

## Judge Schermer and the Creation of the United States Bankruptcy Appellate Panel for the Eighth Circuit

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On September 10, 1996, the Eighth Circuit Judicial Council<sup>1</sup> appointed Judge Barry S. Schermer to the newly created United States Bankruptcy Appellate Panel for the Eighth Circuit.<sup>2</sup> Almost exactly ten years earlier, on October 1, 1986, the United States Court of Appeals for the Eighth Circuit had appointed<sup>3</sup> Judge Schermer as a Bankruptcy Judge for the Eastern District of Missouri. Judge Schermer continues to serve with distinction on both courts. It is worth noting that while service on the bankruptcy appellate panel requires additional work, sometimes a lot of additional work, it involves no additional compensation.

It is my plan in writing this Article to review, at least in summary form, the history of the United States Bankruptcy Appellate Panel for the Eighth Circuit and to try to document, as best that I can, the huge contributions that Judge Schermer has made to both the creation and the maturing of the bankruptcy appellate panel.

### BACKGROUND

Section 201 of the Bankruptcy Reform Act of 1978<sup>4</sup> added section 160 to the United States Judicial Code.<sup>5</sup> Section 160 authorized, for the first time, circuit councils to create bankruptcy appellate panels to hear appeals from bankruptcy courts.<sup>6</sup> Although the Ninth Circuit Judicial Council

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1. Federal statute creates judicial councils and vests in them various administrative responsibilities within the circuit. 28 U.S.C. § 332 (2009). These councils include an equal number of circuit and district judges. 28 U.S.C. § 332(a)(1) (2009).

2. The other judges appointed to make up the original bankruptcy appellate panel were Judge Nancy C. Dreher (D. Minn.), Judge William A. Hill (D.N.D.), Chief Judge Frank W. Koger (W.D. Mo.), Judge Robert J. Kressel (D. Minn.), the author, and Judge Mary Davies Scott (E.D. and W.D. of Ark.).

3. Bankruptcy judges are appointed by the court of appeals for the circuit in which the judge's district is located. 28 U.S.C. § 152(a)(1) (2009).

4. P.L. 95-598, November 6, 1978, 92 Stat. 2549.

5. 28 U.S.C. § 160 (1978).

6. District courts would also continue to have concurrent jurisdiction of appeals for bankruptcy courts. 28 U.S.C. § 1334(a) (1978).

established a bankruptcy appellate panel which has remained in existence almost continuously since 1980, there was little interest by other circuit councils, certainly none by the Eighth Circuit Council. The Supreme Court's decision in *Northern Pipeline Co. v. Marathon Pipe Line Co.*<sup>7</sup> and the additional uncertainty it created dampened any enthusiasm that other circuits may have had. The Bankruptcy Amendments and Federal Judgeship Act of 1984<sup>8</sup> modified the provision for bankruptcy appellate panels and renumbered it § 158(b).<sup>9</sup> The Eighth Circuit Judicial Council was still not interested.

In 1994, Congress amended the statute again, using language that sounded like the creation of bankruptcy appellate panels was actually mandatory.<sup>10</sup> The statute as amended now reads:

The judicial council of the circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine with the consent of all parties, appeals under subsection (a) unless the judicial council finds that (A) there are insufficient judicial resources available in the circuit; or (B) establishment of such service would result in undue delay or increase cost to parties in cases under title 11.<sup>11</sup>

#### I. OTHER CIRCUITS' REACTIONS

After the amendment to section 158, the circuit councils in the First Circuit, the Second Circuit,<sup>12</sup> the Sixth Circuit, and the Tenth Circuit voted to establish bankruptcy appellate panels. The circuit councils in the Third, Fourth, Fifth, and Seventh Circuits made the requisite findings and voted to not create bankruptcy appellate panels.

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7. *Northern Pipeline Co.*, 458 U.S. 50 (1982).

8. P.L. 98-353, July 10, 1984. 98 Stat. 333.

9. 28 U.S.C. § 158(b) (2009).

10. P.L. 103-394, October 22, 1994. 108 Stat. 40106 (1994).

11. 28 U.S.C. § 158(b)(1) (2009).

12. The Second Circuit has since disbanded its bankruptcy appellate panel.

## II. EIGHTH CIRCUIT DECISION

On October 18, 1995, the Bankruptcy Committee of the Eighth Circuit Council, chaired by Circuit Judge Roger Wollman, presented to the full council, the results of its study and a recommendation that a bankruptcy appellate panel be created. The recommendation was vigorously discussed and ultimately Judge Wollman's motion to approve the creation of a bankruptcy appellate panel was passed. I was the bankruptcy judge member of the circuit council at the time and also served on the bankruptcy committee with Judge Wollman. I was present at the bankruptcy committee meetings and also at the council meeting at which the vote was taken, although I had no vote at the latter. It is my personal observation that Judge Wollman's work on the committee and his advocacy at the council meeting carried the day for his motion. Without Judge Wollman's leadership, I am confident that there would be no bankruptcy appellate panel in the Eighth Circuit today.

Chief Circuit Judge Richard S. Arnold, who chaired the meeting of the council remained silent during the debate and, as chair, did not vote. Such was the respect that everyone held for him personally and for his stature as Chief Judge of the Court of Appeals that I am sure that a word from him could have guaranteed passage, or killed it instantly.

I sensed that he thought it was a bad idea,<sup>13</sup> so his silence was a positive thing for those of us who supported the creation of a bankruptcy appellate panel. Several years later I was sitting next to Chief Judge Arnold at lunch and he shared with me his thought that "in theory" the bankruptcy appellate panel was a terrible idea, but in practice, it was a big success. Several Arkansas bankruptcy judges have told me that he said something similar in a speech to the bankruptcy bar of that state, using it as an illustration of his many mistakes.<sup>14</sup>

On March 18-20, 1996, the Federal Judicial Center held a seminar for the judges and staff of circuits who were establishing bankruptcy appellate

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13. Instead, Chief Judge Arnold was advocating the elimination of intermediate appeals from bankruptcy courts in favor of direct appeals to the courts of appeals.

14. "Many" is his word, not mine.

panels. Since the Eighth Circuit had not yet chosen either the judges or the staff for its bankruptcy appellate panel, Chief Judge Arnold designated Judge Schermer, along with Chief Judge Koger, Judge Kressel, Judge Wollman, and Assistant Circuit Executive Margaret Dostal to attend.

The process for creating a bankruptcy appellate panel continued deliberately, and on April 10, 1996, the council entered an order establishing a bankruptcy appellate panel consisting of six bankruptcy judges, with a chief judge to be appointed by the chief judge of the court of appeals. The judges were to serve terms of seven years. The order also provided that the clerk of the United States Court of Appeals for the Eighth Circuit would also serve as the clerk of the United States Bankruptcy Appellate Panel for the Eighth Circuit.

At its next meeting on September 10, 1996, the council appointed the original six members of the bankruptcy appellate panel, including Judge Schermer. Chief Judge Arnold appointed Judge Frank W. Koger to be the first chief judge of the bankruptcy appellate panel.

### III. BANKRUPTCY APPELLATE PANELS

If you have read this far, you may be wondering what in the world a bankruptcy appellate panel is. A bankruptcy appellate panel (commonly referred to as a “BAP”) is made up of bankruptcy judges<sup>15</sup> from the circuit it serves. It has concurrent jurisdiction, along with the district courts of appeals from the bankruptcy courts in the circuit. As we have seen, not every circuit has a bankruptcy appellate panel. The circuit council must first create one.<sup>16</sup> Then the district court for a district must authorize appeals in its district to be heard by the BAP.<sup>17</sup> Next, all parties to the appeal must consent to the BAP hearing their appeal.<sup>18</sup> The BAP hears appeals in panels of three judges.<sup>19</sup> A member of the BAP may not hear an appeal from his or her home district.<sup>20</sup>

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15. As noted, judges receive no additional compensation for service on the BAP.

16. 28 U.S.C. § 158(b)(1) (2012).

17. 28 U.S.C. § 158(b)(6) (2012).

18. 28 U.S.C. § 158(b)(4) (2012).

19. 28 U.S.C. § 158(b)(5) (2012).

20. *Id.*

#### IV. DISTRICT COURTS REACT

Within short order, all of the district courts in the circuit, except South Dakota, authorized appeals to be heard by the BAP. South Dakota finally made it unanimous on December 10, 2007, authorizing appeals in that district to be heard by the BAP.

#### V. STAFF

Every court needs a clerk. Since the Eighth Circuit Council designated the clerk of the court of appeals to serve as the clerk of the bankruptcy appellate panel, Michael Gans has been the clerk of the BAP since its creation.

Gans designated Cindy Harrison, one of his deputies, to be the principal person responsible for supporting the BAP, something she has done with complete professionalism, intelligence, conscientiousness, and good humor for over twenty years. Every attorney and pro se litigant gets the assistance he or she needs, always with complete respect. Every judge who has served on the BAP respects and likes Cindy Harrison and knows that the success of the BAP is largely due to her work.

#### VI. EARLY DAYS

Although the BAP judges and its clerk were not authorized any law clerks or other staff assistance, the BAP was scheduled to start receiving cases on January 1, 1997.

Judge Schermer hosted the Eighth Circuit BAP's first meeting on December 6, 1996, at the bankruptcy court in St. Louis. The fledgling court made a number of decisions, such as setting oral arguments in the cities where the bankruptcy court sat and dispensing with complicated rules on briefs, all of which were made with the goal of making the BAP an inexpensive, convenient, and simple place to have appeals heard and decided fairly and expeditiously. While all of the judges agreed on these principles, Judge Schermer was always in the forefront of pushing these goals, under the rubric of being "user-friendly."

The BAP held its first oral arguments in St. Paul, Minnesota on July 1, 1997. Judge Schermer participated in this historic event. He wrote two opinions arising out of those hearings. *Nielsen v. DLC Investment, Inc. (In re Nielsen)*<sup>21</sup>, filed on August 7, 1997 and *Bayer v. Hill (In re Bayer)*<sup>22</sup>, filed five days later. Both dealt with Chapter 13 cases that had been dismissed by the bankruptcy court. He reversed the bankruptcy court in both instances, but never used the word “reverse” preferring instead to remand the cases.

#### VII. THE WORK

Judge Schermer is now in his twenty-second year on the BAP. During that time, he has authored 128 opinions for the court, 1 concurrence and 9 dissents for a total of 138 opinions. Each of those opinions reflects a complete knowledge of the record, a thorough understanding of the law, a thoughtful consideration of the parties’ arguments, and a sympathetic appreciation for the work of the bankruptcy judge.

During the same period, Judge Schermer participated in 198 other opinions, but did not write. I know from my own experience that in each of those cases, Judge Schermer was equally prepared for oral argument and the judges’ conference and decision. Virtually every opinion, even if not written by him, reflected thoughts and contributions he made at the conference.

A lot of the work of all appellate judges, including BAP judges, involves participating on administrative panels. Sometimes that work is routine, like deciding whether a party should be granted a third extension of time to file a brief. Other times, the work is not routine. Is an appeal from a final order and if it is not, should the appeal be dismissed as interlocutory or should leave to appeal be granted? Should an appeal be dismissed for lack of jurisdiction because it was not timely filed? Should the appellant be granted a stay pending appeal? This decision almost never results in a written opinion, but can be challenging and time-consuming nonetheless. In addition to sitting on merits panels, Judge Schermer has participated in hundreds of these administrative panels.

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21. 211 B.R. 19 (B.A.P. 8th Cir. 1997).

22. 210 B.R. 794 (B.A.P. 8th Cir. 1997).

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### VIII. SERVICE

On July 15, 2003, the Eighth Circuit Judicial Council appointed Judge Schermer to a second seven-year term. On August 24, 2010, the council appointed Judge Schermer to his third seven-year term. On July 11, 2017, the Council appointed him to yet another seven-year term.

### CONCLUSION

Judge Schermer received a rare opportunity: to help create a new court. He made the most of that opportunity. He was there at the beginning, helping to determine the goals of the BAP and its very character. He was there as it matured into a fully developed, functioning court, fairly and expeditiously dispensing justice. He has been there to help the court grapple with the new and challenging legal questions that arise in the increasingly complex world of bankruptcy. His jurisprudence will stand the test of time and guide bankruptcy judges not only in the Eighth Circuit, but nationwide.

