



CERTWORTHY

THE NEWSLETTER OF THE APPELLATE ADVOCACY COMMITTEE

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WINTER 2000

DICTA FROM THE CHAIR

Felix Frankfurter said that the legal profession is “concerned with matters of the mind; the mind, and not the imagination, is the instrument of our activities.” He believed that our profession, “beyond any other calling... [is] concerned with those establishments, those processes, those criteria, those appeals to reason and right, which have had a dominant share in begetting a civilized society.” And he insisted that this requires lawyers to pursue their profession in the context of its heritage, by reading, studying, and engaging in “a deep and wide

cultural life.” Perhaps in no other area of law is this truer than in appellate practice. Frankfurter’s lofty vision of the practice of law serves as a reminder of the immense opportunities that appellate lawyers have to shape the development of the law as they argue their clients’ cases. Frankfurter’s words also underscore the difficulty in crafting a persuasive argument and the need to constantly study, not just the law but culture and society, in order to practice this profession at its highest level.

DRI’s Appellate Advocacy Committee

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EDITOR’S FOOTNOTES

As the publication deadline for this edition of *Certworthy* was approaching, I began to worry, because we had very few commitments from authors. I sent out a committee-wide letter, asking for volunteer authors, and I am gratified that so many committee members responded. As you will see, we have our usual complement of articles and columns. I especially want to thank the authors of our lead articles, Robert Markle, Ruth Silvers, and Chester Makowski. At the last minute, we needed one more article, and John Kearney was kind enough to let us reprint his article from the ADR Committee newsletter.

Thanks also to our column contributors, David Lewis, Jay Levin, and David Levine. A number of you volunteered to review *Black’s Law Dictionary*, but David Levine was the first one to contact me. I want to thank the rest of you who volunteered, and ask that you please volunteer for future articles or columns.

I also want to thank our subcommittee vice chair, David Lewis, for his persistence in producing the circuit reports. It takes a lot of effort to coordinate 10 to 12 lawyers to summarize cases from each circuit. Dave does a lot of unheralded work, and I also appreciate his volunteering to do our Writer’s Corner at the last minute.

We have no author commitments for our next issue of *Certworthy*, to be published in June 2000. It is not too early to contact me if you have an interest in writing for that issue of *Certworthy*.

Scott Patrick Stolley
Thompson & Knight L.L.P.
Dallas, TX

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Dicta from the Chair, from page 1

was created two years ago in an effort to assist you in this goal. Through its publications and programs, we hope to provide insight, knowledge, and collegial discussion about the practice of appellate law. We want to provide both practical and up-to-date information about the rules of appellate law, the procedural intricacies that every appellate lawyer needs to understand, and the larger, more theoretical or jurisprudential knowledge that helps an advocate hone an argument.

Those of you who missed our committee meeting and program at the DRI Annual Meeting in New York missed a fabulous event that furthered these committee goals. Our committee co-sponsored a program entitled *Attorney-Client Privilege under the Microscope—How to Preserve it at Trial and Retain it on Appeal*. Mike King, the new Vice Chair of the Appellate Advocacy Committee, deserves

great thanks for his efforts on this program. Two trial lawyers, Michael F. Pezzulli and Mari Henry Leigh, engaged in a mock oral argument before Federal District Judge Vanessa D. Gilmore. Then, noted appellate specialists Michael B. Wallace and David M. Schoeggi presented an appellate perspective on these issues. They and other speakers presented a wealth of information about cutting-edge issues in the attorney-client privilege arena.

In addition to a convivial evening in the South Village for dinner, our committee met to discuss plans for the upcoming year. Elsewhere in this issue of *Certworthy* you will find a list of subcommittee leadership and can read about the exciting plans for this year. After two years of existence under the able leadership of Kelly Freeman, the committee is in great shape. Our membership has grown with each passing month. Our newsletter's high quality has garnered

universal praise. Scott Stolley and David Lewis are to be commended for their efforts. We successfully prepared an appellate-dedicated issue of *For The Defense* that was extremely well-written and informative. And our first seminar was a phenomenal success. Elsewhere in this newsletter, you will read about our second seminar, which promises to be even better.

As I begin my term as chair, let me ask all of you to help reach our goals, and please let me know how we can better assist you in your practice. I encourage you to join us at future committee meetings and seminars, and I look forward to getting to know you better as we work together over the coming year.

Mary Massaron Ross
Plunkett & Cooney, P.C.
Detroit, MI

ATTEND THE NEXT APPELLATE ADVOCACY COMMITTEE MEETING

WHEN: Thursday, March 9, 2000

WHERE: Le Meridien Hotel
New Orleans, LA

WHY: To learn more about Appellate Advocacy Committee activities, participate in planning for the 2000-2001 year, meet other appellate practitioners, and have fun!

HOW: Attend DRI's Appellate Advocacy Seminar, March 9-10, 2000

PERSONAL JURISDICTION AND THE INTERNET

by Ruth A. Silvers & Chester J. Makowski

With the rapid growth of the Internet, e-mail, and business and communication technologies, the “web of commerce” is redefining how companies conduct business. As this occurs, courts must determine when they may exercise personal jurisdiction over a nonresident defendant based upon these electronic contacts. This article discusses the framework that courts are developing to address these personal-jurisdiction issues.

APPEALING JURISDICTIONAL ISSUES

In federal court, the denial of a motion to dismiss for lack of personal jurisdiction is generally not subject to interlocutory appeal. See Charles Alan Wright & Arthur R. Miller, 16 *Federal Practice and Procedure* § 3931 (1996) (explaining that, in an exceptional case, denial of a motion contesting personal jurisdiction may be subject to an interlocutory appeal under 28 U.S.C.A. § 1292(b)); cf., e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1999) (allowing, under Texas law, an interlocutory appeal of jurisdictional issues). Although interlocutory appeal is usually not available, the granting of a motion to dismiss

RUTH SILVERS is an associate with the Houston office of Royston, Rayzor, Vickery & Williams, L.L.P. She practices in the areas of civil appeals and insurance coverage. Before joining the firm, Ms. Silvers served as a briefing attorney for the Texas Court of Criminal Appeals.

CHESTER MAKOWSKI is a partner with the Houston office of Royston, Rayzor, Vickery & Williams, L.L.P. He is the head of the firm’s appellate section, where he concentrates his practice in the areas of civil and intellectual-property appeals, as well as insurance coverage. Mr. Makowski previously served as briefing attorney to the Chief Justice of the Texas Supreme Court.

may be appealed after the order becomes final. See, e.g., FED. R. APP. P. 3 & 4. Thus, upon conclusion of the case in the trial court, the federal (and state) appellate practitioner must be ready to address emerging Internet jurisdictional issues.

ESTABLISHING PERSONAL JURISDICTION

To determine if a nonresident defendant is subject to personal jurisdiction, courts conduct a two-part test. First, constitutional due process provides that a defendant can be sued only in a forum in which the defendant has “minimum contacts.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed.2d 92 (1987) (O’Connor, J., plurality op.). Second, the court’s exercise of jurisdiction over the defendant must be reasonable. See *International Shoe*, 326 U.S. at 316. If either of these prongs is not satisfied, the court of a forum state cannot exercise personal jurisdiction over the nonresident defendant.

A federal court, sitting in diversity, may exercise personal jurisdiction over a nonresident defendant if: (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) the exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution. See *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997); *Latshaw v. H.E. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999). Since most states have broad long-arm statutes, the issue of personal jurisdiction usually turns on whether a defendant has the necessary “minimum contacts” with the forum state. See, e.g., *Uberti v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995); *Reynolds v. Int’l Amateur Athletic*

Fed’n, 23 F.3d 1110, 1117 (6th Cir.) (Ohio law); *Doumani v. Casino Control Comm’n*, 614 F. Supp. 1465, 1471 (D.N.J. 1985) (New Jersey law); *Federal Deposit Ins. Corp. v. Malmo*, 939 F.2d 535, 537 (8th Cir. 1991) (Missouri law). In broad terms, the court’s assertion of personal jurisdiction satisfies due process if “the defendant purposely avails itself of the privilege of conducting activities within the forum state,” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 2 L. Ed.2d 1283 (1958), such that it “should reasonably anticipate being hailed into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980). If the plaintiff establishes that the defendant has sufficient minimum contacts with the forum state, the exercise of jurisdiction may still be defeated if it would be contrary to traditional concepts of “fair play and substantial justice.” See *International Shoe*, 326 U.S. at 316.

The necessary extent of the “minimum contacts” required to support jurisdiction varies, depending on whether the state asserts “specific jurisdiction” or “general jurisdiction” over the nonresident defendant. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-18, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Specific jurisdiction may be asserted when the controversy arises out of, or is directly related to, the nonresident defendant’s contacts with the forum state. See *International Shoe*, 326 U.S. at 318. General jurisdiction, on the other hand, may be exercised if the nonresident defendant’s contacts with the forum state are unrelated to the cause of action, but are “continuous and systematic.” See *id.* In the last few years, plaintiffs have attempted to use a nonresident defendant’s website and other activities over the Internet to establish both general and specific jurisdiction.

Specific Jurisdiction

If a controversy arises out of a defendant's specific contacts with a forum state, the exercise of specific jurisdiction is proper. See *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). As one court correctly noted, "different results should not be reached because business is conducted over the Internet." *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997); see also *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (finding jurisdiction proper since the defendant's Internet activities were, in part, a basis of the plaintiff's trademark-infringement allegation); *EDIAS Software Int'l, L.L.C. v. BASIS Int'l, Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) (holding that personal jurisdiction existed where a defendant sent defamatory e-mail messages to customers within the forum state, and the e-mail messages formed the basis of plaintiff's alleged injury); *Hall v. Ronde*, 66 Cal. Rptr. 3d 399 (Cal. Ct. App. 1997) (explaining that the court had specific jurisdiction over a defendant that had conducted negotiations and entered into a contract with a California resident over the Internet by e-mail).

General Jurisdiction

In addressing whether general jurisdiction based upon Internet conduct can be constitutionally exercised over a nonresident defendant, courts look to the "nature and quality of commercial activity that an entity conducts over the Internet." See *Mink v. AAAA Dev., Inc.*, 1999 WL 728101 (5th Cir., Sept. 17, 1999); *Zippo*, 952 F. Supp. at 1124. The Internet presents new problems, however, that often conflict with traditional jurisdictional principles. Under a traditional jurisdictional analysis, a defendant who chooses to conduct business in multiple states is assumed to have the ability to defend itself in multiple arenas. The Internet alters this equation by allowing a defendant to conduct business in a potentially unlimited number of jurisdictions with relatively little or no cost. See,

e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 117 S. Ct. 2329, 2336, 138 L. Ed. 2d 874 (1997) (describing the Internet as "a sprawling mall offering goods and services"). A small organization conducting business over the Internet is unlikely to possess the resources necessary to defend itself in multiple jurisdictions. Thus, a traditional jurisdictional analysis conflicts with the realities of e-commerce. Further, a defendant may enter into a jurisdiction through the Internet without having knowledge that it did so. In that situation, it is uncertain whether a defendant should be deemed to have "purposefully availed" itself of the protection of the laws of that jurisdiction.

The Zippo Framework

One of the first decisions to attempt to systematically address these problems was *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). The *Zippo* court attempted to classify Internet websites along a spectrum. *Id.* at 1124-25. At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states that "involve the knowing and repeated transmission of computer files over the Internet"—an interactive website. *Id.* at 1124. In this situation, personal jurisdiction is proper. *Id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)). At the opposite end of the spectrum, there are situations where a defendant merely establishes a website that does little more than advertise and provide information on the Internet—a passive website. *Id.* at 1124. With passive websites, the exercise of personal jurisdiction is not appropriate. *Id.* (citing *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997)). In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information or communicate with a host computer. *Id.* In this middle ground, "the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website." *Id.* (citing

Maritz, 947 F. Supp. at 1328). In *Zippo*, the court found that the defendant's conduct in entering into a contract with approximately 3,000 residents of the forum state constituted "purposeful availment" of the forum state's laws, and thus, the assertion of jurisdiction was proper. *Id.* at 1125-26.

The framework employed by the *Zippo* court has been followed by the majority of courts analyzing jurisdiction in Internet-related disputes. See, e.g., *Mink*, 199 WL 728101 at *3; *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997); *Esab Group, Inc. v. Centricut, L.L.C.*, 34 F. Supp. 2d 323, 330 (D.S.C. 1999); *Origin Instruments Corp. v. Adaptive Computer Sys., Inc.*, 1999 WL 76794 at *2-3 (N.D. Tex., Feb. 3, 1999); *Fix My PC, L.L.C. v. N.F.N. Assoc., Inc.*, 1999 WL 184130 at *2-3 (N.D. Tex., Mar. 26, 1999); *Stomp, Inc. v. Neato, L.L.C.*, 1999 WL 635460 at *3 & n.7 (C.D. Cal., Aug. 6, 1999); *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 783 (W.D. Tex. 1998); see also *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 638 (E.D. Pa. 1998) (applying the *Zippo* analysis to a venue determination).

Other Frameworks

But not every court has adopted the *Zippo* framework. See, e.g., *Superguide Corp. v. Kegan*, 987 F. Supp. 481, 486-87 (W.D.N.C. 1997) (holding the defendant subject to personal jurisdiction based upon the defendant's maintenance of an Internet site offering commercial service, even though there was no evidence that a forum resident had ever visited the site); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 4-5 (D.D.C. 1996) (holding that the defendant's conduct in soliciting donations over a website that is always available to forum-state residents was a proper basis for asserting personal jurisdiction); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D. Conn. 1996) (allowing exercise of jurisdiction based upon the defendant's website, because "unlike hard-copy advertisements... Internet advertisements are in electronic printed form so that they can be accessed again and again by many more potential customers"); *Minnesota v. Granite Gate Re-*

sorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997) (holding that a Belize defendant had sufficient “minimum contacts” with Minnesota, since its website was available 24 hours a day, had a toll-free number to solicit subscribers, and was actually accessed by Minnesota residents). These cases, however, are in the minority. See *Esab Group*, 34 F. Supp. 2d at 330 n.4. In fact, if the minority position is applied, a defendant with a website would be subject to jurisdiction on a worldwide basis, which would eviscerate personal jurisdiction as it is currently known. See *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 115 (D. Conn. 1998); *Osteotech v. GenSci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 349, 356 (D.N.J. 1998); *E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173, 177 (D. Conn. 1997) (stating that if a website alone conferred jurisdiction, any nonresident defendant conducting business by telephone, television, or mail would be subject to suit in the forum).

DOES THE FRAMEWORK WORK?

Judicial Reactions

There are limitations to the jurisdictional answers provided by classifying a website as passive, interactive, or somewhere in between. See *Esab Group*, 34 F. Supp. 2d at 330. As explained by the federal district court for the District of South Carolina, “merely categorizing a website as interactive or passive is not conclusive of the jurisdictional issue. General in personam jurisdiction must be based on more than a defendant’s mere presence on the Internet even if it is an ‘Interactive’ presence.” *Id.* (citations omitted). The critical inquiry for a court is the quality and nature of the business actually conducted over the Internet. *Id.* at 330-31. For example, the Fifth Circuit recently held that a website containing e-mail access, a printable order form, and a toll-free phone number, without more, was insufficient to establish personal jurisdiction. *Mink*, 1999 WL 728101 at *4. The Fifth Circuit explained that “[a]bsent a defendant doing business over the Internet or sufficient interactivity with residents of the forum state, we cannot conclude that personal jurisdiction is

appropriate.” *Id.*; see *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997) (explaining that general jurisdiction did not exist over a foreign hotel that maintained advertisements on a website); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W.D. Ark. 1997) (finding that a manufacturer’s advertisement that was accessible to forum-state residents through the Internet was “simply insufficient contact” to satisfy due process). Thus, the *Mink* court recognized that to establish personal jurisdiction, additional evidence is required, such as whether a forum resident actually contacted the website.


In some instances, it is clear when a defendant’s conduct over the Internet will be sufficient to confer jurisdiction. The Sixth Circuit held in *CompuServe, Inv. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), that a nonresident defendant transacted business within the meaning of Ohio’s long-arm statute, based upon conduct that included transmitting files to the plaintiff’s service via the Internet, and advertising and selling his products on the plaintiff’s website. *Id.* at 1265-66. Although the defendant made only 12 sales of his product to Ohio residents, the *CompuServe* court reasoned that it should not focus solely on the number of sales to Ohio residents, but rather, on the fact that “[the defendant] consciously reached out from Texas to Ohio to subscribe to CompuServe, and to use its service to market his computer software on the Internet.” *Id.* at 1266. Thus, it was the defendant’s conduct over the Internet, not the existence of a website, that conferred jurisdiction over the defendant.

Commentators’ Reactions

Commentators have issued mixed reviews as to whether the *Zippo* framework fairly addresses the personal-jurisdiction issues raised by the Internet. Compare David S. Godkin & Marc E. Betinsky, “Personal Jurisdiction: If the (International) Shoe Fits, Wear It—But Does It Fit the Net?,” *Journal of Internet Law*, July 1999, at 18 (criticizing the *Zippo* analysis by reasoning that one court’s passive website might be classified as an “interactive” website by another court), with Findlay Walton, “Boundaries of Cyberspace: Personal Jurisdiction Analysis in the Information

Age,” (seminar paper presented in conjunction with CLE Online.Com) (concluding that applying well-settled jurisdictional precedent to the Internet results in a workable analysis). The problem lies in the fact that the “minimum contacts” analysis is amorphous and appears to be largely within an individual court’s discretion. Thus, when the Internet is factored into the jurisdictional formula, it remains difficult to predict whether personal jurisdiction over a nonresident defendant will exist. See, e.g., *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997) (exercising personal jurisdiction based upon a website that advertised the availability of technical support across the United States, coupled with (1) six New York subscribers who contracted to obtain the service through the defendant’s website, and (2) receipt of subscription fees from New York residents). But see *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q. 1926 (S.D. Cal. 1996) (refusing to assert jurisdiction over a defendant who hired a California-based independent contractor, placed advertisements in California, and maintained a website); *Pres-Kap, Inc. v. System One Direct Access, Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994) (holding that a nonresident defendant’s Florida contacts, which consisted of logging into a Florida computer and mailing lease payments to a nonresident, did not establish personal jurisdiction).

CONCLUSION

As technology develops and the global economy expands, many traditional commercial boundaries disappear, leading to new issues involving personal jurisdiction. Although courts are constructing a framework to address these new jurisdictional issues, the results reached by different courts analyzing similar fact patterns are, at times, in conflict. Thus, the variables of the choice of forum and the factfinder will strongly influence the outcome of a particular case. The appellate attorney must be aware of these developments and be prepared to tailor the jurisdictional facts and arguments into the appropriate slot in the jurisdictional spectrum. 

POST-TRIAL ADR—THE APPELLATE MEDIATION OPTION

by John B. Kearney

Does this sound familiar? Discovery was time consuming and expensive. Non-binding arbitration and several conferences with the court did not lead to settlement, nor did the events during trial. And so the jury was asked to render its verdict, creating a winner and a loser. But the verdict did not result in finality, only a change in the battlefield, as your disappointed adversary vows to appeal.

Is it too late to mediate? In the past, the appellate process has not been seen as a time when cases get resolved by settlement. Often, the only exchange of views between the parties or their counsel takes place with the exchange of briefs or in oral argument. Other than in those two settings, counsel traditionally had little or no opportunity to express their views, explore their positions in light of what transpired in the proceeding below, and see if resolution of the dispute could take place before the significant costs of the appellate process are undertaken.

Over the last decade, however, there has been a slow but steady growth of appellate mediation to get the parties talking about resolution of the case before the appellate process moves into high gear.¹ This article will review in summary form the types of appellate mediation options now available on the federal and state levels.²

Editor's Note: We are grateful to Mr. Kearney and to the DRI Alternative Dispute Resolution Committee for giving us permission to reprint this article, which originally appeared in the Summer 1999 issue of *ADR Choices*.

JOHN KEARNEY is a partner at the Cherry Hill, New Jersey firm of Kenney & Kearney. He is a member of DRI and serves as the ADR Committee's Liaison to the Industrywide Litigation Committee. He was assisted in the research for this article by his law clerk, Joseph Ciampoli.

MEDIATION BASICS

By now, mediation is part of a lawyer's basic legal vocabulary. Mediation is a method of settlement negotiation in which the parties and their lawyers meet with an impartial third party, the mediator, and attempt to reach a mutually satisfactory resolution to their dispute. A mediator has no power to render a decision or force the parties to accept a settlement, but seeks to find areas of common ground and mutual benefit upon which a settlement can be reached. *Alternative Dispute Resolution Practice Guide* § 23:3.

Appellate mediation is just what the term states: a mediation conducted after proceedings at the trial level are concluded and before an appeal is decided. Appellate mediation was first introduced by the United States Court of Appeals for the Second Circuit in 1974 and is currently utilized by all of the federal circuits. Moreover, as of 1995, twenty-five state court systems operate a functioning appellate mediation program. Thus, mediation has become an accepted ADR practice at the post-trial level.

MEDIATION ELIGIBILITY

What types of cases are mediated while on appeal? There is no standardized model for determining whether a case is eligible for appellate mediation. Most programs provide for the mediation of all but a narrow range of civil matters. Exclusions that are common to nearly all programs are *pro se* and *habeas corpus* cases. Some programs also exclude original proceedings in the appellate court, social-security cases, immigration and deportation cases, emergency appeals, adoption and child-care cases, commitment proceedings, and cases where extraordinary relief is sought. No one system excludes all such cases, however. In addition, the D.C. Circuit Mediation Program handles both private cases and those involving the federal and District of Columbia governments.

How are cases chosen for appellate mediation? In most programs, there is a screening process based upon required docketing statements submitted by each party after a notice of appeal is filed. In some programs, like those of the Tenth Circuit and the Utah Court of Appeals, the cases are randomly selected. The logic behind this approach is that the settlement potential of a case in appellate mediation is very difficult to predict accurately based upon a docketing statement. Other programs, such as those of the First and Second Circuits, include virtually all eligible cases. Finally, in many programs, parties may request appellate mediation without the request being revealed to the opposing party. Obviously, such confidentiality enables one to seek appellate mediation without being perceived as operating from weakness or lacking confidence in one's legal position.

Once a case is selected for appellate mediation, participation generally is mandatory. However, some programs, such as the Ohio Tenth District Court of Appeals and the Massachusetts program, permit parties to opt out by means of a joint written statement submitted with a completed docketing statement that provides mediators with a synopsis of the case.

MEDIATION ATTENDANCE

Who must attend the appellate mediation? While nearly all courts require lead counsel, the attendance requirements for parties vary. The Fourth Circuit makes attendance of parties optional, while some courts, such as the Second Circuit, typically exclude the parties themselves from attending at least the initial conference. The Second Circuit reasons that client exclusion decreases the burden on the parties, relieves the need for the attorneys to put up a tough demeanor in front of their clients, and reignites some dialogue between counsel.

Some courts, like the Third Circuit, take the opposite view of client participa-

tion. That program requires both senior attorneys and parties to attend and, if necessary, an insurance representative. The thinking behind this approach is that in many cases, appellate mediation is the first time that the litigants have an opportunity to tell their story and actually communicate. Once that opportunity is provided, the ability to have decision makers present maximizes the chances of resolving the dispute at that time.

MEDIATOR SELECTION

Who serves as appellate mediators? Different programs draw on different types of people. In many programs, the mediators are staff attorneys. In the Third Circuit, the program director (who is an experienced attorney) conducts most of the mediations, with occasional assistance from senior judges in the circuit. The Massachusetts Court of Appeals uses both active attorneys and retired judges, while the Missouri Court of Appeals relies exclusively on sitting judges only. Finally, the D.C. Circuit is fortunate to have local attorney volunteers to mediate its cases.

MEDIATION STYLES

How are appellate mediations conducted? Some programs are flexible in the use of telephone conferencing. Both the Fourth Circuit and the Utah Court of Appeals allow attorneys to participate by telephone. In the Third Circuit, if a party is more than 150 miles away from the mediation site, that party may participate by telephone, but attendance by the attorneys is still mandatory.

The scope of the mediator's role typically will depend on whether the program operates independently or as part of a comprehensive program. The Second Circuit and others include appellate mediation as part of the larger Civil Appeals Management Plan ("CAMP"). Thus, mediators in that program typically get involved in deciding some procedural motions and handling scheduling matters in addition to their mediation responsibilities. However, other courts typically limit the scope of the mediator's responsibilities to settling the case at hand.

What style is employed in appellate mediation? Much like mediation at the

trial level, the style of the mediator and the format of the mediation vary from program to program. For example, the Second Circuit and the Missouri Court of Appeals encourage their mediators to discuss the merits of the case with the parties. Other programs, like the Ninth Circuit, concentrate more on helping the parties find common ground through discussion and exchange of ideas. All programs, however, ensure confidentiality by having the program operate on a separate track from the appeal itself.

MEDIATION RESULTS

Cynics among us would say that appellate mediation will not work for cases that did not settle after the parties or their attorneys engaged in settlement conferences, an arbitration or mediation at the trial level, and any number of informal discussions before a jury verdict or summary judgment sent the case to the appellate court. Yet appellate mediation programs are reporting success in having parties reach settlement, even at such a late date in the life of a case.

For example, the Fourth Circuit reports a settlement rate of 37%,³ while the Tenth Circuit boasts a success rate of more than 40%.⁴ Why does it work? Sometimes the mediator can help a party realize that it cannot afford to pursue an appeal, due to the prohibitive cost that victory would bring in the form of a new trial and another likely appeal. Other times, an incentive for resolution at the appellate level is that companion cases, not yet filed or still at the trial level, can also be settled during the appellate mediation process.

MEDIATOR EFFECTIVENESS

A mediator can give the parties a way to craft a remedy at the appellate stage that gives them more options than merely to win or lose on the legal issues of the appeal. In addition, the appellate mediation process can often serve to help the lawyers and their clients evaluate the chances of success in the appellate court, and at what cost and risk.⁵

The effective appellate mediator is one who can help the parties and their lawyers move beyond the thrill of victory or the agony of defeat that was experienced

at the trial level, and help them look anew at what is at stake and what can be accomplished with a settlement. Although the trauma of trial often results in hardening of positions by both the winner and the loser, the skilled appellate mediator can help the parties consider, before the expense of the appeal is incurred and the judgment of the appellate court is rendered, how a settlement can be to their advantage.⁶

Endnotes


¹ For a more complete discussion of the Third Circuit Appellate Mediation Program by its Director Joseph Torregrossa, Esq., see Torregrossa, "Settling Cases on Appeal, Third Circuit's Mediation Program," Lit. Q., A Supplement to *The Philadelphia Legal Intelligencer and PA Law Weekly*, March 22, 1999, at 2.

² For a review of appellate mediation programs as of the Spring of 1995, see Dick, *The Surprising Success of Appellate Mediation*, 13 Alternatives to High Cost Litig. 41 (April 1995).

³ Thomas F. Ball, III, "Appellate Mediation in the Fourth Circuit: An Idea That Works," 9-Dec. S.C. Law. 28 (Nov./Dec., 1997).

⁴ David Aemmer, "Appellate Mediation in the Tenth Circuit," 26-Oct. Colo. Law. 25 (October 1997).

⁵ An article by Thomas F. Ball, III, Esq., who has served as a mediator with the Pre-Argument Conference Program in the Fourth Circuit since 1994, contains an excellent discussion of fourteen legal and nonlegal reasons why cases settle on appeal. Ball, "Settling Cases on Appeal: An Option to Consider," 11-Oct. W. Va. Law. 14 (1997).

⁶ For a detailed discussion of the programs available in the different circuits, see the comprehensive work by Robert J. Niemic of the Federal Judicial Center entitled "Mediation & Conference Programs in the Federal Courts of Appeals, a sourcebook for judges and lawyers" (1977). Several articles regarding specific state court programs are Sheila Prell Soneshine, "Real Lawyers Settle: A Successful Post-Trial Settlement Program in the California Court of Appeal," 26 Loy. L.A. L. Rev. 1001 (1993); Wilkins and Hobbs, "Utah's Appellate Mediation Office Opens January 1998 A New Option for Case Resolution At the Utah Court of Appeals," 10-Dec. Utah B.J. 25 (1997); and Corinne Hirsch, "The Massachusetts Appeals Court Conference Program: Appellate ADR in Progress," 40-APR B.B.J. 10 (1996). 

WHO'S ON FIRST? (NOT NECESSARILY SUBJECT-MATTER JURISDICTION)

by Robert Markle

From the day you leave the sane confines of everyday life to become a law student, you are taught that, in the law, few enduring truths exist. One of the few such unwavering propositions, however, is that federal district and circuit courts are courts of limited jurisdiction. As such, they possess only the jurisdiction authorized by Congress. See *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Congress may give, withhold, or restrict such jurisdiction at its discretion, provided the jurisdiction is not extended beyond the boundaries fixed by the Constitution. See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

Subject-matter jurisdiction, you were instructed, is the power to declare the law, and when such jurisdiction ceases to exist, the *only* function remaining to the court is that of announcing the fact and dismissing the case. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868). Without jurisdiction, a court cannot proceed. *Id.* The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power of the United States” and is “inflexible and without exception.” *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Appellate practitioners learn that “every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts’ in a cause under review....” *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1012 (1998) (quoting *Arizonaans for Official English v. Arizona*, 117 S. Ct. 1055, 1071 (1997)). The rule that a federal court, trial or appellate, must first address its jurisdiction is so fundamental that the courts “are obliged to inquire *sua sponte* whenever a doubt arises as to the

existence of federal jurisdiction.” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977). The parties cannot confer jurisdiction on a court that has not been vested with jurisdiction by the Constitution and Congress. Thus, parties cannot waive lack of subject-matter jurisdiction by consent, or conduct, or even by estoppel. See, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). These axioms are constantly driven home to law students and practicing lawyers alike. They are virtually sacrosanct.

THE RUHRGAS CASE

Notwithstanding these established truths, the Supreme Court recently decided *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563 (1999), in which it concluded that “there is no unyielding jurisdictional hierarchy.” *Id.* at 1567. While customarily “a federal court first resolves doubts about its jurisdiction over the subject matter... there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry. The proceeding before us is such a case.” *Id.*

THE FACTS

Ruhrgas is the result of an international commercial dispute. Plaintiff Marathon Oil Company became involved in Norwegian North Sea gas exploration activities when its affiliate, Marathon International Oil, purchased a European concern that held a North Sea production license. The license, originally held by Marathon Petroleum Norge, ultimately gave another affiliate, Marathon Petroleum Norway, rights to 24% of a gas field in the North Sea. Another large interest holder in the same gas field, Statoil, held a 40% interest.

Defendant Ruhrgas, A.G. is Germany’s primary gas company. The litigation arose over alleged oral and written agree-

ments between the Marathon companies, Ruhrgas, and other European companies regarding the development and production of the gas-field reserves.

According to the plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas’s production facilities in Germany. Marathon alleged that, to effectuate the plan, Ruhrgas duped it into providing Marathon Petroleum Norway with a large sum of money to participate in extensive construction and drilling operations, under false promises of premium prices for Marathon’s European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.

THE DISTRICT COURT ACTION

When it became apparent that premium prices would not be paid and that the scheduled transportation tariffs would not materialize, Marathon sued Ruhrgas in state district court in Houston, Texas, for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas removed the case to the U.S. District Court for the Southern District of Texas, invoking jurisdiction under 28 U.S.C. §§ 1331 and 1332 and 9 U.S.C. § 205.

Ruhrgas then filed a motion to dismiss for lack of personal jurisdiction. In turn, Marathon moved to remand the case to state court for lack of subject-matter jurisdiction. The district court granted Ruhrgas’s motion to dismiss for lack of personal jurisdiction and dismissed all other motions as moot. Marathon timely appealed to the U.S. Court of Appeals for the Fifth Circuit.

THE FIRST FIFTH CIRCUIT OPINION

As might be expected, the Fifth Circuit

ROBERT MARKLE is an associate with Adams & Reese LLP in New Orleans, where he focuses on appellate practice. He was formerly a staff attorney for the U.S. Fifth Circuit Court of Appeals.

addressed, at the threshold, the “vital question” of federal subject-matter jurisdiction. *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 317 (5th Cir. 1997). In its brief, Ruhrgas insisted that the Fifth Circuit rule on its personal-jurisdiction challenge without first determining whether the court had subject-matter jurisdiction. The appellate court noted that no dispositive Fifth Circuit precedent has held that a court may ignore a lack of subject-matter jurisdiction when the court could more easily dispose of the case through a motion to dismiss for lack of personal jurisdiction. *Id.* at 318. Such a rule “necessarily would be invalid” in light of the court’s constitutional and statutory authority and the “overwhelming body of precedent” commanding all federal courts “to scrutinize assiduously” subject-matter jurisdiction at each stage of litigation—trial and appellate—and to dismiss cases not properly before them. *Id.*

The court explained that the appropriate course is to examine for subject-matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss. “Such a course respects the proper balance of federalism.” *Id.* The court flatly rejected Ruhrgas’s contention that the personal-jurisdiction objection be resolved first. After examining each of the three bases that Ruhrgas had asserted in support of subject-matter jurisdiction, the court concluded that the district court lacked subject-matter jurisdiction. It therefore vacated the district court’s judgment and remanded to that court with instructions to remand the case to state court. *See id.* at 319-21.

The Supreme Court denied Ruhrgas’s petition for a writ of certiorari, which was limited to the question whether subject-matter jurisdiction existed under 9 U.S.C. § 205. *See Rubrgas, A.G. v. Marathon Oil Co.*, 522 U.S. 967 (1997). Based on the federal courts’ unflagging obligation to be certain that they have subject-matter jurisdiction, this is the result one would have expected. But there’s more!

THE SECOND FIFTH CIRCUIT OPINION

On a delayed basis, the Fifth Circuit, *sua sponte*, granted rehearing en banc, and vacated the panel opinion. *See Marathon*

Oil Co. v. A.G. Rubrgas, 129 F.3d 746 (5th Cir. 1997). The court characterized the issue as “whether, on removal from a state court, a district court has discretion to resolve a challenge to personal jurisdiction before ruling on a legally more difficult question concerning its alleged lack of subject-matter jurisdiction.” *Marathon Oil Co. v. A.G. Rubrgas*, 145 F.3d 211, 214 (5th Cir. 1998) (en banc). Given the primacy of subject-matter jurisdiction, one would expect the answer to be a resounding No!

By a somewhat less-than-resounding 9 to 7 vote, the court concluded that, “at least in removed cases, district courts should decide issues of subject-matter jurisdiction first and, only if subject-matter jurisdiction is found to exist, reach issues of personal jurisdiction.” *Id.* This result is mandatory even if the existence of subject-matter jurisdiction is a more difficult legal issue. *Id.* at 215.

The majority relied in part on the fact that, while lack of personal jurisdiction is waivable, lack of subject-matter jurisdiction is not. A defendant’s ability to waive the personal-jurisdiction defense arises from the fact that the requirement that a court have personal jurisdiction flows not from Article III of the Constitution, but from the Due Process Clause. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. *See id.* at 217. The significant distinction is that subject-matter jurisdictional requirements “prevent our overreaching into the powers that the Constitution and Congress have left to the state courts, while personal jurisdiction requirements prevent both state and federal courts from upsetting the defendant’s settled expectations as to where it can reasonably anticipate being sued.” *Id.* at 218.

The court noted that a federal court’s dismissal for lack of personal jurisdiction affects the state court from which a case was removed in a way that a remand for lack of subject-matter jurisdiction does not. Specifically, dismissal for a lack of personal jurisdiction adjudicates the matter between the parties and is binding on the state court. *See id.* In the removal context, when a federal district court that lacks federal subject-matter jurisdiction dismisses for want of personal jurisdiction, it impermissibly wrests that decision

from the state court. This follows from the fact that, after remand, questions of personal jurisdiction necessarily would fall within the state court’s exclusive, residual jurisdiction.

According to the court, a rule of discretion like the one advocated by Ruhrgas threatens the Article III principles of separation of powers and federalism, at least as the rule would relate to a removed case. *See id.* at 219. In sum, a federal court can remand a removed case for lack of subject-matter jurisdiction without offending the right and residual power of a state court to adjudicate, or dispose of, that case, but the federal court cannot do the same by assuming that it has subject-matter jurisdiction in order to reach an easier personal-jurisdiction issue. *See id.* The court viewed its approach as respecting the limits that Congress has placed on the federal courts to adjudicate cases. In addition, this approach accords the proper respect to the state courts, as the residual courts of general jurisdiction, to make the personal-jurisdiction inquiry when federal courts lack either constitutional or statutory subject-matter jurisdiction over a removed case. *See id.* at 220.

The en banc court vacated the district court’s judgment and remanded the case. Unlike the panel, however, the en banc court did not rule on the substance of the motion to remand, but rather, instructed the district court to address that motion in the first instance. *See id.* at 225.

THE DISSENT

Judge Higginbotham, in an impassioned dissent, concluded that “the majority’s claim of federalism on the facts before us is impoverished, a cape for unauthorized appellate rule making.” *Id.* For the seven dissenting judges, he pointed out that no rule of civil procedure denies a district court the discretion to dismiss a case for want of jurisdiction by footing its decision upon a lack of personal jurisdiction rather than subject-matter jurisdiction. *See id.* at 226. In fact, “[a] range of discretion to choose the basis for a dismissal for want of jurisdiction has long been recognized....” *Id.* Further, the contention “that subject matter jurisdiction exists above personal jurisdiction in some hierarchy of jurisdictional importance is untenable.” *Id.* at 228.

Concluding that personal and subject-matter jurisdiction do not differ in relevant ways, the dissent noted that a federal district court is powerless to decide the merits of a case if it lacks *either* subject-matter jurisdiction or personal jurisdiction. In fact, both jurisdictional requirements “are rooted in constitutional commands of case or controversy and due process.” *Id.* The dissent sharply disagreed with the majority on the importance of personal jurisdiction being subject to waiver while subject-matter jurisdiction is not. According to the dissenters, that distinction does not elevate subject-matter jurisdiction in status. “Both are critical to the power of a court; both are rooted in core constitutional precepts.” *Id.* at 229.

According to the dissent, the majority’s attempt to limit its holding to cases removed from state court is not justified. In the dissenters’ view, no principle justifies a distinction between cases removed to federal court and cases filed there originally. *See id.* at 230 n.5.

Expressing the view that a district court should *ordinarily* first satisfy itself of its subject-matter jurisdiction, the dissent proclaimed that “[n]onetheless, we would continue to hold that there are limited circumstances under which it may be more appropriate for the federal court to decide the issue of personal jurisdiction first.” *Id.* at 231. The dissent commented that a federal court’s resolution of a simple matter of personal jurisdiction, premised on federal constitutional law, intrudes little upon the domain of state courts. If a federal court should determine that an issue of personal jurisdiction is resolved easily in favor of a defendant, little is accomplished, and much is wasted, by a remand to state court to permit that tribunal to come to the same conclusion. *See id.* In essence, the dissent believed that neither constitutional nor statutory principles mandated the “jurisdictional hierarchy” resulting in the “rigid sequencing of decisions” implemented by the majority. *Id.* at 233.

THE SUPREME COURT’S RESOLUTION

To resolve a conflict between the circuits—the Second Circuit, in *Cantor*

Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 (2d Cir. 1996), had concluded that district courts *do* have discretion to dismiss a removed case for want of personal jurisdiction without reaching the issue of subject-matter jurisdiction—the Supreme Court granted *Ruhrigas*’s petition for a writ of certiorari. *See Ruhrigas AG v. Marathon Oil Co.*, 119 S. Ct. 589 (1999). The specific question was whether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first determining its subject-matter jurisdiction. Naturally, framing the question in this manner suggests an answer in the negative.

For a *unanimous* Court, Justice Ginsburg stated tersely that the Fifth Circuit “incorrectly read *Steel Co.* to teach that subject-matter jurisdiction must be found to exist, not only before a federal court reaches the merits [of the case], but also before personal jurisdiction is addressed.” *Ruhrigas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1569 (1999). Reversing the Fifth Circuit’s judgment and agreeing with the en banc dissenters, the Court explained that the distinctions between subject-matter jurisdiction and personal jurisdiction—that is, distinctions in origin, function, and the interests that each serves to protect—do not mean that subject-matter jurisdiction “is ever and always the more ‘fundamental.’ Personal jurisdiction, too, is ‘an essential element of the jurisdiction of a district... court,’ without which the court is ‘powerless to proceed to an adjudication.’” *Id.* at 1570 (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)).


While the Court, in *Steel Co.*, had reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle “does not dictate a sequencing of *jurisdictional* issues.” *Id.* (emphasis added). The Court agreed with a recent court of appeals decision noting that when a court dismisses on nonmerits grounds, such as personal jurisdiction, before finding subject-matter jurisdiction, it “‘makes no assumption of law-declaring power that violates the separation of powers principles...’” *Id.* (quoting *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)).

In accord with Judge Higginbotham’s dissent, the Court recognized that in

most instances, subject-matter jurisdiction will “involve no arduous inquiry.” *Id.* at 1572. In such cases, both expedition and sensitivity to state courts’ co-equal stature should impel the federal court to dispose of that issue first. *See id.* (citing *Cantor Fitzgerald*, 88 F.3d at 155).

Where, however, a district court has before it a straightforward personal-jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, “the court does not abuse its discretion by turning directly to personal jurisdiction.” *Id.* Unlike the Fifth Circuit majority, the Supreme Court did not limit its holding to cases that had been removed from state court to federal court. Rather, agreeing with the Fifth Circuit dissenters, the Court held that, as in cases removed from state court, there is no “unyielding jurisdictional hierarchy” in cases *originating* in federal court. *See id.* at 1567.

CONCLUSION

Thus, irrespective of the origin of a case, a federal district court is now free to address an easy personal-jurisdiction question before facing a difficult question of subject-matter jurisdiction. Because of the recent vintage of this case, it is not apparent what ramifications it will have for the federal appellate practitioner. It is reasonable to assume, however, that it will be subject to another law that, so far, has gone unmentioned—the law of unintended consequences. 

MEMBER RECOGNITION

The Oregon Supreme Court has appointed Daniel Lindahl of Bullivant Houser Bailey, P.C., in Portland, Oregon, to the Oregon Board of Bar Examiners. This board is responsible for administering the Oregon bar exam and assessing the character and fitness of bar applicants. Congratulations to Dan on what will likely be a time-consuming commitment.

SUBCOMMITTEE REPORTS

Corporate Involvement

The Corporate Involvement Subcommittee was recently formed to encourage DRI corporate members to join the Appellate Advocacy Committee and to increase corporate-member activity in the committee. The subcommittee is co-chaired by Bob Powell of the Ford Motor Company and Raymond Ripple of E.I. DuPont de Nemours & Co. The co-chairs are currently developing plans to attract greater corporate membership and involvement. If anyone has any questions or suggestions regarding this subcommittee or corporate involvement, please contact one of the co-chairs.

Robert Powell
Ford Motor Co.
Dearborn, MI

Raymond M. Ripple
E.I. Du Pont de Nemours & Co.
Wilmington, DE

Membership

The DRI Membership Committee is attempting to involve the DRI substantive and practice-area committees in membership-development efforts. The idea is to use the various committees as laboratories to test various methods of increasing DRI membership. Toward that end, the Membership Committee has asked the various membership subcommittees, including ours, to devise a membership-development plan. We are to submit the plan for approval by the Membership Committee and perhaps by the DRI Board, too. The timeline is as follows:

December 15, 1999:

Submit written plan to a liaison from the Membership Committee.

January 15, 1999:

Liaison to provide feedback to the subcommittee.

January 31, 1999:

Submit refined plan to Membership Committee liaison.

February, 2000:

If necessary, submit plan to DRI Board for approval.

We ask any Appellate Advocacy Committee members who have ideas to forward them to the subcommittee chair or vice chair at the following addresses:

Geffrey W. Anderson, Chair
Howell, Dorman, Anderson, Berg & Smyer, L.L.P.

1300 South University Drive, Ste 110
Fort Worth, TX 76107
Tel: (817) 334-0059
Fax: (817) 334-0425
anderson@hdabs.com

Raymond P. Ward, Vice Chair
Sessions & Fishman, L.L.P.
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500
Tel: (504) 582-1540
Fax: (504) 582-1555
rward@sessions-law.com

The subcommittee chair and vice chair will be working diligently over the next month to devise our membership-development plan. We hope to have the plan in place by the March 2000 Appellate Advocacy Seminar in New Orleans.

Geffrey W. Anderson
Howell, Dorman, Anderson, Berg & Smyer, L.L.P.
Fort Worth, TX

Publications

The DRI Board of Directors is debating a proposal to change the publication format for all committee newsletters. The proposal is to alternate between mailed and e-mailed issues. One issue would be mailed to each committee member, with the next issue to be e-mailed to all committee members. There would be no hard-copy, mailed version of the e-mailed issue, but members could, of course, print their own copy of the e-mailed issue. This proposal was the topic of spirited debate at several meetings during the DRI Annual Meeting in New York. For reasons that I won't detail, the leadership of the Appellate Advocacy Committee opposed the proposal. We would like to continue to be able to mail two issues of

Certworthy each year. At any rate, the final decision rests with the DRI Board.

In addition to publishing *Certworthy*, our committee is investigating the possibility of launching two other projects. First, DRI has discontinued the concept of doing "dedicated" issues of *For The Defense*. Instead, DRI has created a new section in *For The Defense*, entitled "From the Committees." Each month, one DRI committee will be allocated 15 or 20 pages to publish articles in the "From the Committees" section. DRI anticipates that there will be four or five articles in this section, so these articles will be shorter than the usual lead articles in *For The Defense*. We are looking into the possibility of reserving an issue of *For The Defense* in the latter part of 2000, for our committee to be responsible for the "From the Committees" section. And, of course, if any of you ever has the urge to publish a lead article in *For The Defense*, you can contact DRI directly.

Second, DRI has instituted the Defense Library Series, replacing DRI monographs. DRI hopes to use this series to tap into the market for defense-oriented manuals. DRI has suggested that each substantive committee should publish a book or special publication at least once every three years. Our committee has been in existence for about two years, so it is time for us to begin thinking about publishing something. Our current thought is to do a book for the Defense Library Series. This would be a long-term project that would take about a year from concept to publication. We are currently contemplating two ideas for such a publication. If you have an interest in authoring an article for this publication, please contact me.

Finally, many of you will have noticed that DRI has started publishing a monthly Writer's Corner in *For The Defense*. Dave Ream, the editor of *For The Defense*, is looking primarily toward members of the Appellate Advocacy Committee to author this monthly column. If you are interested in authoring one of those columns, please contact Dave at the DRI offices in Chicago.

Scott Patrick Stolley
Thompson & Knight L.L.P.
Dallas, TX

Seminar

Plans are complete for the second annual Appellate Advocacy Seminar, to be held March 9-10, 2000 in New Orleans (at the Le Meridien Hotel). We have a truly impressive list of speakers lined up, as we continue the standard of excellence with which we opened our first effort in Washington, D.C. last January. Four Federal Circuit judges will join us. Ninth Circuit Judge Alex Kozinski, one of the most sought-after speakers on the "CLE Tour," will address how *not* to win an appeal. Senior Circuit Judge John Godbold of the Eleventh Circuit will speak on the crafting of appellate briefs, and then will be joined by Judge Fortunato "Pete" Benevides of the Fifth Circuit and Judge Martha Craig Daughtrey of the Sixth Circuit to hear an oral argument presented by two Appellate Advocacy Committee members. Other topics to be

addressed include CD-ROM briefs; interlocutory appeals in federal court; ethics and professionalism on appeal; administrative agency appeals; special issues associated with seeking a new trial; amicus briefing; and—an especially practical topic—marketing your appellate practice.

The Steering Committee and the "Committee of the Whole" will also meet. Perhaps most important, a series of "dine arounds" will give you a chance to sample the culinary delights of a city that is world renowned for its delectations and comestibles. Please join us in the "Big Easy" for what should be a fun and informative time!

Michael B. King

Lane Powell Spears Lubersky, L.L.P.
Seattle, WA

John Bredehott

Venable Baetjer & Howard, L.L.P.
McLean, VA

Web Page

The DRI Web site keeps expanding. In addition to full-text newsletters from various committees, you can review the publications indexes, which include monographs and special publications, seminar course books, and *For The Defense*. There is also a section to review the newest publications from DRI. You can do your own expert-witness search, article search, or brief-bank search. You can also see what amicus briefs DRI has filed over the past few years, and order full-text copies on line. Our appellate practice newsletter is currently available on line.

We look forward to receiving any comments that you may have regarding the Web page.

Jody Nathan

Feldman, Franden, Woodard, Farris & Taylor
Tulsa, OK

NOTABLE FINALES

In the last issue of *Certworthy*, we mentioned that DAVID C. LEWIS of Jones, Skelton & Hochuli, in Phoenix, Arizona, filed an amicus brief for DRI in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 1999 WL 181158, pending in the United States Supreme Court. We regret that we didn't know that DRI member DEBORAH ALLEY SMITH, partner in the Birmingham, Alabama law firm of Rives & Peterson, successfully argued that case before the Supreme Court. The Court held that the 30-day period for removing cases from state court to federal court begins with formal service of process, and not with informal receipt of the complaint. Congratulations to Deborah for this successful result!

EDMUND G. FARRELL III of Murchison & Cumming, in Los Angeles, received a favorable opinion from the California Supreme Court in *Preferred Risk Mut. Ins. Co. v. Reiswig*, 21 Cal. 4th 208 (1999).

The court held that the 90-day post-notice tolling period created by the Medical Injury Compensation Reform Act applies to equitable indemnity actions that flow or originate from professional negligence. Thus, if a notice of intent to is filed within the final 90 days of the one-year statute of limitations for equitable indemnity actions, the limitations period is extended by 90 days.

RAYMOND P. WARD of Sessions & Fishman, L.L.P., in New Orleans, Louisiana, obtained a favorable result from the Louisiana Court of Appeal in *Johnson v. Louisiana Dept. of Labor*, 737 So. 2d 898 (La. Ct. App. 1999). The court rejected constitutional and statutory attacks on an administrative rule barring class actions in workers' compensation proceedings. Because this holding arguably conflicts with another Louisiana decision, Ray may not have heard the last of this issue.

DAVID C. LEWIS of Jones, Skelton &

Hochuli, in Phoenix, Arizona, obtained a favorable en banc decision from the Ninth Circuit in *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999). The court held that a jail regulation prohibiting inmate possession of "sexually explicit" materials was a valid restraint on inmates' First Amendment rights. Among the justifications for the policy was that female detention officers have a right to work in an atmosphere free of sexual harassment. The inmates apparently intend to petition the U.S. Supreme Court for writ of certiorari in this case.

JOHN B. FARLEY of Halloran & Sage, L.L.P., in Hartford, Connecticut, received a favorable opinion from the Connecticut Supreme Court in *Paige v. St. Andrews Roman Catholic Church Corp.*, 250 Conn. 14, 734 A.2d 85 (1999). In a rare en banc reversal of a prior panel opinion, the court held that there was insufficient evidence to support a verdict for the plaintiff, who had suffered severe injuries after being trapped inside an oil-fired burner.

THE IMPORTANCE OF THE OPENING IN AN APPELLATE ARGUMENT: A CASE STUDY

There is a frequent debate about the value of oral argument in appeals. On the one hand, some judges believe that “cases are not won at oral argument; they are only lost.” R. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 299 (1992). Other judges believe that oral argument has an important affect on the ultimate decision in appellate cases. See, e.g., M. Bright & R. Arnold, “Oral Argument? It May Be Crucial!” 70 A.B.A. J. 68 (Sept. 1984). Whichever view is adopted, it is up to the advocate either to foster the best chance of winning, or to limit the possibility of losing. The premise of this article is that an effective appellate argument requires a strong opening statement.

Most appellate courts today are “hot” courts, where the judges have read the briefs and have given some significant thought to how the case should be decided. Oral arguments are generally short, with most courts allowing no more than 15 minutes per side. Indeed, some courts have been encouraging, if not mandating, even shorter arguments. For example, the Pennsylvania Superior Court urges lawyers to place their cases on the expedited argument list, which permits only five minutes a side. At a recent session of the Pennsylvania Supreme Court, where each side is nominally allowed 30 minutes, the court actively encouraged lawyers to use less than their allotted time and, in some cases, actually cut lawyers off well before their time was up.

Most courts will not permit the advocate to use the entire allotted time uninterrupted. Courts will frequently ask questions—usually hard questions. If the advocate is going to get any uninterrupted time, it will be at the beginning of the argument. Therefore, the introduction is very significant. See K. Williams, “Appellate Advocacy: Help Us Help You: A Fourth Circuit Primer On Effective Appellate Oral Arguments,” 50 S.C. L. Rev. 591, 592 (1999). During the introduction, the advocate must succinctly

present the issue on appeal and explain to the court the most important reason why his or her client should prevail. *Id.* As a noted Supreme Court advocate has stated:

Every good salesman knows that the first few minutes of an oral presentation are important. In the Supreme Court, this is also the case. The introduction should orient the Court so that it can easily follow the subsequent development of the argument. S. Shapiro, “Symposium on Supreme Court Advocacy: Oral Argument In Supreme Court of the United States,” 33 Cath. U.L. Rev. 529, 530 (1984).

Although appellate judges may try to be objective, they are human beings with beliefs, attitudes, and values. N. Cripe, “Fundamentals of Oral Persuasion,” 20 Forum 342 (1985). It is also important that the argument explain the “bigger picture of the case”—that is, how the resolution of the case will affect subsequent cases and policy concerns. Williams, *supra*, at 596.

Given these assumptions about oral argument, an effective opening statement must set forth the key issue in the case in a clear, persuasive, and sympathetic light, and provide an outline to the argument as a whole. If this is done well, it can immediately start moving the court towards the desired result. If it is done poorly, it can have a detrimental effect on the case.

An instructive example of the power of a good opening statement, and the harm from a poor one, can be seen in the oral argument in *2-J Corp. v. Tice*, 126 F.3d 539 (3d Cir. 1997). In that case, the buyer of a pre-engineered warehouse sued the warehouse manufacturer for negligence, products liability, and breach of contract, alleging that the warehouse collapsed and damaged goods stored inside. The district court granted summary judgment to the defendant, holding that tort recovery was barred by the economic-loss doctrine. This holding expanded that doctrine, by barring tort recovery for damage to property that

foreseeably may be injured if the defective product fails.

On appeal, 2-J’s counsel sought to limit the economic-loss doctrine, so that it would bar recovery only for damage to the product itself, not damage to “other property.” The argument for appellant began as follows:

My name is [counsel] and I represent the Appellant, 2-J Corporation. It is the position of the Appellant that the decision of the Court below as in the *Hartford v. Holz* case represents an unwarranted, unjustified, illogical and improper extension and expansion of the economic loss doctrine. . . . Moreover, it represents a deviation from the application of the appropriate test of the limits of that doctrine as set forth in the very opinions of this Court, the key one of which I think was offered by Your Honor, Judge Stapleton [the presiding judge of the panel], and is inconsistent with the manner in which that case and others have been applied by the courts of Pennsylvania, particularly the Superior Court and the common pleas court. Finally, the judgment appealed from is inconsistent with the modern economic loss rule articulated by the Supreme Court of the United States in *East River Steamship* and its progeny and represents either judicial legislation or social policy creation, which does not comport with precedent or is a reasonable prediction of what the Supreme Court of Pennsylvania would hold on the same issue. It seems to be, Your Honors, when boiled down to a microscopic look, where Judge Joyner and Judge Pollack, if I may say so, in the case upon which Judge Joyner relied, went wrong is that they simply applied the wrong test and based their determination upon two fictions as I can read the cases, which were self-created.

This opening statement took less than two minutes and started the argument very strongly with the advocate’s main theme—namely, that the district court opinion represented a significant expansion of the economic-loss doctrine and was contrary to state law. The opening explained why the district court was in error and how the opinion will affect later cases. Counsel used strong, direct

language to emphasize his theme and grab the court's attention.

The argument for appellee in the same case began far differently:

I am [counsel] and I represent Jewel Building Supply in this matter. Nearly 27 years ago at an Officer Candidate School, an instructor drill sergeant informed our class that the only thing more useless than a second lieutenant was wet toilet paper. I submit this case presents an example of a commercial product that has failed to meet its expectations and essential purpose and as such is like that wet toilet paper.

In 1987, my client sold the component parts of a building to be erected as a warehouse by the plaintiff 2-J at its Bethlehem facility. Two commercial entities reached agreement on what was being sold, what was being bought. 2-J, Your Honor, in response to Judge Hall's question, what was it buying? It was buying a warehouse to protect its inventory. Much like this past Sunday at a local nursery buying annuals, only to find the nursery man scrambling to pull his zinnias and

straw flowers into the building for fear of frost. 2-J bought this component part building to protect its inventory. That came with Jewel's five year warranty. Jewel's product served that purpose for nearly seven years. Like wet toilet paper, it collapsed. An example might be like the law library shelving that collapses, tossing historic books and their bindings with damage to the floor. Or an example this Court has dealt with recently, in [case name inaudible], the refrigeration system that failed to chill its stored product. Or sweet potatoes in the *Hilton Davis* case that were treated with a contaminant that caused damage.

This argument is much less effective, because it begins by conceding that the appellee sold a defective, if not useless, product. Whatever inclination the court might have had to find in favor of the appellee on the equities is lost in the face of that concession. Moreover, the analogy does not support the central theme of the argument — that the district court properly applied the economic-loss doctrine under state law. The initial impression re-

ceived by a judge who is concerned about public policy and equities is that the equities require the court to do something to protect the public from the sale of defective products.

We will never know whether and to what extent the argument affected the outcome. However, the Third Circuit did reverse and limit the economic-loss doctrine as suggested by the appellant.

Assuming that oral argument can affect the outcome of a case, it pays to remember that the beginning of an argument can have a dramatic effect on how the judges perceive the case and on how the argument proceeds. The advocate should make the strongest possible opening, one that explains the relief requested, and why the client is entitled to that relief on both legal and equitable bases. Anything else may lead to your case being an example that supports Judge Aldisert's view that "cases are not won at oral argument; they are only lost."

Jay M. Levin

Cozen and O'Connor

Philadelphia, PA

BROWSING THE BOOKSHELF

Black's Law Dictionary (7th ed. 1999) **Edited by Bryan A. Garner**

What is longer than *War and Peace*, contains more information per column inch than an encyclopedia, and is heavier than the Rock of Gibraltar? Answer: the Seventh Edition of *Black's Law Dictionary*, edited by Bryan A. Garner. This is not the kind of book that you read from cover to cover, put on the shelf, and never look at again. Nor is it the kind of book that you keep around because it looks good on a coffee table. But it should be one of the few books that every lawyer has within reach—and reaches for often. Its design is attractive, the typeface easy to read, and the pronunciation key easy to understand. Also, the extensive compilation of legal maxims can provide amusement for cocktail parties.

A particularly attractive feature of the Seventh Edition is the frequent use of ex-

cerpts from various legal writers to illustrate a particular word or to explain something about its history and usage. For example, the entry under Federal Kidnapping Act aptly uses an excerpt from *Am. Jur. 2d* to explain the motivation for enacting that law. In another example, a quotation from Rudolph Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law*, explains the term "manumission."

One entry that I was particularly pleased to see is "conclusory." Lawyers have been using this word for a long time, but I always thought it was a bit cheap and have tried to avoid it because it was not in dictionaries that I consulted. Even the spell-check function in my word processor refuses to recognize the word. Now, on the authority of a leading legal lexicographer, we can all use the word "conclusory," secure in the knowl-

edge that it is recognized in the leading legal dictionary of our time.

The dictionary also includes appendices of useful information. The United States Constitution, the Universal Declaration of Human Rights, a time chart of the United States Supreme Court, and a map showing the federal circuits are all handy. Of the appendices, though, by far the most entertaining is the 85 pages of legal maxims, translated from the original Latin. Two of these maxims are of particular interest to briefwriters, although that was not their original function: "Aequitas supervacua odit: Equity abhors superfluous things"; and "Sublato fundamento, cadit opus: When the foundation has been removed (or demolished), the structure collapses."

I was unable to find anything superfluous in this dictionary. It will serve as a strong foundation for lawyers and legal writers of all kinds for some time to come.

David C. Levine

Baker & Hostetler, L.L.P.

Columbus, OH

CIVILITY IN LEGAL WRITING

We all know the sermon: Thou Shalt Be Fair and Courteous to Thy Litigation Adversary. We have heard it preached at legal education seminars and have seen it mandated in creeds of professionalism adopted by national and state bar organizations. In practical terms, we are taught to never arbitrarily refuse an extension request, to avoid interrupting a deposition with speaking objections, and to treat judges, our opponents, their clients, and witnesses with respect.

It seems that this sermon on civility rarely reaches lawyers as writers. Some attorneys are as cordial as Andy Griffith in personal conversation, but put a key-board under their fingers and they turn into Attila the Hun. Whether motivated by the thrill of insulting their opponents from a distance, or by the delusion that their caustic letters and briefs will be viewed favorably by a judge, these lawyers do themselves (and their clients) no favors, and only coarsen a profession that is already held in low regard.

George Washington knew something about civility. He once recorded more than 100 "Rules of Civility & Decent Behaviour in Company and Conversation." Beyond remembering to cough in a handkerchief and stand when another enters the room, Washington's "Rules of Civility" included the following:

- "Use no Reproachful Language against any one neither Curse nor Revile;"
- "Let your Conversation be without Malice or Envy, for 'tis a Sig[n] of a Tractable and Commendable Nature; And in all Causes of Passion [ad]mit Reason to Govern;"
- "Speak not injurious Words neither in Jest nor Earnest; Scoff at none although they give Occasion."

Like good table manners, civility in legal writing is best achieved when a few

simple rules are remembered and practiced. These rules are common sense and can be summarized as follows:

Know your audience

Lawyers write for the courts, not for a tabloid magazine where sensationalism and fiction reign supreme. Judges read motions and briefs as an impartial tribunal; they do not appreciate cat-fights among litigants and their lawyers. You may lose far more credibility points than the nominal points scored for cleverness. When writing letters to opposing counsel, write as though each letter will ultimately become a trial exhibit. Keep it simple and polite. Show that politeness not just when the occasion requires it (when you need the extension), but at all times.

Avoid getting personal

Yes, this is easier said than done. Most of us have inherited a file from another lawyer in the office whose relationship with opposing counsel was anything but positive. The insults and personal warfare seem to continue no matter how much you try to convince your opponent that he or she is dealing with someone new. The temptation to continue the war is almost irresistible, but nothing good will come of it. Keep the letters short, simple, and cordial. When drafting motions and briefs, recognize the difference between your adversary and his or her pitiful argument. Expose his or her argument as weak, but refrain from taking the personal shot.

Cool off before responding

Technology and tempers rarely mix well. The facsimile letter and hastily written e-mail can haunt the sender. We have all read an e-mail message sent by someone

with an incredible lapse of judgment, fired off in anger or to prove his or her wittiness. Avoid the terse response. Write a draft and edit it a few days later. Or better yet, wait a few days after reading your opponent's brief before starting your draft response. Procrastination hurts here, because relatively few lawyers plan ahead. Most write their response as the deadline looms, or immediately before starting another pressing project. Give yourself time to draft a tempered response.

Have another lawyer edit

This one seems obvious, but many lawyers—caught up in their personal battles—either forget or do not want to bounce their ideas off of another. If there is any question about whether your creative jab has crossed the line, ask a lawyer whose opinion you respect.

Acquire a thick skin

Part of the adversarial process is persuading the court that your client is right and your opponent wrong. This conflict requires thick skin at times. You must expect and tolerate your opponent's attempts to expose your argument as meritless. Belittling your opponent because you feel insulted by his or her written words does not level the playing field and only annoys the judge who feels caught in the fray. Take the high road by sticking to the facts and law.

These rules were, of course, drafted to apply in an environment where we must continually struggle with the difference between argument and insult. As one writer once noted: "When people get in trouble they want a pit bull, not a poodle, to represent them in court." The task of writing for the courts, however, is not so difficult that it forces us to choose between playing a poodle or a pit bull. An advocate can forcefully get his or her point across without resorting to insults and attacks.

David C. Lewis

Jones, Skelton & Hochuli, PLC

Phoenix, Arizona

U.S. Supreme Court

SANCTIONS

In *Cunningham v. Hamilton County*, 119 S. Ct. 1915 (1999), the Supreme Court held that an order sanctioning an attorney for discovery abuse was not immediately appealable under the collateral-order doctrine, even when the sanctions included disqualification of counsel. The attorney in this case was sanctioned for failure to comply with discovery orders, and was disqualified from further participation in the case. The order was immediately appealed to the Sixth Circuit, which dismissed the appeal for lack of jurisdiction, because the underlying case had yet to reach a final judgment, and the sanction order was not immediately appealable under the collateral-order doctrine.

The Supreme Court affirmed the Sixth Circuit, holding that a sanction order and disqualification of counsel do not fall within the collateral-order doctrine. Although the sanction order was conclusive as to the issue of discovery violations, the Court concluded that the issue was not completely separate from the merits of the litigation. Sanction orders are based on the adequacy and completeness of discovery responses, which requires an inquiry into the merits. Most significantly, though, the Court concluded that such orders are adequately reviewable at the end of the litigation. Attorneys and clients have an identity of interests, because counsel's ethical obligations demand that they place the client's interests ahead of their personal self-interest. Although one could argue that the client's interest may include the right to counsel of choice, the Court concluded that the identity of interests means that disqualification orders are reviewable at the conclusion of the litigation.

EXPERTS

In *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), the Supreme Court ruled that the *Daubert* standard for the admissibility of expert testimony applies to engineers and other experts, not just to scientists. Because Federal Rule of Evidence 702 makes no distinction between scientists and other experts, the Court noted that the rules applicable to experts are to be applied without regard to the

type of expert in question. Although several of the criteria in *Daubert* are geared toward scientific experts, those criteria are flexible and can be molded to apply to nonscientific testimony. In addition, the courts of appeals must apply an abuse-of-discretion standard in determining if a district court correctly admitted or excluded expert testimony. Thus, according to the Supreme Court, district courts have considerable latitude and flexibility in performing the gatekeeper function defined in *Daubert*. For a more detailed analysis, see the June 1999 edition of "For the Defense."

STANDARD OF REVIEW

In *Dickinson v. Zurko*, 119 S. Ct. 1816 (1999), the Court held that in reviewing findings of fact made by the Patent and Trademark Office, the Federal Circuit should apply a "clearly erroneous" standard, rather than the less stringent "arbitrary and capricious" standard under the Administrative Procedure Act (APA), 5 U.S.C. §706. The "clearly erroneous" standard, which is applied by the circuit courts to determinations of district courts, is not as deferential as the APA standard of review, which is applied to factual determinations of administrative agencies. The APA standard requires a reviewing court to accept an agency's factual determinations, unless they are arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.

STANDARD OF REVIEW

In *United States v. Hagggar Apparel Co.*, 119 S.Ct. 1392 (1999), the Court held that a Customs Service regulation regarding exemptions from import duties was subject to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and should not have been disregarded by the Court of International Trade. The regulation at issue imposed import duties on clothing that was treated before importation, whereas the duty did not apply to untreated clothing. Hagggar challenged the duty in the Court of International Trade, which declined to give the agency regulation any deference, and held for the company. The Federal Circuit affirmed.

The Supreme Court vacated those de-

terminations and held that the Customs Service regulation was subject to *Chevron* analysis and deserved appropriate deference. The Court noted that the regulation was promulgated using the standard notice-and-comment rulemaking process, and was not intended as merely a guideline for customs officers. Under *Chevron*, an administrative agency's reasonable interpretation and implementation of an ambiguous regulation must be given judicial deference. The Court rejected the assertion that the governing statutes of the Court of International Trade displaced the standard *Chevron* analysis to give the court broader discretion in reviewing challenged regulations.

Frank Noyes

Duane, Morris & Heckscher, L.L.C.
Philadelphia, PA

First Circuit

REMITTITUR

Richard Costa received a \$1 million verdict in his age discrimination case against TWA. On appeal, the court rejected all of TWA's liability arguments, but found that the award of emotional-distress damages was excessive. *Costa v. TransWorld Airlines, Inc.*, 181 F.3d 24 (1st Cir. 1999). Evidence of lost wages (back pay and front pay) amounted to approximately \$284,000, and thus, the remaining \$716,000 was for emotional-distress damages. The court observed that it and other appellate courts had ordered remittitur in a number of similar cases. The court acknowledged that Costa suffered emotionally following his furlough, but there was no evidence that Costa ever sought medical treatment or suffered any long-term depression or incapacitation. After concluding that the emotional-distress award was too high, the court declined to remand, in view of the fact that the district court had denied TWA's motion for remittitur. Instead the court invoked its "maximum recovery rule" and decided that, as a matter of law, the maximum recovery of emotional damages was \$250,000. 181 F.3d at 36. Accordingly, a new trial was ordered on the issue of emotional damages only, conditioned on Costa's declining to remit \$466,000 of the jury award.

RES JUDICATA

Tingley Systems, Inc. brought suit against Bay State Health Management, Inc. for breach of contract, fraud, misappropriation of trade secrets, and copyright infringement. After learning of facts that allegedly implicated CSC Consulting, Inc. as a co-perpetrator, Tingley filed a new complaint against CSC and consolidated that case with the case against Bay State. Tingley and Bay State settled the claims raised in the first complaint and stipulated to dismiss the first action with prejudice. The district court then entered summary judgment against Tingley in the second action, finding it barred by *res judicata*, even though the court termed this to be a “harsh result.”

The court of appeals found that there was no final judgment on the merits. *Bay State HMO Management v. Tingley Systems, Inc.*, 181 F.3d 174 (1st Cir. 1999). The court ruled that the rationale of *res judicata* is to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and prevent inconsistent decisions. None of these policies was implicated here. In addition, equitable considerations favored treating the consolidated cases as a single action for *res judicata* purposes. Consequently, the first element of *res judicata* was not satisfied, because there was no final judgment on the merits in the earlier action; there was only a final judgment on a portion of the aggregate case. Judgment in favor of CSC was vacated, and the case was remanded to the district court.

Richard L. Neumeier

McDonough Hacking & Neumeier
Boston, MA

Second Circuit

NOTICE OF APPEAL

In a case of first impression, the Second Circuit joined the majority of circuit courts that have considered the issue, in holding that a merits panel may revisit a motions panel’s decision on jurisdiction. In *Rezzonico v. H&R Block, Inc.*, 182 F.3d 144 (2d Cir. 1999), the court was faced with a November 26, 1997 judgment that was entered on a counterclaim filed by the defendant, H&R Block. In entering judgment, the court intended to state that “the Rezzonicos are not entitled....”

But the court erroneously omitted the word “not” from the judgment. Along with the judgment, the parties were sent a form (under Fed. R. Civ. P. 77(d)), indicating that a notice of appeal must be filed on or before December 29, 1997. On December 1, 1997, the district court clerk entered an amended judgment, adding the mistakenly omitted “not.” The parties were again provided with a Rule 77(d) form, which now indicated that a notice of appeal must be filed on or before December 30, 1997. On December 15, 1997, the plaintiffs filed a motion for reconsideration and a motion for a new trial. (These motions would have been timely with respect to the December 1, 1997 judgment date, since weekend days would not be counted). Both motions were denied, and an appeal was filed.

H&R Block moved to dismiss the appeal, claiming that the notice of appeal was untimely. A motions panel denied the motion. When considering the merits, a different panel determined that it could revisit the motions panel’s decision and that it was not barred from doing so by the law-of-the-case doctrine. The court found that every circuit but one that has considered this question has ruled that a merits panel may revisit a jurisdictional decision made by a motions panel. The exception is the D.C. Circuit. See *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997).

In considering the timeliness of the appeal, the court found that the entry of the amended judgment constituted only the correction of a “clerical error” that did not effect a material change in the judgment so as to restart the running of the time for filing motions and the notice of appeal. Accordingly, the court found that judgment was entered on November 26, 1997 and that the appeal was untimely, because the appellants’ notice of appeal was not filed within 30 days of that date. The court also found that the appellants’ motions for reconsideration and for a new trial had no tolling effect, since they were not filed within 10 days of the entry of the judgment.

Finally, the court discussed the “unique circumstances” doctrine first developed by the Supreme Court in *Thompson v. INS*, 375 U.S. 384 (1964). The court found that neither the language of the district court’s order denying the ap-

pellants’ motions to reconsider and for a new trial, nor the district court’s Rule 77(d) notice (nor several statements allegedly made by the district court clerk’s office) constituted unique circumstances sufficient to allow the appellate court to consider the appeal.

AMBIGUOUS REMAND

In *Discon, Inc. v. Ninex Corp.*, 184 F.3d 111 (2d Cir. 1999), the court was confronted with a rather uncommon scenario involving an ambiguous remand order from the United States Supreme Court. The underlying district court action involved claims stemming from alleged violations of the Sherman Act. In an earlier appeal (*Discon, Inc. v. Ninex Corp.*, 93 F.3d 1055 (2d Cir. 1996)), the circuit court held that the underlying complaint sufficiently alleged a violation of Section 1 of the Sherman Act under the rule of reason and possibly under a per-se rule applied to group boycotts. The Supreme Court granted certiorari and remanded the case for further proceedings. Unfortunately, neither the litigants nor the Second Circuit could conclusively determine what further proceedings the high court intended, with the possibilities including dismissal of the case or remand to the district court for further proceedings. The circuit court ultimately concluded that the proper course was to remand the case to the district court for further proceedings, including providing the plaintiff with the opportunity to amend its complaint.

APPELLATE JURISDICTION

The Second Circuit also issued a string of decisions in which it provided an interesting and useful discussion of appellate jurisdiction over various forms of allegedly “nonfinal” judgments. These decisions include *Leboeuf, Lamb, Green & Macrae, LLP v. Worsham*, 185 F.3d 61 (2d Cir. 1999) (stating that judgment on a claim seeking damages is not final, even where the district court says it is final, until the district court actually awards damages); *Shannon v. General Elec. Co.*, 186 F.3d 186 (2d Cir. 1999) (stating that an interlocutory order denying the plaintiff leave to amend his complaint and granting summary judgment in favor of one of several defendants is not a final judgment and, thus, is not appealable); *CPR (USA), Inc. v. Spray*, 187 F.3d 245

(2d Cir. 1999) (stating that a district court's order compelling arbitration is appealable even though the arbitration is compelled in an allegedly "embedded" action); *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999) (stating that under the collateral-order doctrine, a district court's order denying qualified immunity would be immediately appealable); and *Whiting v. Lacara*, 187 F.3d 317 (2d Cir. 1999) (stating that denial of an attorney's motion to withdraw as counsel is immediately appealable under the collateral-order doctrine).

Michael S. Taylor
Halloran & Sage, L.L.P.
Hartford, CT

Fourth Circuit

SANCTIONS

The Fourth Circuit recently addressed the narrow circumstances under which an attorney can be sanctioned under 28 U.S.C. § 1927. In *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999), the court reviewed sanctions imposed jointly and severally upon Sue Harris DeBauche and her counsel, arising from her suit against organizers and sponsors of a 1997 gubernatorial debate in Virginia. Ms. DeBauche, the Reform Party candidate, was not included in the debate, so she sued under 42 U.S.C. § 1983, alleging a violation of her rights under the First, Ninth, and Fourteenth Amendments of the United States Constitution.

The district court dismissed DeBauche's claims, concluding that her claims against several of the defendants were "without foundation" and "baseless and unreasonable." The court found that the theory on which DeBauche based the assertion of state action by the private broadcasters to be "tenuous." As a result, the district court inferred bad faith on the part of DeBauche's attorneys, and made the attorneys jointly-and-severally liable (under 28 U.S.C. § 1927) for \$38,000 of the private broadcast defendants' attorneys' fees and costs. DeBauche was made responsible for the full \$48,000 awarded to the defendants.

On appeal, DeBauche (and the ACLU as amicus) argued that requiring DeBauche to pay fees and costs would chill lawsuits by future individuals who thought that their constitutional rights

had been violated. The Fourth Circuit disagreed, quoting *Hutchison v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993): "When a court imposes fees on a plaintiff who has pressed a frivolous claim, it chills nothing that is worth encouraging."

But the Fourth Circuit also held that the district court should have considered DeBauche's financial circumstances when setting the amount. In vacating and remanding the issue to the district court, the appellate court explained that "the policy of deterring frivolous suits is not served by forcing the misguided [§ 1983] plaintiff into financial ruin simply because [s]he prosecuted a groundless suit."

The Fourth Circuit agreed with DeBauche's contention that the sanctions ordered jointly and severally against her attorneys were erroneous as a matter of law. Section 1927 permits sanctions against attorneys whose conduct "so multiplies the proceedings in any case unreasonably and vexatiously." The statute focuses on the conduct of the litigation and not its merits; it is "concerned only with limiting the abuse of court processes." The court explained that an attorney who files a meritorious claim and wins a substantial verdict may be sanctioned under section 1927, if that attorney conducted the case in manner that "multiplies the proceedings... unreasonably and vexatiously." Conversely, an attorney who files a meritless claim cannot be sanctioned unless he or she engages in conduct that "multiplies the proceedings... unreasonably and vexatiously." Because DeBauche's attorneys filed nothing more than a complaint and an amended complaint, the Fourth Circuit held that the section 1927 sanctions were improper.

Gina Fantasia
Rose, Padden & Petty
Fairmont, WV

Fifth Circuit

COLLATERAL-ORDER DOCTRINE

In *Falcon v. Transportes Aereos de Coahuila, S.A.*, 180 F.3d 267 (5th Cir. 1999), the district court entered simultaneous orders that found personal jurisdiction, but remanded the case to state court for lack of subject-matter jurisdiction. In dealing with this issue of first impression, the Fifth Circuit held that it had no jurisdiction to review the orders, because the or-

der regarding personal jurisdiction was a nonconclusive jurisdictional order. Review under the collateral-order doctrine is available only for conclusive orders affecting a substantive right. Because the refusal to dismiss for lack of personal jurisdiction had no preclusive effect on the state court, the Fifth Circuit had no jurisdiction to review the orders.

REMAND ORDERS

In *Smith v. Texas Children's Hospital*, 172 F.3d 923 (5th Cir. 1999), the district court had dismissed for lack of jurisdiction and remanded under 28 U.S.C. § 1447(c). Noting that such orders are statutorily unreviewable (under § 1447(d)), the Fifth Circuit dismissed the appeal. The court looked only at the language of the remand order, and refused to look beyond that language to determine if the remand was actually based on a substantive decision on the merits. The court concluded that it would review only remand orders that affirmatively state a ground for remand that is not based on § 1447(c).

Debora McWilliams Alsup
Thompson & Knight L.L.P.
Austin, TX

Sixth Circuit

REMOVAL

In *Brierly v. Aluisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999), *pet. for cert. filed*, (Oct. 21, 1999), the Sixth Circuit considered "whether, in cases with multiple defendants served at different times, the last-served defendant is allowed a full 30 days after being served to remove or, instead, only has 30 days from time the first defendant is served." After noting that "[t]he question is one of first impression in this circuit and one that has divided our sister courts" as well as the "[t]he two leading treatises," the court concluded that statutory interpretation and fairness require that a later-served defendant be allotted the full 30 days from date of service upon that defendant. *Id.* at 532-33 & n. 2 (comparing 14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3739, at 336-39 (3d ed. 1998), with Moore's *Federal Practice* § 107-30[3][a] (3d ed. 1997)).

EXPERTS

In *Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir. 1999), the Sixth Circuit found that the district court had properly admitted the testimony of an accident reconstructionist, noting that such testimony was sufficiently relevant and reliable. The court made this finding despite the fact that the expert had "stated that the eyewitness testimony was contradictory and that he had no principled basis for accepting one eyewitness version of events over another... [and that he had therefore] disregarded all of them."

Rebecca D. Hannifan

Brown, Todd & Heyburn, PLLC
Lexington, KY

Seventh Circuit

CLASS CERTIFICATION

In June 1999, the Seventh Circuit was the first circuit to render a decision under the new Rule 23(f), which gives appellate courts discretion to hear appeals from orders granting or denying class certification. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). The Seventh Circuit discussed several factors that it will consider when deciding whether to exercise this discretion.

First, the court found merit in reviewing orders that deny the class and are ultimately the "death knell" for the claim. *Id.* at 834. Second, the court will examine whether a defendant may be pressured to settle regardless of the merits if a class is certified. *Id.* at 835. Third, the court will be strongly persuaded if an immediate review would develop a legal issue that normally evades consideration. The court expressly refused to limit its analysis to these factors alone and will consider others that promote the purpose of Rule 23(f). *Id.*

Last but not least, Rule 23(f) requires that an appeal be filed within 10 days from the order, excluding weekends and holidays. *Id.* at 837. The Seventh Circuit held that the appeal may also be filed within 10 days of the disposition of a request for reconsideration, if that request was filed within the time for appeal. *See Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999) (stating that if the request for reconsideration is filed after the 10 days allowed for appeal, then Rule 23(f) does not apply, and the certification ruling

cannot be appealed until the final disposition of the case).

Karena Bierman

Wildman, Harrold, Allen & Dixon
Chicago, IL

Eighth Circuit

RICO

In *Fogie v. Thorn Americas, Inc.*, No. 98-2442, 1999 WL 632251 (8th Cir. 1999), members of a class who entered into rent-to-own agreements alleged that the contracts violated state usury law and RICO. Addressing a question of first impression, the Eighth Circuit held that only those individuals injured by use or investment of racketeering income have standing to sue under the RICO provision barring the use or investment of income derived from a pattern of racketeering activity or through collection of an unlawful debt. Thus, the class members lacked standing to sue under that provision. Addressing another matter of first impression, the court also held that class members had failed to show sufficient distinctiveness between the rental company, its parent corporation, and other subsidiaries to maintain a claim under the provision of RICO creating liability for those persons who conduct or participate in the conduct of a RICO enterprise. In the Eighth Circuit's view, wholly related business entities, a parent corporation, and its subsidiaries, lacked the capacity to conspire with each other to violate RICO.

NEW TRIAL

In *Dominium Management v. Nationwide Housing Group*, No. 98-2620 (8th Circuit 1999), the plaintiff sought a declaratory judgment that it had a binding contract to purchase real-estate partnership interests. The jury found that there was a contract, that the defendant had breached it, and that the plaintiff was entitled to \$18.3 million in compensatory damages. The court granted certain aspects of post-trial motions for judgment as a matter of law, and then conditionally ordered a new trial on damages unless the plaintiff consented to a remittitur of \$15.5 million and entry of judgment in the total amount of \$2.8 million. The plaintiff appealed, arguing that the district court erred by granting judgment as

a matter of law and by conditionally ordering a new trial. The appellate court reversed the partial grant of judgment as a matter of law, and affirmed the conditional grant of a new trial.

The most significant part of the court's decision was with regard to the new-trial motion. Noting that it reviews a district court's conditional grant of a new trial for abuse of discretion, the court spent a considerable amount of time addressing the "necessity of an adequate statement of the reasons for a district court's grant of a new trial." Also noting its recent decision in *Van Steenburgh v. Rival Co.*, 171 F.3d 1155 (8th Cir. 1999), in which it had reversed the grant of a new trial that was based on "the reasons stated above," the court repeated its observation that the district court has an obligation to articulate its reasons, so that the appellate court can meaningfully review the granting of a new trial.

In the case at bar, the district court clearly set forth the appropriate standard for granting a new trial, and then recited that the jury's verdict "shocks the conscience of the court, considering the complete failure of proof of lost profits which necessarily resulted in the jury's resort to speculation." The trial court also determined that "a miscarriage of justice would result if the court were to allow the jury's verdict to stand." Although pointing out that verbal formulas are insufficient, standing alone, to justify the grant of a new trial, the appellate court concluded that in this "close case," the trial court "said enough to demonstrate that the proper standard was applied and to convince us that there was no abuse of discretion."

WAIVER

The United States Department of Interior filed suit in *United States v. Mannis*, 1999 WL 55736 (8th Cir. 1999), seeking an injunction requiring a houseboat owner to remove the houseboat from a wildlife refuge. The district court granted summary judgment and an injunction in favor of the United States. The houseboat owner appealed, raising in his brief a single issue that had not been presented in his summary-judgment opposition, but was first raised in a motion under Fed. R. Civ. P. 60(b) filed after the appeal was perfected. The district court denied

the Rule 60(b) motion, and no appeal was taken from that order.

Noting that it does not entertain new arguments on appeal from the grant of summary judgment, and that review of a Rule 60(b) motion is properly sought only from an appeal of the order denying the Rule 60(b) request, the court dismissed the appeal. "Because there is nothing for us to consider on the merits, we must dismiss [the boat owner's] appeal."

The Eighth Circuit has a long history of strictly enforcing the rules concerning appeals in cases where post-decision motions have been brought. The court has pointed out the pitfalls of bringing such motions, and explained how they may complicate or misdirect an appeal. See *Sanders v. Clemco Indus.*, 862 F.2d 161 (8th Cir., 1988), in which Judge Myron Bright summarizes in cogent detail the various post-decision motions available, and their impact on appeal. Practitioners should take great care in the Eighth Circuit (and elsewhere) to make sure that their appeal is taken in a timely fashion, from the proper decision, raising the proper issues.

Eric J. Magnuson
Rider Bennett Egan & Arundel
Minneapolis, MN

Ninth Circuit

COLLATERAL-ORDER DOCTRINE

Exploring the parameters of its own jurisdiction in three recent cases, the Ninth Circuit either found it had no jurisdiction over the matters or that they were "unreviewable." In the first matter, the court determined that it lacked jurisdiction to hear either an appeal or a petition for mandamus in which the government sought relief from an order denying a motion to unseal financial affidavits filed by defendants in support of their request for court-appointed counsel. In *United States v. Hickey*, 185 F.3d 1854 (9th Cir. 1999), the government asked the Ninth Circuit to use the "collateral-order" exception to its one-final-judgment rule. The Ninth Circuit, which applies the collateral-order doctrine strictly in criminal cases, found that the government's request met none of the criteria for application of the exception. Interestingly, the court also noted that the government lacked third-party standing to

assert the public right of access to documents filed with the court, and moreover, there was no showing of impediment to public access. In finding no jurisdiction either over the appeal or the mandamus action, the court noted that such writs are not to be used to rectify "erroneous interlocutory orders that are within a district court's prescribed jurisdiction," or to "thwart the congressional policy against piecemeal appeals."

DISQUALIFICATION

The court also dismissed an appeal and denied mandamus in *In re Grand Jury Investigation*, 182 F.3d 668 (9th Cir. 1999). In this matter, one attorney was representing several witnesses who had been called to testify before a federal grand jury. The government's second attempt to disqualify the attorney from his multiple representation was successful, and the attorney appealed on behalf of his clients. The court first decided that the order was not appealable, a decision consistent with its treatment of disqualification orders in both civil and criminal proceedings. The court then considered the alternative request, that the appeal be treated as a petition for writ of mandamus. Explaining that it would issue the writ only if the district court had made a clear error of law, the Ninth Circuit denied the petition. Although the witnesses claimed a due-process right to the assistance of counsel when testifying before the grand jury, the court found that that right is not coextensive with a criminal defendant's Sixth Amendment right to counsel of choice, because a grand-jury witness is not an "accused." Because the Due Process Clause does not contain any right to counsel of choice for grand-jury witnesses, no substantive rights were violated, and mandamus was inappropriate.

APPELLATE JURISDICTION

In the third case, the court dismissed as "unreviewable" an appeal from a remand order that was based solely on the lack of subject-matter jurisdiction. *Lyons v. Alaska Teamsters Employer Serv. Corp.*, 188 F.3d 1170 (9th Cir. 1999). This was a wrongful-termination matter, filed in state court and removed on a theory of federal preemption under ERISA. The district court, finding that the matter was not completely preempted by ERISA, held that jurisdiction was lacking, removal improper, and remand necessary.

An order remanding a case to state court for lack of subject-matter jurisdiction is not reviewable on appeal under 28 U.S.C. § 1447(d), except where the remand order is based on a substantive determination on the merits apart from any jurisdictional decision. Here, the district court engaged in a preemption analysis under ERISA for the purpose of determining whether federal jurisdiction could be established, and concluded that it could not. Accordingly, the Ninth Circuit held that the remand order did not fall into the exception to the general rule of nonappealability, because the district court's consideration of the merits of the ERISA preemption defense was not "apart" from its jurisdictional determination. Accordingly, the Ninth Circuit found that it lacked jurisdiction to review the remand order.

Diane R. Crowley
Gordon & Rees
San Francisco, CA

Tenth Circuit

ARBITRATION AND RELEASE

Gibson v. Wal-Mart Stores, Inc., No. 98-8040 (10th Cir. 1999), involved the enforceability of an arbitration clause in a worker's compensation release. Gibson was injured at work, decided to see a doctor, and asked Wal-Mart to pay for it. Wal-Mart agreed, provided that Gibson first sign a release with an arbitration provision. She signed the release and received over \$31,000 in worker's compensation benefits. Eventually, the worker's compensation payments ceased, because she had achieved maximum medical improvement. She then sued Wal-Mart, which filed a motion to compel arbitration. The court granted the motion and dismissed the suit.

In Gibson's appeal, the court held that the arbitration agreement is enforceable and valid under Wyoming law and that it was not executed under duress. The court observed that Gibson was "someone who was initially satisfied with her settlement, but who, upon subsequent reflection, concludes that she could have gotten more out of the deal and therefore attempts to renege on it."

RIGHT TO JURY TRIAL

Fischer Imaging Corp. v. General Elec. Co., No. 98-1225 (10th Cir. 1999), was a declaratory-judgment action to deter-

mine a reasonable price for “Tilt C” units to be sold by Fischer to GE. GE counter-claimed for specific performance. Under to Fed. R. Civ. P. 39(c), the court empaneled an advisory jury, but did not follow the jury’s verdict. Fischer appealed from the striking of its jury demand and sought an order directing the trial court to reinstate the advisory jury’s verdict. The appellate court reversed and remanded for a new trial. Observing that the case did not fit neatly into either a “legal” or “equitable” category, the court reasoned that in the absence of the availability of declaratory relief, either party could have sued the other for damages had the units been delivered or not delivered. The court determined that the suit was more in the nature of a quasi-contract action, which presented issues for jury resolution.

REMOVAL

The Tenth Circuit visited the interplay between removal procedure and summary judgment in *Huffman v. Saul Holdings Limited Partnership*, No. 98-5053 (10th Cir. 1999). Saul kept trying to fix the roof in space leased to the plaintiffs, but the repairs did not work. The plaintiffs broke the lease, moved out, and sued Saul for breach of contract and rescission. They sought \$300,000 in damages for lost business and harm to their business reputation. Saul removed the case when an economist testified that damages were \$1.9 million. The trial court determined that removal was timely, although Saul knew of the \$300,000 damage claim more than 30 days before removal when one of the plaintiffs testified to that amount in his deposition. Saul’s summary judgment was also granted.

Accepting the majority view that deposition testimony may be an “other paper” triggering the right to removal under 28 U.S.C. § 1446, the appellate court found that the time for removal commenced with the giving of the testimony, rather than when the transcript was received. In this case, removal was therefore untimely. Although a defect in removal procedure does not ordinarily require a remand to state court if subject-matter jurisdiction existed at the time that the trial court entered judgment, this principle is inapplicable if the judgment must be reversed on the merits. In this case, summary judgment was improper, given that material fact issues existed.

APPELLATE PROCEDURE

Two recent Tenth Circuit decisions address appellate procedural issues. In *U.S. v. Smith*, No. 98-6205 (10th Cir. 1999), the court held that a motion for extension of time to appeal may be the equivalent of a notice of appeal, if it states the parties appealing, the judgment or order appealed from, and the court to which the appeal is taken. In *Sac & Fox Nation v. Cuomo*, Nos. 97-6317 and 98-6212 (10th Cir. 1999), the court held that federal jurisdiction does not exist merely because federal funds are involved. The court also emphasized that the failure to plead a basis for federal jurisdiction may not be cured by arguments in the brief on appeal.

Jody R. Nathan
Feldman, Franden, Woodard, Farris & Taylor
Tulsa, OK

Eleventh Circuit

NOTICE OF APPEAL

In *Hollins v. Department of Corrections*, 1999 WL 791444 (11th Cir. 1999), the court allowed an untimely appeal based on the “unique circumstances” doctrine. The appellant filed his appeal 14 months after the district court entered judgment. The appellant claimed that he did not receive a copy of the judgment in the mail and that he regularly checked the electronic docket on the Public Access to Court Electronic Records System (“PACER”), but that the PACER system did not show the entry of judgment. The court found that the appellant reasonably relied on the PACER system, that the failure of court personnel to enter the judgment on the PACER system constituted “judicial action,” and that this failure lulled the appellant into inactivity, thereby meeting the requirements for application of the “unique circumstances” exception to the jurisdictional requirement of timely filing an appeal.

William R. Shreve, Jr.
Lyons, Pipes & Look, P.C.
Mobile, AL

D.C. Circuit

NOTICE OF APPEAL

Noncompliance with Fed. R. App. P. 15(a) (requiring that a petition for review

of an agency decision specifically name each party seeking review) proved fatal when the petitioners identified themselves only by the name “Elkins Carmen,” without indicating that this referred to an unincorporated association. They also failed to list the individuals who comprised the association. Analogizing a petition for review to a complaint (the first filing with the court), the court held that the failure to specifically name the parties required dismissal of the appeal. *Elkins Carmen v. Surface Transp. Bd.*, 170 F.3d 1144 (D.C. Cir. 1999).

JURISDICTION

Byrd v. EPA, 174 F.3d 239 (D.C. Cir. 1999), reminds us that standing is a threshold jurisdictional issue that should not be assumed, cannot be waived, and may be raised for the first time in the appellate process. *Byrd* particularly addresses Article III standing, which requires the plaintiff to prove three elements: injury-in-fact, causation, and redressability. In ruling on the issue of redressability, the court looked beyond the specific remedy sought by the plaintiff and considered how the remedy might influence the defendant’s future behavior.

In *Byrd*, an environmental consultant brought a declaratory-judgment action after he was denied access to a peer-review panel’s notes. He alleged that the EPA had violated the rules of the FACA (“Federal Advisory Committee Act”) with regard to a panel chosen to update the EPA’s interim benzene report. On appeal, the EPA questioned the plaintiff’s standing, arguing that he had not shown redressability, because at the time of the suit, the EPA had provided the plaintiff with the notes and had disbanded the committee. The court held that although the immediate remedy of receiving copies of the notes was no longer available, the broader remedy of a court declaration that the EPA had failed to comply with the FACA would be useful to the plaintiff in subsequent proceedings relying on the updated report, might prompt additional FACA compliant review, and might persuade the EPA to comply more closely with the FACA in future.

Terri Smith
Stevens & Minter
Secaucus, NJ

APPELLATE ADVOCACY STEERING COMMITTEE

Committee Chair

Mary Massaron Ross

Plunkett & Cooney, P.C.

243 West Congress

Suite 800

Detroit, MI 48226-3260

Phone: 313-983-4801

Fax: 313-983-4350

massaronma@plunkettlaw.com

Committee Vice Chair and Seminar Subcommittee Co-Chair

Michael B. King

Lane Powell Spears Lubersky, L.L.P.

1420 Fifth Avenue, Suite 4100

Seattle, WA 98101-2338

Phone: 206-223-7046

Fax: 206-223-7107

kingm@lanepowell.com

2000 Annual Meeting Subcommittee Co-Chair

Maureen Middleton

Freeman Mathis & Gary, L.L.P.

100 Galleria Parkway

Suite 1650

Atlanta, GA 30339-5959

Phone: 770-818-1406

Fax: 770-937-9960

mmiddleton@fmglaw.com

2000 Annual Meeting Subcommittee Co-Chair

Richard Neumeier

McDonough, Hacking & Neumeier

73 Tremont Street

Boston, MA 02108

Phone: 617-367-3815

Fax: 617-367-8307

Board Liaison

Terrance M. Miller

Porter Wright Morris & Arthur, LLP

41 S. High St

Columbus, OH 43215-6194

Phone: 614-227-2000

Fax: 614-227-2100

tmiller@porterwright.com

Brief Bank Subcommittee Chair

R. Daniel Lindahl

Bullivant Houser Bailey, P.C.

300 Pioneer Tower

888 S.W. Fifth Avenue

Portland, OR 97204

Phone: 503-499-4614

Fax: 503-295-0915

dan.lindahl@bullivant.com

Corporate Involvement Subcommittee Co-Chair

Robert Powell

Ford Motor Company

Office of the General Counsel

300 Parklane Towers West

3 Parklane Boulevard

Dearborn, MI 48126-2588

Phone: 313-621-6402

Fax: 313-248-7727

rpowell2@ford.com

Corporate Involvement Subcommittee Co-Chair

Raymond M. Ripple

E. I. Du Pont de Nemours and Company

1007 Market Street, Suite D-7012

Wilmington, DE 19898

Phone: 302-773-3072

Fax: 302-773-7222

Ethnic Minority Committee Representative

Sandra Boyd Williams

Locke Reynolds, L.L.P.

1000 Capital Center South

201 North Illinois Street

Indianapolis, IN 46204

Phone: 317-237-3800

Fax: 317-237-3900

sbwilliams@locke.com

Immediate Past Chair

Kelly A. Freeman

Freeman McKenzie, P.C.

75 North Main, P.O. Box 2335

Mount Clemens, MI 48046-2335

Phone: 810-469-2633

Fax: 810-469-0106

kfreeman@freemanlegal.com

Liaison Subcommittee Co-Chair

Roger W. Hughes

Adams & Graham, L.L.P.

P.O. Drawer 1429

Harlingen, TX 78551-1429

Phone: 956-428-7495

Fax: 956-428-2954

rhughes@adamsgraham.com

Liaison Subcommittee Co-Chair

Anthony J. Russo

Butler Burnette Pappas

6200 Courtney Campbell Causeway

Bayport Plaza, Suite 1100

Tampa, FL 33607-5946

Phone: 813-281-1900

Fax: 813-281-0900

arusso@bbplaw.com

Membership Subcommittee Chair

Geffrey W. Anderson

Howell, Dorman, Anderson, Berg & Smyer,

L.L.P.

University Center 1, Suite 110

1300 S. University Drive

Fort Worth, TX 76107

Phone: 817-334-0059

Fax: 817-334-0425

anderson@hdabs.com

Membership Subcommittee Vice Chair

Raymond P. Ward

Sessions & Fishman, L.L.P.

201 St. Charles Avenue, 35th Floor

New Orleans, LA 70170-3500

Phone: 504-582-1500

Fax: 504-582-1555

rward@sessions-law.com

Publications Subcommittee Chair

Scott P. Stolley

Thompson & Knight L.L.P.

1700 Pacific Avenue, Suite 3300

Dallas, TX 75201

Phone: 214-969-1678

Fax: 214-969-1751

stolleys@tklaw.com

Publications Subcommittee Vice Chair

David C. Lewis

Jones, Skelton & Hochuli, P.L.C.

2901 North Central Avenue

Suite 800

Phoenix, AZ 85012

Phone: 602-263-1779

Fax: 602-263-1784

dlewis@jshfirm.com

Seminar Subcommittee Co-Chair

John Bredehoft

Venable Baetjer & Howard, L.L.P.

2010 Corporate Ridge, Suite 400

McLean, VA 22102

Phone: 703-670-1629

Fax: 703-821-8949

jmbredehoft@venable.com

Web Page Subcommittee Chair

Jody R. Nathan

Feldman, Franden, Woodard & Farris

Suite 1000

525 South Main Street

Tulsa, OK 74103-4514

Phone: 918-764-3121

Fax: 918-584-3814

nathan@tulsalawyer.com

Young Lawyers Liaison

Jeff Cruise

Shook, Hardy & Bacon, L.L.P.
1200 N. Main Street
Kansas City, MO 64105-2118
Phone: 816-391-5539
Fax: 816-421-5547

John Jacobs

*O'Leary, O'Leary, Jacobs, Mattson,
Perry & Mason, P.C.*
26777 Central Park Blvd., Suite 275
Southfield, MI 48076
Phone: 248-799-8260
Fax: 248-799-8265
olearyjacobs@michbar.org

Karen Kendall

Heyl, Royster, Voelker & Allen, P.C.
Bank One Bldg., Suite 600
124 S.W. Adams

Peoria, IL 61602
Phone: 309-676-0400
Fax: 309-676-3374
kkendall@hrva.com

Irene Keyse-Walker

Arter & Hadden, L.L.P.
925 Euclid Avenue
1100 Huntington Building
Cleveland, OH 44115-1475
Phone: 216-696-3982
Fax: 216-696-2645
ikeyse@arterhadden.com

Thomas Sheehan

Shook, Hardy & Bacon, L.L.P.
1200 N. Main Street
Kansas City, MO 64105-2118
Phone: 816-474-6550
Fax: 816-421-5547

Mary Spillane

Williams, Kastner & Gibbs, P.L.L.C.
601 Union Street, 4100 Two Union Sq.
P.O. Box 21926
Seattle, WA 98111-3926
Phone: 206-628-6656
Fax: 206-628-6611
spillamb@wkg.com

Michael B. Wallace

Phelps Dunbar, L.L.P.
MTEL Centre, Suite 500
200 S. Lamar Street
P.O. Box 23066
Jackson, MS 39225-3066
Phone: 601-360-9330
Fax: 601-360-9777
wallacem@phelps.com

PROGRAM OUTLINE

DRI APPELLATE ADVOCACY SEMINAR

MARCH 9-10, 2000

LE MERIDIEN HOTEL

NEW ORLEANS, LA

Wednesday, March 8

6:00 p.m. Registration and Cocktail Reception

Thursday, March 9

7:30 a.m. Registration and Continental Breakfast

8:30 a.m. Welcome and Introduction

— Mary Massaron Ross, Committee Chair
— Michael B. King, Program Vice Chair
— E. Wayne Taff, DRI Law Institute

8:45 a.m. The CD-ROM Brief: The Challenge of Briefing in Cyberspace

— Rebecca Levy Sachs, Podvey, Sachs, Meanor, Catenacci, Hildner & Coccoziello
Newark, NJ

Ms. Sachs will demonstrate the "brave new world" of CD-ROM briefing, based on her extensive experience with this cutting-edge appellate technology, and will explain how federal courts are dealing with the technology.

9:45 a.m. *Cohen*, Final Orders, and Interlocutory Review in Federal Court

— Mary Massaron Ross, Plunkett & Cooney, P.C.
Detroit, MI

The rules governing when and how to take an interlocutory appeal in federal appellate courts are complex. Ms. Ross will address the intricacies of the collateral-order doctrine and the availability of interlocutory review for injunctions, immunity rulings, sanctions, and other matters.

10:35 a.m. Break

10:50 a.m. The Wrong Stuff

— The Honorable Alex Kozinski
Ninth Circuit Court of Appeals
Pasadena, CA

Judge Kozinski will explain how lack of preparation can lose an appeal. You will have the rare opportunity to ask an experienced jurist questions about appellate law and advocacy.

12:00 p.m. Lunch (provided)

1:30 p.m. Ethics and Professionalism on Appeal

— Lynne Liberato, Haynes & Boone, L.L.P.
Houston, TX

Professionalism and compliance with ethical requirements are the responsibility of every attorney. Ms. Liberato will explore the unique duties of the appellate lawyer, including issues concerning trial counsel, relationships with the press, the duty of candor, and more.

2:30 p.m. What's So Different about Appealing the Administrative Agency's Decision?

— Professor Thomas H. Odom, Oklahoma City University School of Law
Oklahoma City, OK

An increasing volume of matters are adjudicated by administrative agencies. Professor Odom will discuss the different rules of appellate procedure and practice that apply when the decision under review was issued by an administrative agency.

- 3:20 p.m. **Break**
 3:35 p.m. **The Role of the Court and the Lawyers**
 — The Honorable John C. Godbold
 Eleventh Circuit Court of Appeals
 Montgomery, AL
Judge Godbold will provide advice on appellate brief writing and, in particular, the need for clear and concise composition.
- 4:15 p.m. **DRI Appellate Advocacy Committee Meeting**
 5:45 p.m. **Cocktail Reception**
 7:15 p.m. **Dine Arounds**
Sign up at either cocktail reception to join other seminar attendees and speakers in sampling the world famous cuisine of the “Big Easy” at area restaurants.

Friday, March 10

- 7:30 a.m. **Continental Breakfast**
 8:35 a.m. **Announcements**
 8:45 a.m. **Oral Argument: A Demonstration of Do’s (and perhaps some Don’ts)**
 Judges:
 — The Honorable Fortunato P. “Pete” Benavides
 Fifth Circuit Court of Appeals
 Austin, TX
 — The Honorable Martha Craig Daughtrey
 Sixth Circuit Court of Appeals
 Nashville, TN
 — The Honorable John C. Godbold
 Eleventh Circuit Court of Appeals
 Montgomery, AL
 Oralists:
 — John M. Bredehoft, Venable Baetjer & Howard, L.L.P.
 McLean, VA
 — Michael B. King, Lane Powell Spears Lubersky, L.L.P.
 Seattle, WA
Briefs are key, but oral argument can also make the difference. Two experienced appellate advocates and a distinguished panel of federal appellate judges will present a program, including a mock oral argument, to illustrate what works (and what doesn’t).
- 10:35 a.m. **Break**
 10:50 a.m. **More Thoughts on Advocacy from the Bench, Bar, and Audience**
 Moderator:
 — Daniel F. Polsenberg, Beckley, Singleton, Jennison, Cobeaga & List
 Las Vegas, NV
 Panelists:
 — The Honorable Fortunato P. “Pete” Benavides
 Fifth Circuit Court of Appeals
 Austin, TX
 — The Honorable Martha Craig Daughtrey
 Sixth Circuit Court of Appeals
 Nashville, TN
 — The Honorable John C. Godbold
 Eleventh Circuit Court of Appeals
 Montgomery, AL

- John M. Bredehoft, Venable Baetjer & Howard, L.L.P.
 McLean, VA
 — Michael B. King, Lane Powell Spears Lubersky, L.L.P.
 Seattle, WA
The mock oral argument will serve as a springboard for a discussion of the most effective methods to present oral arguments that will prove most helpful to your client and the court.

12:00 p.m. Lunch (on your own)

- 2:00 p.m. **New Trial: Do You Really Want It? How Do You Get It?**
 — Michael B. Wallace, Phelps Dunbar, L.L.P.
 Jackson, MS
Appellate lawyers often have no involvement in the case until it has already been lost, and then, they are left with only 10 days to prepare and file a new-trial motion. Counsel must consider whether a new trial is likely to lead to a better or worse result, or whether seeking one may at least be of use in negotiating a settlement. Mr. Wallace will explain the issues and standards of review that offer the most hope for a new trial.

2:50 p.m. Break

- 3:05 p.m. **Friendly Persuasion: The Keys to Effective Amicus Briefs**
 — R. Daniel Lindahl, Bullivant Houser Bailey, P.C.
 Portland, OR
Although an amicus curiae is literally defined as a “friend of the court,” judges increasingly view amici as unwanted house guests. Mr. Lindahl will offer advice on preparing amicus briefs that courts find both helpful and persuasive.

3:45 p.m. Marketing: The Art of Building an Appellate Practice

- Moderator:
 — Daniel F. Polsenberg, Beckley, Singleton, Jennison, Cobeaga & List
 Las Vegas, NV
 Panelists:
 — John M. Bredehoft, Venable Baetjer and Howard, L.L.P.
 McLean, VA
 — Lynne Liberato, Haynes & Boone, L.L.P.
 Houston, TX
 — Mary Massaron Ross, Plunkett & Cooney, P.C.
 Detroit, MI
 — Michael B. Wallace, Phelps Dunbar, L.L.P.
 Jackson, MS
Appellate attorneys know that appellate practice is a specialty. But how do we get clients (and our partners) to “see the light”? Five experienced and diverse perspectives on this bottom-line issue will be presented.

4:30 p.m. Adjourn