# Less is Not More When Designating the Record on Appeal

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Courts acting in their appellate capacity rely on the parties to provide a complete and accurate record of the proceedings below. In the context of a bankruptcy appeal, Federal Rule of Bankruptcy Procedure 8009 directs the appellant to file and serve a designation of the record on appeal within a specified time period.[1] The rule also dictates the minimum required contents that must be included in the designation.[2] Once the appellee is served with the appellant's designation, the appellee then has the opportunity to designate additional items to be included in the record.[3] Either party may subsequently utilize the procedures set forth in this rule to correct or modify the record if necessary.[4]

Under Rule 8009, despite an appellee's opportunity to supplement, correct, or modify the record, the appellant bears the ultimate burden of creating the record on appeal.[5] Without an adequate record before it, an appellate court will be unable to determine if the court below committed any error. And without such a determination, it will typically affirm the order or judgment on appeal.[6]

For example, in a decision from the Middle District of Florida, the court denied relief under two of three grounds raised on appeal because the record on appeal was insufficient. As to one of these two grounds, the appellant asserted that the bankruptcy court erred in entering judgment on the pleadings because certain issues were allegedly not framed by the pleadings. However, because the record on appeal contained neither the complaint nor the answer, the court could not properly evaluate *de novo* the validity of this argument.[7] With respect to the other of these two grounds, the appellant argued that the bankruptcy erred by finding the complaint was untimely because the corporate statement was not a "pleading" to which the complaint could relate back.

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[1] Rule 8009(a)(1), Fed. R. Bankr. P. All references to rules in article are to the Federal Rules of Bankruptcy Procedure, unless identified otherwise.
[2] Rule 8009(a)(4).
[3] Rule 8009(a)(2).
[4] Rule 8009(e).
[5] *Trujillo v. Moffitt (In re Moffitt),* 635 B.R. 836, 839 (M.D. Fla. 2022) (citations omitted).
[6] *Id.* (referring to "absence-equals-affirmance-rule" as recognized in *Selman v. Cobb Cty. Sch. Distr.,* 449 F.3d 1320, 1333 (11th Cir. 2006)).
[7] *Id.* at 840.

"However, again, the items the Appellant would have the Court consider for purposes of this argument are missing from the record, which precludes proper review of this issue."[8]

In another opinion from the Middle District of Florida, decided in a slightly different context, the court considered an emergency motion for a stay pending appeal of an order denying the appellant's request to reconvert its chapter 7 bankruptcy case back to a case under chapter 11.[9] Because the appellant failed to provide a transcript of the hearing at which the bankruptcy court denied reconversion, the district court held that insufficient evidence existed for it to determine the likelihood that the appellant would succeed on the merits, which is a key factor when considering a motion for stay pending appeal. Instead, the appellant relied on "vague, unverified, and unauthorized assertions about the legal basis for the bankruptcy court's ruling." Consequently, the court ruled that it "will not reward with the requested stay [the appellant's] refusal to permit meaningful review of the bankruptcy court's findings."

Yet another example arises in an Eleventh Circuit decision where the court considered the adequacy of the record before it under applicable Federal Rules of Appellate Procedure.[10] There, the district court had denied plaintiffs' motion for summary judgment as to two particular counts and ordered that they be tried by a jury. After losing at trial on both counts, the plaintiffs appealed, arguing, among other things, that the district court committed various evidentiary errors while conducting the trial. They failed, however, to provide a trial transcript, without which the court could not determine if any of the alleged evidentiary errors occurred.[11] And, being thus unable to identify any such errors, the court concluded that it must affirm the judgment below.[12]

The lesson here is clear. Appellate courts cannot find fault with action taken by the court below if the appellant fails to provide a complete record upon which the appellate court can fully analyze the basis for the lower court's ruling. Thus, although less is often more — as with motions

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[8] *Id.* at 841.

[9] *Bruno One, Inc. v. Meininger,* No. 8:20-cv-01644-SDM (M.D. Fla. July 23, 2020) (Doc. No. 8).

[10] Rule 10(b)(2), Fed. R. App. P. (requiring an appellant intending to urge on appeal that a finding or conclusion is not support by, or is contrary to, the evidence must include in the record a transcript of all evidence relevant to that finding or conclusion).

[11] *Loren v. Sasser,* 309 F.3d 1296, 1304 (11th Cir. 2002). *See also Kunsman v. Wall (In re Kunsman),* 752 Fed. App'x 938, 941 (11th Cir. 2018) (affirming dismissal of chapter 13 case following denial of confirmation under the "absence-equals-affirmance rule" because the debtor failed to order transcripts or otherwise provide a record of the proceeding that occurred in the bankruptcy court, particular at the confirmation hearing).

[12] *Id.*

for judicial relief according to the late Hon. Michael G. Williamson, creator of "The 3-3-3 Rule" — less is not more when considering what items to include in a designation of a record on appeal.[13]

[13] Michael G. Williamson, *The 3-3-3 Rule,* http://www.flmb.uscourts.gov/judges/tampa/williamson/3-3-3_rule.pdf [https://perma.cc/SUE7-DSE2] (a typical motion should be no longer than three pages, cite no more than three cases for each legal proposition, and any argument in support thereof should last no more than three minutes; however, for particularly complex matters, this might be a "10-10-10 Rule").