion for Relief from Stay



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WHAT TO INCLUDE IN A MOTION FOR LEAVE TO APPEAL

A request for leave to appeal should demonstrate that the reviewing court should exercise its discretion to hear an interlocutory appeal by invoking one of three doctrines.

What to Include in Motion for Leave to Appeal Interlocutory Order (cont'd)

1. **The collateral order doctrine** – whether order conclusively determined important legal question, separate from merits of primary action, and which is unreviewable on appeal.
2. **28 U.S.C. § 158(a)(3)** – controlling issue of law about which there is differing opinions and resolution of which would materially advance litigation.
3. **The Forgay-Conrad Doctrine** – whether order would result in irreparable injury to appellant if review is delayed. Usually, these orders direct the delivery of physical property.



NAVIGATING MOOTNESS



If mootness is present, the reviewing court may, and in some instances, must, decline to hear an appeal.



There are three types of mootness, all of which are alive and well in the First Circuit.



The BAP will frequently take up the issue of mootness sua sponte, and will issue an OSC directing the Appellant to demonstrate why the appeal should not be dismissed.

Recognizing Mootness

Statutory Mootness: Some sections of the Bankruptcy Code address mootness. *See, e.g.*, 11 U.S.C. §§ 363(m) and 364(e).

Prudential/Equitable Mootness: An appeal may be moot if the court, in its discretion, determines that effective relief is impracticable or unfair. *See In re López- Muñoz*, 983 F.3d 69 (1st Cir. 2020).

Constitutional/Jurisdictional Mootness: A change in circumstances prevents ability to grant relief.

TRUE/FALSE CHALLENGE

As long as I get my motion for stay pending appeal filed with the appellate court, my appeal will not be dismissed as moot.

- A) TRUE
- B) FALSE



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Practice Pointer:



To avoid mootness, appellants should file a Motion for Stay Pending Appeal.

Where: Ordinarily, file the motion first with the bankruptcy court.

When: Promptly!

Grounds: The grounds for obtaining a stay pending appeal are the same as for a preliminary injunction: (1) likelihood of success on merits; (2) whether movant will be irreparably harmed absent stay; (3) whether stay will harm other parties; and (4) whether the public interest lies

TRUE/FALSE CHALLENGE

All debtors have standing to appeal a bankruptcy court order affecting estate property.

- A) TRUE
- B) FALSE



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Navigating the Standing Requirement

- In the First Circuit, standing for bankruptcy appeals is conferred on **person aggrieved**; one whose **pecuniary interests** are affected.
- Examples of lack of standing:
 - A chapter 7 debtor appealing a settlement order.
 - Unsuccessful bidder appealing a sale order.

Standing (cont'd)

- What if you receive an OSC re Standing?
- Practice Pointer: You must demonstrate in your response that the appellant has suffered direct, measurable pecuniary harm that is neither contingent nor speculative.

WHAT NEXT?

Assuming the appellant has overcome the jurisdictional obstacles, the next set of mandatory obligations relate to:

A.) Identifying Issues on Appeal

B.) Designating the Record

C.) Briefing

TRUE/FALSE CHALLENGE

Even though I did not identify an issue in my statement of the issues on appeal, I can raise it in my appellate brief as long as it's relevant to my argument.

- A) TRUE
- B) FALSE



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Statement of Issues

File

File it timely or face a Conditional Order of Dismissal—SOI is due within 14 days after NOA.

List

List all the issues you intend to brief—an issue briefed but not listed in the SOI is at risk of being deemed waived.

See

See Fed. R. Bankr. P. 8009


Designation of the Record

The Appellant's Burden: designate a sufficient record to facilitate review

Consequence of an insufficient record: dismissal or summary affirmance

If there was a hearing, designate the transcript

See Fed. R. Bankr. P. 8009.



Successful Briefing and Argument

Briefing Obligations

Failure to brief an issue waives it;
Raising an issue late, *e.g.*, in a reply
brief, also waives it.

Inadequate briefing can lead to
summary affirmance, waiver of an
issue, or waiver of oral argument.

See Fed. R. Bankr. P. 8014 for list of
briefing requirements.



Tips for Writing Appellate Briefs

1. Know what rules apply (Part 8000 Bankruptcy Rules or Federal Rules of Appellate Procedure and applicable local rules), including as to contents, form and length of briefs and make sure you follow them. For example, Bankruptcy Rules 8014 (contents of briefs) and Federal Rules of Appellate Procure 28 (contents of briefs).

2. Do not always default to setting forth facts and procedural developments chronologically, unless it makes sense to do so.

More Tips for Writing Appellate Briefs

3. Include dates only if they are required (filing dates establishing timeliness of appeal), make a difference, or are important.

4. Spend time crafting your summary of argument.

Even More Tips for Writing Appellate Briefs

5. Know, respect and use the difference between binding authority and persuasive authority in the appellate forum. Explain why supportive authority makes sense and why contrary authority doesn't make sense. Don't treat your brief like a case law survey.

6. Don't think you have to use all the entire word limit or allotted space.

7. Have others read your draft brief who are not familiar with the case, the issues, or even bankruptcy law. Do they get it?

8. Have your computer read your draft brief out loud to you.

9. Don't think you can wait until the last minute to do any of this and still prepare an effective brief.

One Last Tip for Writing Appellate Briefs

10. Make sure your client has an opportunity to read a draft, have input, and ask questions before you file your brief, whether your client is an unsophisticated consumer or the general counsel of a business.

Keeping Your Appeal Alive



Adhere to court orders, including deadlines: failure to comply with court orders can be grounds for dismissing an appeal.



For extensions of time, consult Bankruptcy Rule 9006 and applicable local rule.

CHALLENGE

Would you
grant this
motion . . .

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

RAP NO. MB [REDACTED]

Bankruptcy Case No. [REDACTED]

[REDACTED]
Debtor,

[REDACTED]
Appellant,

v.
[REDACTED]
Appellee.

MOTION TO EXTEND TIME TO FILE BRIEF AND APPENDIX

Now Comes Appellant and requests that this Court allow the Appellant to file his brief and appendix to July 20 [REDACTED]. As reasons Appellant states that Counsel needs the additional time to complete his brief.

Wherefore, Appellant requests that this Court allow this Motion and for any other relief deemed necessary and proper.

Dated: [REDACTED]

Respectfully Submitted By Appellant
Through Counsel [REDACTED]

CERTIFICATE OF SERVICE

I, [REDACTED], hereby certify that I have this date served copies of the foregoing Motion via CM/ECF on July 3, 20 [REDACTED] to [REDACTED].

Tips for Presenting Oral Argument



Consider the argument a conversation, not a speech.



Have a central message and theme.



Outline the argument and practice it repeatedly, so that you can speak extemporaneously, rather than reading.

Tips for Presenting Oral Argument (cont'd)



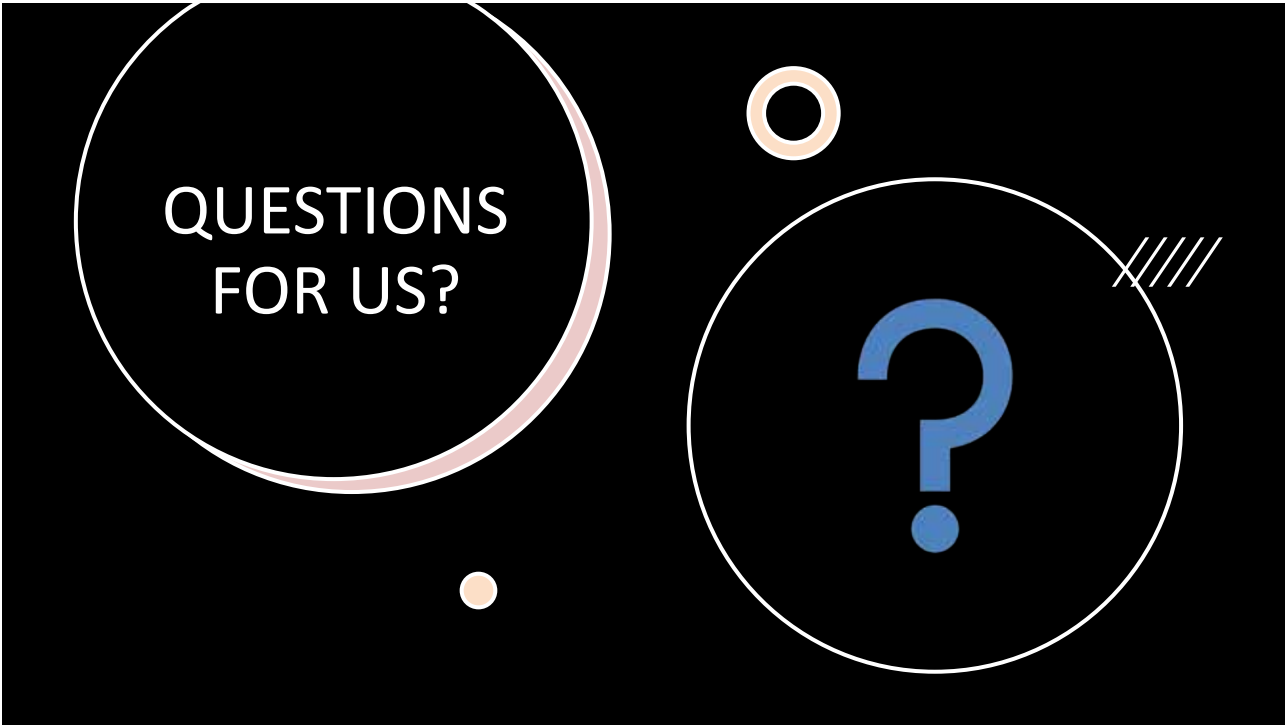
Write out all the potential questions about weaknesses in your argument and strengths of the opposing arguments.



Conclude with a request for the specific relief you seek.



Do not say anything after your time expires unless you are invited to do so by the court or you are asked questions after time has expired.



Faculty

Hon. Peter G. Cary is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Maine in Portland, initially appointed in 2014. He is also a panel member of the U.S. Bankruptcy Appellate Panel for the First Circuit, a member of the First Circuit Workplace Conduct Committee, and member of the First Circuit Access to Justice Committee - Bankruptcy Court Subcommittee, an Observer Judge for the First Circuit Judicial Council, the chair of the Academic Recognition Committee of the National Conference of Bankruptcy Judges, the treasurer of the Maine State-Federal Judicial Council, and an advisory director of the Nathan & Henry B. Cleaves Law Library. Judge Cary is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification. He received his undergraduate degree *cum laude* and Phi Beta Kappa from the University of Massachusetts at Amherst in 1982 and his J.D. *cum laude* from Boston College Law School in 1987.

Prof. Christopher D. Hampson is an assistant professor of law at the University of Florida Levin College of Law in Gainesville, Fla., where he teaches classes on bankruptcy, contracts, corporations and secured transactions. He is a scholar of bankruptcy, insolvency and the ethics of debt; his research focuses on how legal institutions can best serve our shared values during times of financial distress. Prof. Hampson has written on a wide range of topics, from benefit corporations and small business bankruptcy to imprisonment for debt. His scholarship has appeared or is forthcoming in prominent law reviews across the country, including the *Harvard Law Review*, the *Fordham Law Review*, the *Iowa Law Review* and the *American Bankruptcy Law Journal*. His work has also been cited by federal district and appellate courts, as well as two state supreme courts. Prior to joining UF Law, Prof. Hampson practiced law at Wilmer Cutler Pickering Hale and Dorr LLP in Boston, where he led litigation and transactional teams as part of the firm's bankruptcy and financial restructuring group. His bankruptcy work included blockbuster chapter 11, appellate and Supreme Court cases, as well as a \$1.6 billion securities litigation related to the Puerto Rico insolvency proceedings. His *pro bono* practice has included eviction defense and asylum applications. Prior to joining WilmerHale, Prof. Hampson clerked for Hon. Richard A. Posner on the Seventh Circuit in Chicago and worked at White & Case LLP in Miami. He received his A.B. *magna cum laude* with highest honors from Harvard College in the comparative study of religion, his J.D. *magna cum laude* from Harvard Law School, and his M.T.S. from Harvard Divinity School, where he was a Dean's Fellow. During his time at Harvard Law School, he served as articles co-chair of the *Harvard Law Review*.

Leslie C. Storm is a clerk of court for the First Circuit Bankruptcy Appellate Panel in Boston. She previously served as staff attorney for the BAP and as the *pro se* law clerk for the U.S. Bankruptcy Court for the District of Massachusetts. Prior to her public service, Ms. Storm was a longtime litigator in the private and nonprofit sectors in both Massachusetts and Connecticut.

Hon. Eugene R. Wedoff served as a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago from 1987-2015 and as chief judge from 2002-07. A former ABI Chairman and President, he served on ABI's Commission on Consumer Bankruptcy and devotes his present legal practice exclusively to *pro bono* representations in bankruptcy appeals. Judge Wedoff presided over the chapter 11

reorganization of United Air Lines, was a member of the Advisory Committee on Bankruptcy Rules from 2004-14 and served as its chair after 2010. His work on the Rules Committee involved both the implementation of the means test forms and creation of the national form for chapter 13 plans. Judge Wedoff was the president of the National Conference of Bankruptcy Judges from 2013-14 and also served as a member of the NCBJ's Board of Governors as its secretary and as chair of its education committee. Judge Wedoff is a Fellow in the American College of Bankruptcy, as well as a member of the National Bankruptcy Conference. He is the author of the chapter on professional employment in Queenan, Hendel and Hillinger, *Chapter 11 Theory and Practice* (LRP Publications 1994) and was an associate editor of the *American Bankruptcy Law Journal*. Judge Wedoff is a frequent lecturer and served as a member of the Federal Judicial Center's Committee on Bankruptcy Judge Education. In 2016, he received the Judge William L. Norton Jr. Judicial Excellence Award; in 2009, he received the Lawrence P. King Award from the Commercial Law League; and in 1995, he received the Excellence in Education Award from the NCBJ. Judge Wedoff graduated from the college and law school of the University of Chicago.