

Certworthy

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The newsletter of the DRI
Appellate Advocacy Committee


The Voice of the Defense Bar



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The Art (Science?) of Proofreading

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You've probably heard your share of proofreading horror stories, like the one about the dollar figure with too many zeros or the letter brief with the judge's name misspelled. Although we should all appreciate the importance of error-free writing, the truth is that most of us are not very good at proofreading. We read through our documents once or twice and ask our secretary or the newest associate to do the same. Then we reread our brief months later while preparing for oral argument, and there it is: the proverbial sore thumb that we can't believe we missed. As obsessive as I now am about proofreading, I must confess to filing a brief in my youth and missing "not." But rather than regaling you with riveting tales of proofreading gone awry, I'll get to the point. By using the right tools and techniques, you can make your proofreading more efficient and effective.

Use Spell Check, But Don't Rely on It

Most word processors are set to "check spelling as you type," so that words not appearing in the word processor's dictionary are underscored with red dots on the screen. Even if you correct these misspelled words on the fly, your job is not finished. Add these tasks to your list:

- Uppercase words.** By default, your spell check may be set to ignore words in all caps. The theory for this default setting is sound—you don't need your computer to tell you that your acronyms are not real words. If your spell check is ignoring uppercase words, however, it won't find misspellings in your headings. In Word, click "Tools," then "Options" on the drop-down menu, then the Spelling & Grammar tab, then uncheck "Ignore words in uppercase."
- Run spell check separately.** Always run a separate spell check as part of the proofreading process. (In Word, click "Tools," then "Spelling and Grammar," or click the Spelling and Grammar icon on your

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An author usually does not know what he really wants to say until after he has said it clumsily two or three times; and when he recognizes that his exposition is thoroughly bad, then he may be able to cleave to the essence and express his message more gracefully.

— Lester S. King

The time to begin writing an article is when you have finished it to your satisfaction. By that time you begin to clearly and logically perceive what it is you really want to say.

— Mark Twain



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As the members of the Appellate Advocacy Committee prepare for our seminar in New York on November 11–12, 2004, this issue of *Certworthy* reminds us of how important publications are to the daily work of an appellate lawyer. Ray Ward and the members of the Publications Subcommittee do a great job of collecting the most important appellate decisions from around the country and explaining the hottest topics in appellate law. It is not enough to keep up with developments in our own states and circuits; we need to be able to take advantage of the best ideas being developed in other jurisdictions, and *Certworthy* helps us to do that.

By now, you should all know that the wisdom our committee members have collected over the years has finally been distilled into DRI's *Appellate Advocacy Handbook*. Under the

Preaching to the Choir

leadership of Scott Stolley, our members have addressed all the difficult issues that appellate practitioners must master to serve their clients. As you have seen from the registration form on our seminar brochure and our committee website, the Handbook will be available for purchase before our seminar this fall. As with most new DRI publications, the Handbook will be available on CD-ROM.

However, before completing this long project, Scott Stolley performed one more service for us dinosaurs who love the feel of real paper. He has persuaded DRI to print a limited number of copies of the Handbook in hardbound form. There has not yet been an announcement concerning how to order the Handbook in book form, but we will distribute that information when it becomes available.

We have one other important date on our calendar before our seminar, and that is DRI's Annual Meeting in New Orleans on October 6–10. Bob Markle of Adams & Reese in New Orleans has agreed to serve as our Annual Meeting Chair. You will be hearing from him in the months ahead as he encourages all of our members to at-

tend our committee meeting at 4:30 p.m. on Friday, October 8. In addition to our regular committee business, Daniel Ratner of Heidell Pittoni Murphy & Bach in New York will discuss *Arguing for a Change in the Law*. DRI is working to secure CLE credit for the program, so we will keep you advised of further developments. The Annual Meeting is always an important event, and New Orleans always guarantees its visitors a good time. I hope many of you will be able to join us there.

Finally, make your plans now to join us in New York for the seminar. Scott Smith and Dan Lindahl have done a marvelous job of assembling a faculty of judges and scholars from all over the country. This may be the best appellate advocacy seminar that anybody has ever put together, and it is now our job to share the good news with to our members and friends. Linda Morkan of Robinson & Cole in Hartford has agreed to serve as the Marketing Chair, and all of us need to help her with that job. Please spread the word, and I look forward to seeing all of you in New York this fall.

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Where are *Certworthy* and our other publications headed?

Here is one vision: You do not wait for the semi-annual publication of *Certworthy*, or even for the weekly DRI e-mail newsletter, to get circuit reports or other news about important developments in appellate law. Instead, the report of any significant decision or legislative development is written and posted on our web page on the day it happens. If you write for publication by our committee, your work reaches your audience on the day you turn it in, not weeks or months later. Instant gratification.

The truth is, a semi-annual publication like *Certworthy* can't compete with web logs when it comes to delivering legal news timely. Consider just one example: *Abstract Appeal* (www.abstractappeal.com), a web log maintained by DRI member Matt Conigliaro and written up in the last issue of *Certworthy*. On Saturday, July 24, the day I wrote this editorial, Matt reported on four decisions by the Florida Court of Appeals, all rendered three days prior. On Friday, July 23, he reported on a decision by another Florida Court of Appeals, rendered the same day. Matt also commented that he was trying to “catch up” on his Eleventh Circuit reports. The oldest Eleventh Circuit decision

Matt reported that day had been rendered on July 15, or eight days prior. Other Eleventh Circuit decisions Matt reported on July 23 had been rendered on July 20 (three days old), July 19 (four days old), July 21 (two days old), and July 22 (one day old). Each report included a link to the decision itself.

Thus, on a couple of days when Matt found himself having to “catch up,” his readers were reading about decisions that, on average, were just three days old. Mind you, Matt is not a full-time blogger. He's a lawyer, just like you, from whom his firm expects the requisite number of billable hours. He gets some help on *Abstract Appeal* from his colleague Carroll Hunter, but most of it is his.

Consider one more number: 44,473. That was the number of hits racked up by *Abstract Appeal* as of July 24, 2004. That's about 50 percent more than the circulation of *For The Defense*, and probably more than 100 times the circulation of *Certworthy*. That's for a web log focused on one state (Florida) and one federal circuit (the Eleventh), created by one guy, and now maintained by two.

Now, imagine a dozen or so Matt Conigliaros—one for each federal circuit—all writing for the same web log: the DRI Appellate Web Log. Our Web Page Chair, Diane Bratvold, envisions that, and more. She envisions a virtual legal library full of resources about substantive law, practice tips, and legal news—all written by us. She

envisions a virtual forum where we can share information and ideas. Read about her vision in her Web Page Subcommittee report.

Read Deb Ausburn's *Blawg Review*. Her subject is Ernie Svenson, who maintains two legal blogs: *Ernie the Attorney* and *PDF for Lawyers*. Ernie is a visionary who sees, in technology, possibility. After you read Deb's review, visit Ernie's websites.

Read in this issue about our upcoming seminar in New York, where we will hear from Howard Bashman, who runs the premier appellate web log, *How Appealing* (www.legalaffairs.org/howappealing/). Howard will talk to us about “Web Logs, Technology, and the Future of Appellate Practice.” Then sign up for the seminar (if you haven't already done so), go, and listen to Howard.

As you read and listen to these things, ask yourself, “What can I do with this stuff? What can *we* (our committee) do with it?” Bring your ideas to the DRI Annual Meeting in New Orleans in October, where we will meet to talk about (among other things) publications. Or better yet, bring your ideas to our New York seminar, where we will again meet, probably in larger numbers than in New Orleans, to talk about publications.

The way people give and get information is changing. If we don't embrace the change, we become irrelevant. But if we do embrace it, our possibilities are endless.

toolbar.) You are likely to find that you overlooked some red dots while you were typing.

- **Homonyms.** Never assume that the spell check will find all of the typos. I'm sure you've seen many examples of homonyms that spell check missed, but here is my favorite: "Miss Jones, who is alleged to be Mr. Brown's power mower...." (If you don't get it, try reading it with a southern accent.) Here's one that recently snuck by one of our lawyers: "trouble damages."

- **Turn on grammar check.** If you're like most lawyers, you have your grammar check turned off because you're tired of being told that your sentences are too long and that your case cites are "fragments." A grammar check can often find some real gems, though, so try turning it back on—not to "Check grammar as you type," but to "Check grammar with spelling." (In Word, under Tools - Options - Spelling & Grammar, click "Check grammar with spelling"). That way, when you run your separate spell check (see above), you can fast-forward through the useless advice to find some helpful suggestions. Here are some examples of mistakes Word found when I ran its grammar check on some random briefs:

- **"Which" hunting.** The brief says, "Since the equipment which is the subject matter of this dispute constitutes 'goods' under Alabama law, Alabama's version of the UCC governs." Word suggests adding a comma after "equipment" or changing "which" to "that."

- **Subject-verb agreement.** The

brief quotes from an opinion, "We merely need to look at the face of the complaint and ask what the nature of the claims are and what the effect of granting the relief requested would be." Word suggests substituting "is" for "are."

- **Punctuation.** The brief says, "The Plaintiffs were managers and long term employees." Word correctly suggests "long-term."

- **Passive voice.** The brief says, "The Agreements involved are, by virtue of a choice of law clause, governed by Georgia law." Word suggests, "Georgia law by virtue of a choice of law clause, governs the agreements involved." Word forgot a comma, but did a creditable job of restructuring the sentence.

Use Your Word Processor's Find Function

Your word processor's "find" function can help you quickly find and correct inconsistencies and common mistakes. Here is a suggested list of things to look for:

- **Inconsistent terminology.** Your document is likely to contain inconsistencies, particularly if it was a team effort. For example, it may provide a short form for a plaintiff's name in the opening paragraph (*e.g.*, "plaintiff Moore Machinery & Massage Co., Inc. ("Moore Machinery")), but then revert to the full name, or simply to "the plaintiff," thereafter. Or it may call the key document "Lease" at the outset, but later call it the "lease agreement" or the "Contract." Needless to say, inconsistencies can lead to

confusion. If you spot a mistake, chances are that there are more like it. You probably will find 90 percent by rereading your 40-page brief, but you can find them all in minutes by using "find."

- **Incorrect case, statute, or record citation.** By searching for italics and underlining, you can quickly: (a) find out if you've italicized some case names, but underlined others; (b) spot-check your cites for form and completeness; and (c) be sure your short form cites are preceded by full cites. You might also want to look for "*ex parte*," "*in re*," and "v." to be sure that your case cites are in italics or underlined. For statutes, search for the word "section" and the "§" symbol. To check your record references, search for parentheses, if you use them, or some other element common to your references.

- **Common mistakes.** Use "find" to search for mistakes that you and others commonly make. For example, experience should tell you that missing parentheses and quotes are common. Search for quotes and open parentheses to see if you can spot their counterparts. Mistakes in possessives are also common (plaintiff's, plaintiffs'). Search for apostrophes to spot those errors.

Proofread a Hard Copy

Here is the best advice in this article: once you have completed proofing by computer, you must proofread a hard copy. Print it out, get away from your desk, and read with a red pen in

hand. Invariably, you will find mistakes that your eyes skated over on the computer screen.

Proofread Aloud

Proofreading aloud will force you to slow down, stay focused, and read every word. Sometimes you will find awkward sentences that survived the editing process. The trick is to find a quiet place where you can read aloud without passersby getting the wrong impression. An empty conference room is ideal. If your associates believe all knowledge can be found on the Internet, your library may be deserted.

Let Your Fingers Do the Walking

Remember, as a kid, running your finger along the page as you read? Like reading aloud, this practice helps keep you on task and forces you to read every word. Alternatively, place a blank sheet of paper or ruler under the line you are reading and slide it down one line at a time.

Proofread in Stages

If you start at page one of a long document and read through to the end, you are likely to miss mistakes simply because it's hard to stay focused. Try proofreading in stages. Use the following as a checklist, and then adapt it to meet your needs:

- (a) **Format.** Turn the pages to look at the format. Does the document look neat? Is the justification consistent? Does the font change? Are there stray page breaks or extra spacing between paragraphs? Are the page numbers present and in the same font?
- (b) **Beginning.** Be sure that the court is

correctly named (especially if the case has been removed or transferred), that the style is up-to-date, and that the parties' names are correct. If the document is a letter, check the addressee's name and address.

- (c) **End.** Read the signature blocks and certificate of service. If the document is a letter, read the signature, "enclosure" notation, and list of "cc" recipients.
- (d) **Headings and numbered paragraphs.** Check headings and numbered paragraphs for consistent format and consecutive numbering. Read the headings.
- (e) **Block quotes.** Nothing will make your eyes glaze over like a long block quote. Unless your quote was a cut-and-paste from Westlaw or some other online source document, you will need to compare it to the original. Get the source document from the file, get a buddy, and proofread aloud like you did in law school. Better yet, shorten or edit out long block quotes if you can; they make judges' eyes glaze over, too.
- (f) **Footnotes.** Proofread footnotes separately, or you may forget to read them. Be sure they're in the right place. If your court has minimum font requirements, your footnotes should be in the same font size as your text.
- (g) **Text.** By the time you proofread, you should have read your brief for content more than once during the editing process. Read it again, this time looking for errors.
- (h) **Tables.** Once the tables of contents and authorities are generated, proofread them. Check for format irregularities, stray pinpoint cites, alphabetizing errors, and incomplete

statute citations. Spot-check to see if the page locators appear to be correct. You may also find mistakes in your citations and headings that you missed in reviewing the text.

Make Smart Use of WestCheck

WestCheck is a computer program that, with a few mouse clicks, will read your brief, extract the case and statute cites, and then KeyCite them. For an extra charge, it can also locate and check the accuracy of your quotes. The program is free to acquire, but costly to use. The charges are the same as if you KeyCited the cases one-by-one, but it takes less time. By running WestCheck as part of the proofreading process, you can avoid the embarrassment of relying on a case that was overruled the week before. Lexis has a similar program, which I'm sure is equally useful.

If you are running WestCheck late in the game, set it to find only negative indirect history (overruled, criticized, etc.), at least of your secondary cases. That way, you can print out the results without killing as many trees. Then make full use of the printout. The top portion will show the case as you cited it and as Westlaw would cite it. Compare the two to find misspelled or incomplete party names, incorrect court designations, and incorrect dates of decision. Under "Direct History," look for "Certiorari Denied," as well as "Reversed," or "Vacated." Under "Indirect History," look for negative treatment by the same court (especially "Overruled") or criticism by the forum court.

Never rely on Westlaw to do your bluebooking for you. It does not use Bluebook form.

Keep These Books at Your Desk

Many great books have been written on the art of good writing. The problem with most of these books is that you have to read them to get anything out of them. Here are three small, but indispensable, reference books to keep at your desk beside your dictionary: *The Bluebook: A Uniform System of Citation*; Strunk & White, *The Elements of Style*; and *Texas Law Review, Manual on Usage & Style*. The Texas Law Review Manual is a tiny reference book with grammar, capitalization, and punctuation rules for lawyers.

Who Should Do What?

Ideally, the author should set aside the time necessary to do a complete job of proofreading. With practice, she can perform these tasks quickly and efficiently, especially if she is proficient in using the word processor.

Often it takes the author less time to check for mistakes and correct them than to review and approve corrections suggested by others. At a minimum, the author must read the document aloud, with red pen at the ready, because only she knows what she meant to say.

While the author is proofing, particular tasks can be duplicated by or delegated to a secretary, paralegal, or associate. Four eyes (or six) are invariably better than two. An associate or paralegal should read the document for content, check cites and quotes for accuracy, and KeyCite or Shepardize the cases. Your secretary can use “find” to locate common or repeated errors, but not without specific instructions. Both the author and her secretary should proofread a hard copy.

If the secretary or other reader thinks he has found an error while typing from dictation or proofing on the computer, ask him to type in a

note, highlighted with boldface or underlining and set off by curly brackets (e.g., “{Should this be hyphenated?}”). Then your secretary can search for “{” on the final run-through to be sure all the notes have been addressed and removed. If the error is spotted on a hard copy, editorial marks and margin notes will suffice. The author must review these notes to be sure the changes are appropriate. Sometimes a suggested correction will be wrong, but will point to a lack of clarity in the author’s writing.

The keys to effective proofreading are good tools, good technique, and a keen eye. Before you delegate, be sure your trusted colleague is trained or experienced in these techniques and has a clear understanding of the tasks he is expected to perform. I hope the article will help with the training and delegation process.

Writing is the supreme solace.

— William Somerset Maugham

Why Oral Argument Is Still Important, and How to Make It So

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The debate over the value of oral argument appears to be turning in favor of those who believe that spoken words add little to completed briefing. Increasingly, courts are canceling oral arguments and deciding cases strictly on written submissions. Other courts are shortening argument times and encouraging counsel's participation by video-link or a related remote technology. But the California Supreme Court has recently issued a formal opinion that firmly reinforces the importance of oral argument (at least in California), by striking down a California Court of Appeals procedure under which parties were being actively discouraged from exercising their right to have appellate counsel speak directly to the panel. The decision is notable not only for its unusual subject matter, but for the insight it provides regarding effective oral advocacy, from the perspective of both counsel and the bench.

In *People v. Pena*, 32 Cal. 4th 389 (Cal. 2004), the California Court of Appeals was asked to determine the propriety of a form oral argument notice that a division of the Fourth District Court of Appeal used regularly to ascertain whether appellate counsel would be willing to waive oral argument. After the briefing in *Pena* was

complete, the Fourth District sent defendant's appellate counsel a tentative opinion that proposed to reject defendant's claims and affirm his conviction. Accompanying the draft was a standard notice that stated:

Enclosed is the tentative opinion of a majority of the three-justice panel hearing the appeal. The court has determined that (1) the record and briefs adequately present the facts and legal arguments, (2) oral argument will not aid the decision-making process, and (3) the tentative opinion should be filed as the final opinion without oral argument in the interests of a quicker resolution of the appeal and the conservation of scarce judicial resources. *Id.* at 394.

The notice then informed appellate counsel that oral argument would be deemed waived unless defendant affirmatively requested argument within 12 days, and that no relief from default would be granted "under any circumstances." The notice also informed counsel of several additional points, including that "[c]ounsel may not repeat arguments made in counsel's briefs" and that "[s]anctions may be imposed for noncompliance with this notice." Included with the notice was a form titled "Instructions for Requesting Argument," which reiterated that "the court has decided that oral argument *will not* aid the decision-making process." *Id.* at 394-95.

Defendant's appellate counsel chose not to request oral argument, and the Court of Appeals (unsurprisingly) filed its tentative opinion as its final opinion, with only minor, inconsequential changes. Defendant petitioned the Court of Appeals for rehearing, contending that the Court's actions denied him his state constitutional right to due process of law and infringed on this right to present an oral argument. The Court of Appeals denied the petition for rehearing, but the California Supreme Court granted defendant's petition for review. *Id.* at 395.

The California Supreme Court began by emphasizing that the Court of Appeals' "adoption of a procedure under which it prepares and provides the parties with a tentative opinion prior to oral argument does not in itself improperly interfere with the right to present oral argument on appeal," provided the court is not "unalterably bound by the writing" and gives "due consideration" to any oral argument actually presented. *Id.* at 399. In other words, so long as the draft opinion is truly "tentative," and the court is willing to "discard the writing if counsel's arguments persuade the court that its tentative views were incorrect," the draft opinion alone does not itself infringe on the right to present an appellate oral argument. *Id.* at 399-400.

The court held that the notice accompanying the draft opinion was more problematic. The court first fo-

cused on the notice's statement that the Court of Appeals has already determined the tentative opinion "should be filed as its final opinion without oral argument." *Id.* at 400. This language suggested strongly that the Court of Appeals' tentative opinion was not actually tentative. The notice stated unequivocally that "oral argument *will not* aid the decision-making process," and that "the tentative opinion *should be filed* as the final opinion without oral argument." The California Supreme Court concluded that this language could cause counsel to doubt whether oral argument would, in fact, be meaningful, and that it had the potential to discourage improperly the exercise of the right to present oral argument on appeal. *Id.* at 400–02.

The court then focused on the notice's admonition that counsel not repeat arguments made in the briefs. The court viewed that admonition as inconsistent with the rule that appellate courts will not consider points made for the first time at oral argument. "[U]nder the literal language of the notice, if appellate counsel requested oral argument he or she faced the Hobson's choice of orally arguing a point made in the briefing and facing possible sanction, or raising only new points during oral argument that the appellate court properly could decline to entertain." *Id.* at 403. Accordingly, the court directed the Court of Appeals to refrain from using the notice in future cases. *Id.*

There are a number of lessons for appellate practitioners and judges in the *Pena* decision. First, some judges still consider oral argument extremely important, so important that for them, oral argument will have an im-

portant impact on the outcome. *Accord* Bright & Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A.J. 68, 70 (Sept. 1984) (noting that two Eighth Circuit judges changed their mind in 17 percent and 31 percent of the cases in which oral argument was held); Wald, *19 Tips From 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 17 (2001) ("Oral argument seldom brings you 180 degrees around, but if your tilt is, say, 50–49 percent, it can make a big difference"). Thus, while monetary issues may influence a client's decision to send counsel on a cross-country trip to appear in person before an appellate panel, the presumption should be in favor of exercising this important right.

Second, more courts should adopt the practice of circulating a draft opinion to counsel before oral argument. A tentative written statement helps the court collect and organize its thoughts. More important, a draft opinion gives appellate counsel something concrete to aim at during oral argument, providing counsel and the court with an opportunity to correct egregious mistakes in logic or precedent before such mistakes make it into a bound reporter volume. Encourage local appellate judges to adopt this helpful practice; the only downside is to increase the despair of those advocates who, having received a favorable draft opinion, find themselves on the losing end of a final opinion.

Third, counsel should consider strongly the California Court of Appeals' admonition not to simply repeat verbatim the arguments made in the briefs. Although the California Supreme Court held this admonition improper, the Court of Appeals' advice was actually right on the mark. If ap-

pellate counsel's written argument has failed to persuade the panel (or the panel's clerks), what basis does counsel have for believing that restating the argument orally will do so? Oral argument is an opportunity to pick up the file and examine it with fresh eyes, looking for new perspectives, different ways to state an argument, or additional analogies that might persuade the panel in ways the brief did not.

The importance of this "fresh look" was impressed upon me recently when I was retained to argue appeals in consecutive months in cases where I had no prior involvement in the trial or appellate courts. Talk about a fresh look! After experiencing initial frustration, however, I found that my preparation for oral argument was actually quite liberating. Although generally confined to the issues and arguments raised in the briefs, I was not bound by my own preconceived notions of how the case should be structured— notions that form and harden during the brief writing process. Thus unbound, I was free to be more creative with the presentations and to develop new ways to look at the legal issues presented. Although it is impossible to know whether this freedom resulted in a measurable improvement in the quality of the arguments, it was clear that the panel members sat up and took notice. I attribute their attentiveness and active questioning at least in part to the fact that they had been engaged in a completely different manner than they had been in the briefs.

When preparing for oral argument, then, imagine that the court, like the Court of Appeals in *Pena*, has threatened counsel with sanctions for repeating arguments made in the briefs.

This should both encourage creativity and discourage verbatim regurgitation. Although an argument once framed is not easily recast, take the time necessary to do so, relying heavily on associates, peers, and lay persons who are willing to put up with incessant ruminations about an undecided legal question. Focus in particular on why it is important for the court to render a decision in your client's favor, and the consequences if it does not. Common sense and a feeling for how a narrow issue should fit

into a broader legal or societal context are as important—maybe more important—than being able to recite the facts and holding of each relevant case authority. The appellate panel is more concerned with big picture issues than the trial court; be sure the argument paints on a large canvas.

In sum, oral argument is still important (not just in California), but its ability to change a panel's collective mind depends in large part on the advocate. If counsel's intent is to simply summarize the briefs at oral

argument, the client would be just as well served if arguments were waived altogether. While the California Supreme Court was right to criticize its Court of Appeals for discouraging parties to exercise their right to oral argument, the court may have erred in so strongly disapproving of the Court of Appeals' threat to sanction appellate counsel who "repeat arguments made in counsel's briefs." Prepare as if such sanctions may actually be imposed, and you will find that oral argument can make a difference after all.

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Habits in writing as in life are only useful if they are broken as soon as they cease to be advantageous.

— William Somerset Maugham

Our admiration of fine writing will always be in proportion to its real difficulty and its apparent ease.

— Charles Caleb Colton

Less Than Strict Adherence to Appellate Briefing Rules Is a Skate on Thin Ice—It May Leave You All Wet

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Rules of appellate briefing demand strict adherence, and lack of compliance may lead to inadvertent abandonment of an issue or even to dismissal of your appeal. Poorly drafted appellate briefs are filed all too often in both state and federal appellate practice. Just last month, a Second Circuit decision admonished an attorney for deficient briefing. Of course, deficient briefing is not only a source of professional embarrassment for the less-than-diligent attorney; it can also be a disaster for the client.

Federal Practice

The Second Circuit decision, *Amnesty America v. West Hartford*, 2004 WL 49167, ___ F.3d ___ (2d Cir. Mar. 15, 2004), is a good example of the dangers of filing a deficient appellate brief. In that case, the court warned counsel for his repeated disregard for circuit-court and district-court rules. Among other problems were the brief's conclusory nature and counsel's failure to comply with Fed. R. App. P. 28 by citing pages of the record or the brief's 500-page appendix. Although the court found that it would be within its rights to "summarily dis-

miss" the appeal due to counsel's failure to comply with Rule 28, the court declined to do so. But the court warned counsel that "his continued failure to comply . . . will result in discipline, up to and including suspension or disbarment from practice before this Court."

In *Amnesty*, the Second Circuit also noted other instances of inadequate briefing by counsel, including its past rejection of an appeal for submission of a non-compliant brief in *Sioson v. Knights of Columbus*, 303 F.3d 458 (2d Cir. 2002). In dismissing the plaintiff's employment-discrimination claim, the *Sioson* Court stated: "[t]o make a legal argument is to advance one's contentions by connecting law to facts, yet there is not one fact, or supposed fact, let alone a fact properly cited to the record, in the brief's 'argument' section." *Id.* at 460. It found the brief was little more than "a doctrinal recapitulation masquerading as a legal argument," "tantamount to an invitation to scour the record, research any legal theory that comes to mind, and serve generally as an advocate" on the appellant's behalf. *Id.*

Similar failures by counsel in *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110 (2d Cir. 1999) prompted the court to sanction the appellant's counsel by finding him solely liable for attorneys' fees. In *Local Union No. 38, Sheet Metal Workers'*

Int'l Ass'n v. Pelella, 350 F.3d 73 (2d Cir. 2003), the Second Circuit also declined to review whether jury instructions were proper because the appellant, a local sheet metal workers union, neglected to order and append the necessary trial transcripts. *Id.* at 87.

Remember that rules differ in state and federal courts regarding the record and appendix. When in federal court, you must heed both the Federal Rules of Appellate Procedure and the corresponding Local Rules when drafting an appellate brief. A failure to observe these rules may deprive the court of its ability to meaningfully review the issues on appeal and thus may warrant dismissal.

Connecticut State Practice

Connecticut state courts also tend to afford little sympathy to attorneys who fail to concern themselves with appellate rules. For example, in *Mullen & Mahon, Inc. v. Mobilmed Support Services, LLC*, 62 Conn. App. 1, 773 A.2d 952 (2001), the Appellate Court refused to reach the merits of the appeal, "[b]ecause the record is inadequate for our review and because the briefs and arguments of both sides are devoid of legal analysis in a manner consistent with our rules of appellate practice." *Id.* at 8. By way of instruction, and perhaps for future

reference, the court next pointed out that Connecticut's "rules of appellate practice are contained in chapters 60 through 86 of the Practice Book," and went on to explain what it means to "adequately brief" an issue. *Id.* at 8–10.

Even where they decide to review a deficiently briefed claim, Connecticut appellate courts are not shy about pointing out and criticizing attorneys who submit briefs that fall short of the requirements. In *Cable v. Bic Corp.*, 79 Conn. App. 178, 179 n.1 (2003), the Appellate Court began its analysis by pointing out appellants' failure to comply with various sections of the Practice Book: "[t]he defendants have provided no references to the transcripts or other documents from which their facts were drawn...[and] have failed to provide this court with the appropriate standard of review for their claims."

The Connecticut Supreme Court has employed much harsher language in finding that an appellant's claims were "so poorly drafted and so intolerably confusing" as to make "a mockery

of responsible appellate advocacy" thereby precluding "meaningful appellate review." *Kelly v. Bonney*, 221 Conn. 549, 594 n.31 (1992). Obviously, no lawyer wants to be on the receiving end of that rebuff. There is no delicate way for an attorney to explain such an outcome to a client. Moreover, a published decision is there for the entire world to see. Very few reputations can withstand such public deflation.

One common error arises from an attorney's failure to recognize that "[t]he evidence referred to in the brief, and in the appendix . . . will be deemed to embrace all testimony produced at the trial material to the issues on appeal." This means that the appellate courts' purview is generally limited to the briefs and appendices; it does not encompass the entire record established below. While, for "sufficient cause," the court "may consult the transcript of evidence on file or the trial court case file to supplement or explain the evidence," Connecticut appellate courts are loath to

do so where a brief or appendix are deficient. For example, in *Sheiman v. Sheiman*, 72 Conn. App. 193, 198 n.5 (2002), the court "decline[d] the defendant's invitation to read the hearing transcript consisting of approximately 500 pages to find the allegations of partiality that he lists in his brief" due to defendant's failure to "comply with the rules of practice." Connecticut appellate courts expect the appellant to provide them with "an adequate record for review." Conn. Prac. Book §67-10 (2003 Rev.).

To avert these abundant pitfalls, learn the appellate rules of procedure in your jurisdiction. Avoid last-minute assembly of the brief and appendix; otherwise you risk not having adequate time to catch inevitable mistakes and to ensure compliance with technical requirements. Courts will generally grant extensions of time where warranted, and it is advisable to seek an extension—through a properly filed motion, of course—if the alternative would be to file a non-compliant brief.

Writing is hard work and bad for the health.

— *E.B. White*

Kudos

Chuck Craven, longtime Third Circuit editor for *Certworthy*, has had a busy 2004.

On May 13, 2004, he received the Pennsylvania Bar Association's Special Achievement Award, for his dedication and commitment in helping to create the PBA's Post-Trial and Appellate Practice Committee. That committee was formed in the spring of 2003 and has since blossomed under Chuck's leadership.

And as founding co-chair of that committee, Chuck helped plan and present its first seminar, titled "Appellate Advocacy in the Pennsylvania State Courts," and held February 26–

27, 2004. That seminar, held at the Pennsylvania Bar Institute's headquarters, began immediately after the PBI's seminar on appellate practice and procedure, held on February 26. Chuck gave a presentation at the PBI seminar on "Requesting Reconsideration from the Appellate Courts; Taking a Second Appeal; Seeking Appellate Costs." Chuck repeated this presentation for another PBI seminar held in Philadelphia on April 20, 2004.

Besides serving as *Certworthy's* Third Circuit editor, Chuck is taking over as editor of the Appellate Advocacy Committee newsletter of the ABA's Tort, Trial, & Insurance Practice Section for the 2004–05 year. He succeeds Richard L. Neumeier in that position.

Chuck is a shareholder in Marshall, Dennehey, Warner, Coleman & Goggin in the firm's Philadelphia office.

John P. Jacobs has received the "Excellence in Defense" honor, the highest Lifetime Achievement Award bestowed by the DRI-affiliated Michigan Defense Trial Counsel, Inc. The MDTC recognized John for practicing appellate law on the defense at the highest level for 34 years. This is the first time that the MDTC, a trial lawyers' group, has given this award to an appellate lawyer.

John leads John P. Jacobs, P.C., a four-lawyer firm in Detroit, MI.

Writing has laws of perspective, of light and shade just as painting does, or music. If you are born knowing them, fine. If not, learn them. Then rearrange the rules to suit yourself.

— Truman Capote

Writing is a difficult trade which must be learned slowly by reading great authors; by trying at the outset to imitate them; by daring then to be original; by destroying one's first productions.

— Andre Maurois

Notable Finales

No Duty to Defend Means No Duty to Indemnify

Barbara Frederick and James Tallberg of Updike, Kelly & Spellacy, P.C., report a significant victory before the Connecticut Supreme Court by their firm's Appellate Practice Group in *DaCruz v. State Farm Fire & Casualty Co.*, 268 Conn. 675 (2004).

The case arose from a brutal, violent attack by a middle-school student, Michael Bullock, on a fellow student, David DaCruz. DaCruz sued Bullock, alleging both an intentional tort and negligence. Bullock was an insured under a homeowner's policy issued by State Farm. State Farm defended Bullock under a reservation of rights and brought a declaratory-judgment action to deny coverage, naming both DaCruz and Bullock as defendants in the DJ action. The court in the DJ action rendered summary judgment holding that State Farm had no duty to defend Bullock. But the court declined to address whether State Farm had a duty to defend Bullock, finding that issue premature.

DaCruz then obtained a judgment against Bullock for more than \$100,000, and convinced the trial court to make findings that Bullock not only committed an intentional tort, but also was negligent (for continuing to hit DaCruz after he was unconscious). Armed with that negligence finding, DaCruz then brought a direct action against State Farm to recover under the Bullock homeowner's policy. State Farm answered that its policy did not cover

Bullock's actions and that DaCruz was bound by the declaratory judgment that State Farm had no duty to defend Bullock. The trial court rendered judgment for State Farm on the coverage issue. The intermediate appellate court reversed. But the Connecticut Supreme Court unanimously reversed the intermediate court.

Although the court could have directed judgment for State Farm based solely on collateral estoppel, it instead went on to address four important issues. First, the court held that a Connecticut trial court may address an insurer's duty to indemnify in a declaratory-judgment action. Second, the court clarified the limits of collateral estoppel, holding that State Farm could not be bound by the negligence finding in *DaCruz v. Bullock* because State Farm was not a party to that action. Third, the court held that the negligence finding in *DaCruz v. Bullock* was legally and factually unsupported, and that an intentional tort cannot be converted to negligence by describing the defendant's actions as "unreasonable" or "excessive." Fourth, the court disapproved DaCruz's attempt to finesse his allegations so as to recover from deep-pocketed State Farm. "[A]lthough the plaintiff's desire for a deep pocket ... is understandable, the bonafides of his transparent efforts to accomplish that result in the circumstances of the present case ... are, at best, debatable."

Actual Harm Needed to Support Awards for Nominal Damages and Attorney's Fees

On March 10, 2004, the Massachusetts Supreme Judicial Court denied further appellate review from *Lord v. Commercial Union*, 60 Mass. App. Ct. 309 (2004), a case tried, briefed, and argued by Richard L. Neumeier, a partner of Morrison, Mahoney & Miller in Boston. The plaintiff in this case tried to bring a class action on behalf of thousands of automobile-policy holders who received a property-damage coverage notice a few days late; he sought nominal damages for each class member. The trial court denied class certification but awarded the plaintiff \$25 nominal damages plus a sizeable award for attorney's fees and costs. The Appeals Court affirmed denial of class certification and reversed the awards for nominal damages, attorney's fees, and costs. The court reasoned that the legislature "did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney's fee recovery." 60 Mass. App. Ct. at 322-23. This decision is significant to the heavily regulated insurance industry. After *Lord*, a claimant who proves an unfair or deceptive act or practice, including unfair claims practices, cannot recover damages or attorney's fees in the absence of harm.

“Good Samaritan” Doctrine in Parent-Subsidiary Context

Three committee members in New Orleans shared a big win in the Supreme Court of Louisiana: Joseph L. McReynolds of Deutch, Kerrigan & Stiles, LLP, Louis C. LaCour and Robert N. Markle of Adams and Reese LLP. On May 25, 2004 the Supreme Court of Louisiana released its decision in *Bujol, et al. v. Entergy Serv., Inc. c/w Perkins, et al. v. Entergy Serv., Inc.*, 03-0492 c/w 03-0502 (La. 5/25/04), ___ So.2d ___, 2004 WL 1157413, reversing a decision of the Court of Appeal, First Circuit, that had affirmed a trial-court judgment of \$158 million in compensatory and punitive damages to three plaintiffs injured in an explosion and fire of an oxygen pipeline in 1994.

In its 6-1 decision the court addressed, for the first time, the contours of Section 324A of the Restatement, Torts (Second) [the so-called “Good Samaritan Doctrine”], in the context of a parent-subsidiary corporate relationship. Plaintiffs contended at trial that the parent corporation, by issuing certain safety recommendations, had assumed a “duty of safety” for the employees of its subsidiaries. The court concluded

that the jury’s verdict, finding that such an assumption had occurred, was manifestly erroneous, causing the court to reverse the verdict and judgments below.

In its opinion, the court stressed that normal interactions between parent and subsidiary corporations should not lead to Good Samaritan liability. “[W]e will not ‘lightly assume’ that a parent corporation has agreed to accept the subsidiary-employer’s duty to provide a safe workplace absent proof of an affirmative undertaking of that duty by the parent corporation....[N]either a parent’s concern with safety conditions and its general communications with the subsidiary regarding safety matters, nor its superior knowledge and expertise regarding safety issues, will create in the parent corporation a duty to guarantee a safe working environment for its subsidiary’s employees under Section 324A.”

The decision is significant in its insistence that corporate structures be respected, and for the high bar it sets for plaintiffs to recover against corporate parents who seek to aid their subsidiaries in enhancing workplace safety.

The plaintiffs’ rehearing applications are still pending, so Joe, Louis, and Bob are keeping their fingers crossed.

Defense Verdict Reinstated

On July 2, 2004, Louis LaCour and Bob Markle racked up another win in the Supreme Court of Louisiana, in *Bonin v. Ferrellgas, Inc.*, 03-3024 (La. 7/2/04), 2004 WL 1475375. This case arose from a flash fire, fueled by propane, that horribly injured six people. The case went to trial against Empiregas, a propane supplier. The jury found in the defendant’s favor, and the trial court rendered judgment on the defense verdict. But the intermediate appellate court reversed, imposing 35 percent fault on Empiregas and fixing damages at more than \$21 million. *Bonin v. Ferrellgas, Inc.*, 855 So.2d 781 (La. App. 3 Cir. 2003). Under Louisiana’s comparative-fault system, this resulted in a judgment against Empiregas for \$8 million, plus costs and about eight years of prejudgment interest. The supreme court reversed the intermediate appellate court’s judgment and reinstated the trial court’s judgment on the jury verdict.

Seminar

The brochures for the Appellate Advocacy Seminar have been printed and are being mailed to appellate practitioners nationwide. We have an exciting program planned for New York in November.

Here is an overview of the program. At DRI's fifth Appellate Advocacy Seminar, the distinguished faculty of judges, professors, and appellate practitioners will provide experienced perspectives on appellate advocacy. The nation's foremost teacher and author on appellate practice, Judge Ruggero Aldisert, will share his secrets to winning on appeal. A panel of Second Circuit Judges—Chief Judge John Walker, Judge Sonia Sotomayor, and Judge Richard Wesley—will discuss what works and doesn't work from the judges' perspective. Chief Judge Judith Kaye of the New York Court of Appeals will talk about federal certification of state-law issues to State Supreme Courts. The seminar also includes a writing workshop for brief writers taught by Professor George Gopen of Duke University; a discussion of oral argument by David Frederick, the author of *Supreme Court and Appellate Advocacy: Mastering Oral Argument*; and a primer on U.S. Supreme Court practice by Maureen Mahoney, the attorney who successfully argued the University of Michigan affirmative action cases. In addition, the seminar will provide the clients' perspective on appellate practice from a panel of in-house lawyers from AT&T, Union Pacific, and Hyundai America.

If you have not already received a

copy of the brochure, you can access it online at http://www.dri.org/dri/cle-seminars/pdf/2004_appellate_brochure.pdf. You can also register online at http://www.dri.org/dri/cle-seminars/seminar_viewmain_hidden.cfm?SeminarID=497. Or just go to www.dri.org, click on "CLE Seminars and Events," then click on "View Complete Listing of Future Seminars." You should see "Appellate Advocacy" listed. Click there for online information and registration.

Now that the brochures are out, we need your help marketing the seminar. We hope to have over 300 attorneys attend. Please share the brochure with all of your colleagues and clients who might be interested. If you need an electronic version of the brochure to attach to an e-mail, please contact me at ssmith@bradleyarant.com. I look forward to seeing you in New York.

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Web Page

Our web page has undergone some changes that merit a visit. You can view our brochure for the New York seminar, print or download a registration form, and access information about seminar accommodations. Back issues of *Certworthy* (dating from 1999) are also available and very handy for finding the case you remember reading about but only now developed a reason to cite.

The committee is hoping to add

more features to the appellate-advocacy web page. We have an opportunity to extend our reputation for excellence in writing and scholarship. We have long been known for delivering timely and topical legal analysis through *Certworthy*, and through Committee Perspectives and "Writers' Corner" in *For The Defense*. Soon we will publish an appellate manual. It's time to take this tradition into another dimension—our web page.

I am looking for volunteers to provide source materials to be distributed through our website. Your name and law firm will be included.

There is a wide range of materials needed. Although federal law may have the broadest appeal, every appellate lawyer looks for a state, any state that has grappled with a legal issue in a way that supports a client's interest on appeal.

Other possibilities include: Appellate writing or other practice tips; appellate rule amendments, proposed and pending; case-law trends; a survey of appellate law, *e.g.*, electronic filing is a topic generating a great deal of interest right now. A helpful survey may include any region of the United States, although 50-state comprehensive surveys are always in demand.

If you have materials that would benefit other DRI members, please contact the Web Page Chair Diane Bratvold at dbbratvold@riderlaw.com or (612) 340-7966.

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Amicus

Would you like to be considered to write an amicus brief for DRI? If so, then please contact Nancy Ciampa, Chair of our Amicus Subcommittee. She is compiling a list of interested

members to submit to DRI on behalf of the Appellate Advocacy Committee. Send her a brief bio outlining your appellate experience, your areas of expertise, and the courts in which you are admitted.

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Have You Signed Up For The Appellate Advocacy Seminar taking place November 11-12 at the Westin New York at Times Square? To register, call 312.795.1101.

If any wish to write in a clear style, let him be first clear in his thoughts; and if any would write in a noble style, let him first possess a noble soul.

— Johann Wolfgang von Goethe

Either write something worth reading or do something worth writing.

— Benjamin Franklin

Blawg Review: *Ernie the Attorney and PDF for Lawyers*

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One disadvantage to following blawgs is that you quickly can develop an inferiority complex. The thought that an attorney is able to find the time to run a successful practice, keep up with legal trends or current events, and write witty, thoughtful comments can be rather intimidating. By that measure, Ernest Svenson, with two blawgs to his credit, is very intimidating indeed.

His best-known blawg is *Ernie the Attorney* (www.ernieattorney.typepad.com), where he opines about technology, current events, and often about law. He is a partner with Gordon, Arata, McCollam, Duplantis, Eagan in New Orleans, LA. A self-described “lawyer who likes change,” Svenson has a wide variety of interests, including “suspension of disbelief, self-delusion, inevitability, and unintended consequences.” That diversity and humor pervade his blog, making it one of the most interesting ones on the Web.

Although *Ernie the Attorney* covers many topics, most of the posts deal with the intersection of law and technology. He usually is the first to know about a new Wi-Fi spot or a court’s latest foray into electronic filing. He also has one of the best lists of blogs (and blawgs) around.

One useful feature of Svenson’s blawg is the archive index, which groups posts by topic. If you want to see his posts and links to articles about litigation or ethics, just click on the listed topic. Be sure to check out his posts on legal writing, judges, and judicial clerks. A former law clerk, Svenson has some helpful insights on how judges think and what they think of some lawyers. Recently, he has solicited comments from other former and current law clerks, and is posting their suggestions for lawyers. This information is as close as you can get to hearing from the judges themselves.

His second blog is *PDF for Lawyers*, (www.pdfforallawyers.com). “PDF” stands for *portable document format*, an almost universal format for disseminating documents over the Web. (*Certworthy* is published and distrib-

uted in PDF.) *PDF for Lawyers* covers just what it says—how lawyers can use PDFs in legal practice. With the decision of all federal courts and some state appellate courts to move to electronic filing, PDFs quickly are becoming a necessary tool for appellate attorneys. Most federal appellate courts require a PDF version of every brief to be filed with the hard copy, for example.

Svenson, with co-author Dave Fishel, concentrates on nuts-and-bolts applications of PDF to law practice. He believes that the decision of federal courts to move to PDF documents will drive the format into the mainstream of legal practice. Because of the blog’s relatively narrow focus, it is not updated as often as Svenson’s other blog, but the information is very practical. The posts include directions for creating a PDF document for electronic filing, tips about navigating PDF documents, and links to other helpful websites. For an appellate lawyer who wants to get in step with the technology trend, *PDF for Lawyers* is an indispensable resource.

Inside: A Public and Private Life, by Joseph Califano

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Over 50 years ago, CBS began a series of radio and television broadcasts entitled *You Are There*. The program dramatized historical moments with a network reporter narrating. With *Inside: A Public and Private Life*, Joseph Califano provides an insider's description of the pinnacle of American government and politics from the early sixties through the late seventies. He also allows us views of his values, a conservative Catholic ethos driving a liberal power broker and public servant to use his position to "do good." This vivid and frank memoir is well worth reading for a host of reasons.

Califano is the product of Brooklyn, a Jesuit education, and Harvard Law School. This beginning formed the personal psychology that motivated him as a player in many of the key political conflicts of the twentieth

century. He quickly tired of the life of an associate at a prestigious Wall Street law firm and landed a job in President Kennedy's Defense Department. In LBJ's White House, Califano was a powerful domestic-policy adviser. When Nixon defeated Humphrey in 1968, Califano became a Washington lawyer and practiced with Edward Bennett Williams, who may have been the best trial lawyer of his generation. Together they represented the Democratic Party and the *Washington Post*. As President Carter's Secretary of HEW, he launched a campaign against smoking, which ultimately led to his discharge from the administration because of Carter's concern over political fallout in tobacco-growing states. Expectedly, based on Califano's characterization of Carter, they are not likely on each other's Christmas card lists.

The Democratic Party has been in various degrees of disarray since Vietnam and Watergate. Democrats grew to distrust power because of the foibles of LBJ and Nixon. One lesson

of *Inside* is that diffusion of power may go too far. The party leadership too often has become bogged-down in pleasing everyone, *i.e.*, special interest groups, and delegating decision-making to large and cumbersome committees.

By contrast, Califano sought power and used it to benefit society, as well as himself. He was one of the chief architects of the Great Society and worked indefatigably to defeat the use of tobacco. He also relished providing counsel to the Democratic Party, attending dinner parties with Washington's elite, and going to Oxford, Mississippi with James Meredith.

The book expertly describes the inner workings of government and politics. For many of us, it may trigger nostalgia for times when idealism was high and people's sex lives—including the president's—were off limits. Most importantly, it shows how a person with vision and negligible moral ambiguity can use ambition and power to benefit others. The 2004 candidates and their deputies would do well to read *Inside* and know this lesson.

Acting Governor Not Entitled to Qualified Immunity for Firing Turnpike Commissioner

Mihos v. Swift, 358 F.3d 91 (1st Cir. 2004)

Former Massachusetts Turnpike Commissioner Christy Peter Mihos brought a 42 U.S.C. §1983 action against Jane Swift, then acting governor, alleging that Swift terminated him in violation of his First Amendment rights in retaliation for his vote on proposed turnpike toll increases. Swift moved to dismiss, asserting the defense of qualified immunity. The district court denied Swift's motion to dismiss but, in a subsequent decision, entered a declaratory judgment finding that, although Swift had violated Mihos' rights by retaliating against him for his voting, that Swift's own First Amendment interests served as a shield to damages, essentially granting Swift qualified immunity. *Mihos v. Swift*, 235 F.Supp.2d 45 (D. Mass. 2002).

The First Circuit affirmed the denial of Swift's motion to dismiss, vacated the declaratory judgment and denial of damages, and remanded the matter. The court emphasized that the case had to be decided on the pleadings and that Mihos had alleged that Swift stated in her February 6, 2002, termination letters that she had removed him and Levy from office principally because their votes were "fiscally irresponsible." Mihos alleged that his vote was "fiscally sound and in the best interest of the Author-

ity." Mihos further alleged that Swift was enraged that the Authority failed to approve the January 2002 toll increase, which she supported, and that the actions Swift took against him "were in direct retaliation for the votes." 358 F.3d at 107–108. The First Circuit ruled that Swift was not entitled to qualified immunity as a matter of law based on the pleadings because "[n]o reasonable public official could have failed to realize that a member of a public instrumentality cannot be terminated on such grounds for voting on matters of public concern within his authority." *Id.* at 110. In a footnote, the court stated that its ruling did not preclude Swift from asserting qualified immunity in a subsequent motion for summary judgment or at trial. *Id.* at 110, n. 16.

Brady Violation Requires New Trial

Norton v. Spencer, 351 F. 3rd 1(1st Cir. 2003)

Norton was convicted of four counts of indecent assault and battery on a child under the age of 14 and sentenced to jail. The Massachusetts Appeals Court affirmed his conviction and the Supreme Judicial Court denied further appellate review. Thereafter, Norton made two discoveries that he claimed constituted "new evidence" under 28 U.S.C. §2245(d)(1)(D), documents having to do with the timing of the assaults and affidavits undermining the credibility of the accuser and a witness. The prosecutor had never provided Norton with the information contained in these affidavits.

Norton's motion for a new trial before the original judge based on the new evidence was denied. The Massa-

chusetts Appeals Court affirmed the denial and the Supreme Judicial Court denied further appellate review. Norton then turned to the federal system and sought *habeas* relief from the district court, arguing that the prosecution had violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The writ was granted and the Commonwealth appealed.

On appeal, the Commonwealth argued that in denying the motion for a new trial, the trial judge implicitly found the affidavits to be incredible. The First Circuit rejected this contention because "there is no evidence that the trial court ever viewed or evaluated the affidavits." 351 F. 3rd at 6. The trial judge did not hold a lengthy hearing on the affidavits or make any findings of fact. In addition, the First Circuit agreed with the district court that the evidence could not be cumulative when it went to an issue that was not known at the time of trial. *Id.* at 7. The First Circuit found that the state court decisions were "an unreasonable application of clearly established federal law—a holding clearly inconsistent with *Brady*" (*id.* at *8), and affirmed the district court's conclusion that *habeas* be granted.

Obstinate Conduct Requires Sanctions

Top Entertainment, Inc. v. Torrejon, 351 F.3d 531 (1st Cir. 2003)

In 2002, after plaintiffs' counsel admitted that the allegations in the complaint in a contract action were false, the First Circuit found that the complaint violated Federal Rule of Civil Procedure 11, affirmed its dismissal, and awarded double costs and attorney's fees to the defendant. On remand, plaintiffs failed to pay sums

they were ordered to pay, and the defendant's assignee filed motions to compel compliance, for contempt, and for sanctions under Puerto Rico Rule of Civil Procedure 44.1(d), which states that a court *must* impose sanctions if a party or its attorney acts "obstinately or frivolously." The district court ordered payment of the sanctions imposed by the circuit court, but denied the motion for contempt and the motion for further sanctions. Defendant's assignee appealed. The First Circuit vacated the order and remanded to the district court for reconsideration of defendant's Rule 44.1(d) motion for mandatory sanctions, which the court found to be "premised on very serious allegations." The court also found the award against the plaintiff's attorney in the amount of \$4,000 in attorney fees, costs and expenses was warranted.

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Second Circuit

Appellate Jurisdiction over Interlocutory Decrees

Blue Water Yacht Club Ass'n v. New Hampshire Ins. Co., 355 F.3d 139 (2d Cir. 2004)

The New Hampshire Insurance Co., subrogee of several of the owners of boats damaged in a fire at a yacht club, brought an action for damages against the club. The district court denied the club's motion to dismiss on the ground that an exculpatory provision in its licensing agreement relieved it of liability, even if the damages were sustained as a result of the

club's own negligence. The club appealed under 28 U.S.C. §1292(a)(3), which provides for jurisdiction over "(i)nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

The insurer moved to dismiss for lack of appellate jurisdiction, arguing that an order denying a motion to dismiss was not a decree determining the rights and liabilities of the parties within the meaning of section 1292(a)(3). The Second Circuit agreed, concluding that the jurisdictional grant in that section should be construed narrowly as an exception to the general rule of finality stated in 28 U.S.C. §1291 that is carved out in admiralty to accommodate the once-common practice of referring the determination of damages to a master or commissioner.

Because the district court order merely denied the appellant's motion to dismiss, holding the liability question open for adjudication, the Second Circuit held that section 1292(a)(3) did not provide it with appellate jurisdiction, and dismissed the appeal.

Appellate Jurisdiction over Refusals to Abstain

Beightol v. UBS PaineWebber, Inc., 354 F.3d 187 (2d Cir. 2004)

Plaintiff-appellants appealed the decision of the district court refusing to abstain from adjudicating their lawsuit against defendant-appellees pursuant to 28 U.S.C. §1334(c)(2), and declining to remand to the Mississippi State Court system pursuant to 28 U.S.C. §1452(b). Defendants moved to dismiss the appeal, arguing that the Second Circuit lacked jurisdiction.

Plaintiffs' two suits in Mississippi

State Court were removed, transferred to the Southern District of New York, and consolidated with related securities fraud actions. Plaintiffs moved for abstention pursuant to 28 U.S.C. §1334(c)(2), which provides that a district court "shall abstain" from hearing a proceeding removed solely on the basis of section 1334(b) jurisdiction "if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

The key statute provides: "[a]ny decision to abstain or not to abstain made under this subsection (*other than a decision not to abstain in a proceeding described in subsection (c)(2)*) is not reviewable by appeal or otherwise by the court of appeals under §158(d), 1291, or 1292 of this title." (28 U.S.C. §1334(d); emphasis added. In opposition to the motion to dismiss, plaintiffs argued that the emphasized language provided an independent basis of appellate jurisdiction to review a refusal to abstain under section 1334(c)(2), regardless of whether that order was otherwise reviewable under sections 158(d), 1291, or 1292.

The Second Circuit disagreed and held that it could review such an order only if jurisdiction was conferred by one of the enumerated provisions. Specifically, the court recognized that section 1334(d) was structured as a prohibition on all appeals of abstention decisions made under section 1334. The prohibition would apply even where the decisions would otherwise be reviewable under sections 158, 1291 or 1292, which together confer the entirety of the appellate jurisdiction of the circuit courts. Excepted from the prohibition were refusals to abstain under section

1334(c)(2). Thus, nothing in the text of section 1334(d) created an independent basis of appellate jurisdiction over section 1334(c)(2) decisions; rather, the provision simply indicates that these decisions will be reviewable if the court otherwise has appellate jurisdiction over the decision. The court also recognized that it did not have jurisdiction to review the district court's denial of a remand pursuant to section 1452(b), as that section provides that a decision not to remand is not reviewable.

Subject Matter Jurisdiction over Permissive Counterclaims

***Jones v. Ford Motor Credit Co.*, 358 F.3d 205 (2d Cir. 2004)**

Plaintiff-appellees sued Ford Credit alleging racial discrimination in its financing plan under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691 *et seq.* Ford denied the charges and asserted state law counterclaims against three of the plaintiffs for the amounts of their unpaid loans, plus conditional counterclaims against members of the putative class plaintiffs sought to certify. Plaintiffs moved to dismiss Ford's counterclaims for, *inter alia*, lack of subject matter jurisdiction. The district court granted plaintiffs' motion and dismissed Ford's counterclaims, stating that they did not meet the standard for compulsory counterclaims.

On appeal, the Second Circuit agreed with the district court's conclusion that the counterclaims were permissive, but questioned whether supplemental jurisdiction was available. At the outset, the court recognized that the counterclaims and the underlying claims, all of which arose from plaintiffs' decisions to buy Ford

cars, bore a sufficient factual relationship to constitute the same "case" within the meaning of Article III and 28 U.S.C. §1367. However, that did not end the inquiry. A trial court must consider whether *any* of the four grounds set out in subsection 1367(c) are present to an extent that would warrant the exercise of discretion to decline the assertion of supplemental jurisdiction.

The Second Circuit concluded that the district court had apparently based its decision on subsection 1367(c)(4), which asks whether, in "exceptional circumstances," there are other compelling reasons for declining jurisdiction, as it cited only that subsection in its opinion. However, it also noted that the district court's discussion implicated the "substantial predomination" analysis of subsection 1367(c)(2). The court further recognized that whether Ford's counterclaims predominated over plaintiffs' claims and whether there were exceptional circumstances for declining jurisdiction could not properly be determined until a decision had been made on plaintiffs' motion for class certification. The district court's conclusions that it would be unfair and expedient to require out-of-state class members to litigate Ford's state law debt claims in New York, and that allowing the counterclaims might dissuade potential plaintiffs from joining the class, were, therefore, premature.

Accordingly, the judgment dismissing Ford Credit's counterclaims was vacated and the case was remanded with directions to the district court to exercise its discretion pursuant to subsection 1367(c) in light of *Itar-Tass*

Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442 (2d Cir. 1998), particularly the caution there expressed concerning the use of subsection 1367(c)(4).

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Third Circuit

Remedial Measures Taken by Non-Party Admissible against Manufacturer

***Diehl v. Blaw-Knox*, 360 F.3d 426 (3rd Cir. 2004)**

Plaintiffs alleging injury caused by a machine manufactured by defendant sought to introduce evidence that, after the accident, the non-party owner of the machine took several remedial measures to prevent similar accidents. The district court excluded this evidence under Federal Rule of Evidence 407. The jury returned a verdict for defendant and plaintiffs appealed.

The Third Circuit reversed, rejecting the lower court's rationale for its Rule 407 ruling and focusing instead on the policy behind the rule of encouraging manufacturers to make improvements for greater safety. The court found that the policy is not implicated where the evidence concerns remedial measures taken by a non-party, as no admissions would expose that non-party to liability or discourage the non-party from taking the remedial measures in the first place.

The Third Circuit also held that design changes made by the manufacturer before the accident were not barred by Rule 407 because "the implementation of remedial measures to improve the safety of a product is

consistent with an inference that the older product of a similar design was defective.” *Id.* at 431. Nevertheless, the evidence of the design changes would still be subject to the considerations of Rule 403.

Distinction between Notice Deadlines for Criminal and Civil Appeals

***Poole v. Family Court of New Castle County*, 368 F.3d 263 (3rd Cir. 2004)**

Plaintiff-appellant was a prisoner whose civil case was dismissed by the district court via an order that was sent by the court to the Delaware penal institution which held plaintiff at the time he filed the civil case. By the time the order was issued, however, plaintiff had been transferred to a Pennsylvania prison. As a result, notice of the order did not reach him until 41 days after the order was filed. Instead of filing a motion with the district court to extend the time for appeal under Federal Rule of Appellate Procedure 4(a)(6), plaintiff filed his notice of appeal three days after finally receiving the notice, or 14 days after the deadline.

Facing dismissal of his appeal for lack of jurisdiction, plaintiff argued that the time between the two mailings of the order should be excluded in calculating the timeliness of his notice. He predicated that argument on the Third Circuit decision in *United States v. Grana*, 864 F.2d 312, 313 (3d Cir. 1989), a criminal case in which the court held that, “in computing the timeliness of filings which are jurisdictional in nature, any delay by prison officials in transmitting notice of a final order or judgment to an

incarcerated *pro se* litigant should be excluded from the computation.”

The Court of Appeals rejected that argument, holding that, while *Grana* remained viable for *criminal* cases, it provided no avenue of relief from a clerk’s failure to serve notice of the entry of a judgment or order in *civil* cases, and cannot be used to extend the time for filing a notices of an appeal in civil cases, which are governed by Federal Rule of Appellate Procedure Rule 4(a) and Federal Rule of Civil Procedure 77(d).

Appealability of Abstention Order When Court Retains Jurisdiction of Fees Claim

***Lui v. Commission on Adult Entertainment Establishments of the State of Delaware*, 369 F.3d 319 (3rd Cir. 2004)**

In this federal lawsuit for declaratory, injunctive, and compensatory relief, the owner of an adult entertainment facility challenged state law on the same grounds on which he challenged his contemporaneous prosecution by the state for operating the facility without obtaining the required certification and license. The district court opted to refrain from deciding the issues under the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), but retained jurisdiction over plaintiff’s claim for attorneys’ fees and costs.

Plaintiff appealed from the *Younger* order, and defendant challenged the timeliness of the appeal and the appealability of the order. The Third Circuit rejected both arguments on grounds which appear to be inconsistent. As to the timeliness issue, the court stated that the claim was without merit because the order that the

county identified as being “final” was, in fact, interlocutory, as it was “without prejudice,” and because the lower court retained jurisdiction over the fees and costs claimed by plaintiff, thereby ostensibly leaving that order non-final.

In an apparent contradiction of that comment, the Third Circuit then held that the district court’s retaining jurisdiction over plaintiff’s claim for fees and costs did not affect the finality of the abstention order, but that the abstention order was final and immediately appealable. The court explained that “a ruling which orders *Younger* abstention transfers the entire proceeding to the State court for adjudication, including all of its collateral aspects—in this case, fees and costs.” *Id.* at 325.

Turning to the merits of the case, the court concluded that all three factors for abstention were met and that the trial court had not abused its discretion in deciding to abstain because the criteria were met. However, the court held that the lower court erred when it retained jurisdiction over plaintiff’s claim for fees and costs, as the defense of a state criminal prosecution is not a proceeding for which fees and costs can be awarded under section 1988.

Local Rules Cannot Permit Reinstatement of Arbitration Award after Trial *De Novo* Demand

***D’Iorio v. Majestic Lanes Inc.*, 370 F.3d 354 (3rd Cir. 2004)**

The district court’s local rules allowed a party to an arbitration to withdraw its demand for trial *de novo* and have the arbitration award reinstated. Pursuant to that rule, plaintiff filed a de-

mand for trial *de novo*, and then withdrew the demand and asked for reinstatement of the award after the time for filing a demand for trial *de novo* had elapsed. The district court rejected the defendant's attempts to have the plaintiff's withdrawal stricken and to seek trial *de novo*, and entered judgment on the reinstated arbitration award; defendant appealed.

The Third Circuit reversed, upholding defendant's challenge to the local rule as inconsistent with section 657(c) of the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651 *et seq.* The court held that "[the language of Section 657(c)(2)] implies that all parties to the arbitration are treated as if the arbitration never occurred; thus, once [one party] filed a demand for a trial *de novo*, [the remaining party] was relieved of the obligation to file such a demand."

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Fourth Circuit

Establishment Clause

Wynne v. Town of Great Falls, No. 03-2069, slip op. (4th Cir. July 22, 2004)

Plaintiff, a Wiccan, objected to her town council's practice of opening its meetings with prayers invoking the name of Jesus Christ. She asked that the opening prayer not include references to Christ or, in the alternative, that members of different religions be invited to give prayers. In response, one council member posted the request on the town's website. At the

next council meeting, about 100 citizens showed up (compared to the usual five or six), and responded with "hallelujahs" and "amens" to the opening Christian prayer. Plaintiff continued to attend council meetings, but found herself singled out and verbally harassed. Finally, she sued, and after trial on the merits, the district court granted a permanent injunction against the town's "invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings." On appeal, the Fourth Circuit affirmed.

The court distinguished *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Supreme Court upheld the Nebraska legislature's practice of opening each session with a non-sectarian prayer. "Here, on the other hand, the prayers sponsored by the Town Council 'frequently' contained references to 'Jesus Christ,' and thus promoted one religion over all others, dividing the Town's citizens along denominational lines." Slip *op.* at 9. By "insist[ing] upon invoking the name 'Jesus Christ,' to the exclusion of deities associated with any other particular religious faith... the Town Council clearly 'advance[d]' one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*." *Id.* at 14.

Free Speech v. Freedom from Harassment in the Workplace
***Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir. 2004) (en banc)**

Dixon, an employee of Coburg Dairy, displayed decals of the Confederate battle flag on his toolbox. The display offended an African-American co-worker, who complained to Coburg's management. When Dixon refused

management's request to remove the decals or the toolbox, Coburg fired Dixon.

Dixon sued Coburg in state court, alleging violation of a South Carolina statute making it unlawful for an employer to fire an employee for exercise of a constitutional right. Coburg removed the action to federal court and moved for summary judgment; meanwhile, Dixon moved to remand the action. The district court denied Dixon's remand motion and granted Coburg's summary judgment motion. Dixon appealed, and the Fourth Circuit, sitting *en banc*, reversed, holding that the district court lacked subject-matter jurisdiction, and ordered that the action be remanded to state court.

In reversing, the Fourth Circuit rejected Coburg's argument that Dixon's complaint depended on resolution of a federal-law question, *i.e.*, violation of Dixon's free-speech rights under the First Amendment. "A plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue," the court reasoned. *Id.* at 816. And while Dixon referred to the First Amendment, none of his causes of action relied exclusively on the First Amendment to establish violation of South Carolina statutes. The court also found significant the absence of any act of Congress extending free-speech rights to the private workforce, finding this "tantamount to a congressional conclusion that the presence of a claimed violation of the [First Amendment] as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 819.

A concurrence expressed concern over the employer's dilemma. Because many people identify the Confederate battle flag with slavery and the notion that the races are not equal, an employer who does not respond to complaints could find itself in violation of federal statutes barring racial harassment in the workplace. But if the employer takes action like Coburg's, it could find itself in violation of state statutes protecting employees' free-speech rights. Thus, "If Mr. Dixon's interpretation of the South Carolina statute is correct then the statute surely invites conflict with federal anti-discrimination law." *Id.* at 822 (Gregory, J., concurring).

Preservation of Rule 11 Issue for Appeal

***Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385 (4th Cir. 2004) (en banc)**

The Fourth Circuit, sitting *en banc*, held that the safe-harbor provisions of Federal Rule of Civil Procedure 11 are mandatory and unwaivable—thus preserved for appeal even though not raised in the district court.

Brickwood sued Datanet for defamation and tortious interference with business relations. After the district court granted summary judgment in Datanet's favor, Datanet filed a motion for sanctions under Rule 11, contending, *inter alia*, that Brickwood's complaint was frivolous. The motion failed to comply with Rule 11(c)(1)(A)—the "safe-harbor" provisions—which require that a Rule 11 motion not be filed unless the violation is called to the offending party's attention, and the offending party fails to correct the violation within 21 days. But Brickwood failed to raise

the safe-harbor provisions in district court. The district court granted Datanet's motion and imposed \$15,000 in sanctions.

On appeal, Brickwood raised the safe-harbor issue. The Fourth Circuit reversed because the issue had not been raised below, but the then granted rehearing *en banc*, apparently to question whether Brickwood had preserved the safe-harbor argument. The *en banc* court ultimately reached the same result as the three-judge panel, reversing the imposition of sanctions because of Datanet's failure to comply with the safe-harbor provisions. The *en banc* court reasoned that the safe-harbor provisions "are inflexible claim-processing rules and that a district court exceeds its authority by imposing sanctions requested through a procedurally-deficient Rule 11 motion." *Id.* at 396.

And though Brickwood had failed to raise this issue in the district court, the *en banc* court nonetheless found itself empowered to reach the issue. "The rule that issues raised for the first time on appeal will not be considered is a general rule only. Under certain circumstances, this court is free to consider issues that would otherwise be forfeited." *Id.* In deciding whether failure to comply with the safe-harbor provisions was such an issue, the court looked to the plain-error doctrine in criminal law, under which "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." *Id.* at 396, quoting Fed. R. Crim. P. 52(b). This particular error met that test.

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Noncommercial Criticism Is Not Trademark Dilution

***TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004)**

Unhappy with what he viewed as misrepresentations about a house he was interested in buying from TMI, Maxwell created a website to tell his story, and registered an Internet domain name that resembled TMI's mark. TMI obtained a judgment against Maxwell in the district court, enjoining him from using the website, based on violations of the Lanham Act (15 U.S.C. §1125) and the Texas Anti-Dilution Statute. On appeal, the Fifth Circuit reversed.

The court first addressed whether Maxwell's use violated two provisions of the Lanham Act—the anti-dilution provision and the Anti-Cybersquatting Consumer Protection Act ("ACPA"). The court explained that, to violate these provisions, Maxwell's use must have been commercial in nature, and in the case of the ACPA, his use must have been made with a bad faith intent to profit. TMI agreed that the section of the site addressing Maxwell's complaints about TMI was noncommercial, but argued that Maxwell put the site to commercial use by including a forum for readers to exchange information about other contractors. The court rejected TMI's argument, finding that Maxwell never accepted payment for reading the forum or placing listings in it.

The court also determined that Maxwell's use of the site was not made with a bad faith intent to profit. Of the nine factors to consider in defining a bad faith intent to profit, one of the factors most relevant to the

court's analysis was bona fide non-commercial use of the mark. The court found that this factor weighed heavily against TMI because Maxwell's use of the site was noncommercial. Lastly, the court held that Maxwell's use of the site did not violate the Texas Anti-Dilution Statute because the statute is not intended to address non-trademark uses of a name to comment on, criticize, ridicule, parody, or disparage the goods or business of the name's owner.

Agreements Can Bind, Even When Not Read

Washington Mutual Finance Group, LLC v. Bailey, 364 F.3d 260 (5th Cir. 2004)

Several illiterate parties who had entered into agreements with Washington Mutual ("WaMu") filed state actions alleging that WaMu charged for insurance that they did not need or want. As the parties had signed arbitration agreements, WaMu brought separate actions under the Federal Arbitration Act ("FAA") against them, seeking an order staying the state actions and compelling the parties to arbitrate. The district court consolidated the cases and held that the arbitration agreements were procedurally unconscionable and therefore unenforceable because the parties were illiterate and because WaMu never specifically informed them that they were signing arbitration agreements. The Fifth Circuit reversed.

Applying Mississippi contract law, the court explained that procedural unconscionability is proved by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties, and/or a lack

of opportunity to study the contract and inquire about the contract terms." *Id.* at 264. The court also explained that an individual's inability to understand a contract because of his or her illiteracy is not a sufficient basis for concluding that a contract is unenforceable. Additionally, the Fifth Circuit pointed out that Mississippi courts have consistently held that a party is charged with knowing the contents of any document that he or she executed and that, accordingly, the district court erred in holding that the arbitration agreements were unconscionable and therefore unenforceable.

Appealing a Discovery Order *Piratello v. Philips Electronics North America Corp.*, 360 F.3d 506 (5th Cir. 2004)

The district court entered a judgment against Piratello for losses sustained by his former employer, Philips Electronics, as a result of Piratello's allegedly fraudulent activities. Philips filed a motion to compel Piratello to answer questions about his assets in order to collect on its judgment and also sought to enjoin him from disposing of certain assets.

The district court granted the motion in part by ordering Piratello to answer questions, but denied the request for an injunction. Piratello appealed on self-incrimination grounds. The Fifth Circuit dismissed the appeal, finding that it lacked appellate jurisdiction.

The court stated that, as a general matter, discovery orders do not constitute final decisions under 28 U.S.C. §1291, and therefore are not immediately appealable. Citing *Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992),

the court explained that a party wishing to appeal a discovery order must first refuse compliance, be held in contempt, and then appeal the contempt order. Finding that the basis of Piratello's claim—the Fifth Amendment privilege against self-incrimination—does not, standing alone, entitle him to an interlocutory appeal, the court held that in order to sustain an appeal, Piratello must first choose to disobey the district court's order and endure the district court's sanction.

Qualified Immunity to Constitutional Claims

Beltran v. City of El Paso, 367 F.3d 299 (5th Cir. 2004)

Beltran, grandmother of a young murder victim, filed suit against the city and a 911 operator who allegedly mishandled the emergency call by not including the victim's statements that she feared for her life. The exclusion of this information resulted in a lower priority for the call, which Beltran argued violated the decedent's rights to equal protection and due process; she argued further that the call classification system discriminated against women. The 911 operator moved for summary judgment, arguing that her conduct was protected by the qualified immunity doctrine. The district court denied the motion, and the Fifth Circuit reversed.

The Fifth Circuit explained that, to sustain a gender-based equal protection challenge, a plaintiff must show (1) the existence of a law enforcement policy to provide less protection to victims of domestic assault than to other victims, (2) that discrimination against women was a motivating factor, and (3) that plaintiff was injured

by the policy. The court found that Beltran had made no showing that the city assigns a lower level priority code to 911 family violence assault calls as the result of an effort to discriminate against women, and concluded that, without such evidence of discriminatory intent, Beltran cannot argue that the mere existence of such a policy violated the Equal Protection Clause.

Next, the court rejected Beltran's due process claim, explaining that the Due Process Clause does not require a state to provide its citizens with particular protective services. Lastly, the court stated that even if Beltran had established a viable constitutional claim, the 911 operator's conduct was objectively reasonable and that qualified immunity protects her from any civil liability.

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Sixth Circuit

Class Certification Denied for Lack of Commonality and Typicality

Bacon v. Honda of America Mfg., Inc., 370 F.3d 565 (6th Cir. 2004)

The Sixth Circuit affirmed a district court's decision to deny class certification in an employment discrimination action in which the named plaintiffs sought to represent all current and former African-American employees at Honda's four manufacturing plants in central Ohio, alleging that Honda had engaged in a pattern or practice of discrimination against African-American employees by denying them

promotions. Plaintiffs sought declaratory and injunctive relief, promotion to desired positions, back pay, and compensatory and punitive damages.

The court concluded that plaintiffs had failed to satisfy the commonality and typicality requirements set forth in Federal Rule of Civil Procedure 23. In discussing the commonality requirement, the court noted that plaintiffs had not alleged any particular facts to show that the class shared a common interest and instead relied on "[c]onclusory allegations and general assertions of discrimination." *Id.* at 571. It noted that, "Plaintiffs failed to show how hourly wage earners and salaried employees would have the same interests." *Id.* The court also emphasized that plaintiffs had failed to show "how differing promotion criteria for jobs as diverse as welding, accounting, and engine-building could discriminate against each African-American employee." *Id.* Without any particular facts establishing commonality, the court concluded that the class certification motion was properly denied.

The court then concluded that the named plaintiffs were not typical of the class. Neither of the named plaintiffs was eligible for promotion, as neither had satisfied attendance prerequisites nor completed Honda's mandatory career interest application. On this basis, the court concluded that the named plaintiffs could not reasonably represent the interests of those employees who may have consistently applied for promotions and been turned down for discriminatory reasons. *Id.* at 575.

Finally, the Sixth Circuit affirmed the district court's grant of summary judgment on the named plaintiffs' discrimination claims. The district

court concluded that plaintiffs lacked standing to bring the claims because they could not show that the employer's requirements for determining eligibility for promotion injured them *personally*. In affirming, the Sixth Circuit pointed to plaintiffs' failure to satisfy attendance prerequisites or to complete the necessary paperwork to be considered for promotion. The court concluded that these requirements served a legitimate business purpose because it enabled Honda to "gaug[e] commitment to the company." *Id.* at 578. Because the named plaintiffs had failed to comply with the requirements, they lacked standing to complain that Honda's promotion practices discriminated against African-Americans by denying them promotions.

Allowing Lay Opinion Testimony on Profits and Loss Was Abuse of Discretion

JGR, Inc. v. Thomasville Furniture Industries, Inc., 370 F.3d 519 (6th Cir. 2004)

The Sixth Circuit concluded that a district court abused its discretion when it allowed a witness to give lay opinion testimony about a company's lost profits and loss of business value. The dispute began when a furniture retailer entered into a sales agreement with a high-end manufacturer that required the retailer to set up a 7,500-square foot showroom to display the manufacturer's furniture. After the retailer set up the showroom, the manufacturer entered into a contract with the retailer's competitor across the street, not requiring the competitor to display any of the merchandise, but allowing it to order from a catalogue. This led the competitor to tell cus-

tomers to go across the street, view the entire line of merchandise at the retailer's store, and then come back and order it from the competitor at a 5 percent discount. When the retailer learned of this arrangement, it sued the manufacturer for breach of contract.

During the trial, the retailer offered the testimony of an accountant, who testified about the lost profits and loss of business value attributed to the arrangement with the competitor. The district court did not hold a *Daubert* hearing for the accountant and never qualified him as an expert. Instead, he was allowed to testify as a lay witness under Federal Rule of Evidence 701. After hearing the accountant's testimony, the jury returned a \$1.5 million verdict in favor of the retailer. The accountant was the only witness that either side offered on the issue of damages.

On appeal, the Sixth Circuit affirmed the jury's verdict as to liability but vacated and remanded as to damages. Concluding that the district court had abused its discretion by allowing the accountant to testify as a lay witness, the court pointed to the Advisory Committee Notes to Rule 701, which provide that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business . . . because of the particularized knowledge that the witness has by virtue of his or her position in the business." The court explained that, while most courts allow owners or officers of a business to testify under Rule 701, they do not allow outsiders to testify about lost profits because, unlike owners or officers, they have no particularized personal knowledge about

the business. Because the accountant had no personal knowledge about the retailer's business and did nothing to verify the information on which he relied, the court concluded that he should not have been allowed to testify as a lay witness at the trial. He should have been qualified to testify as an expert or not allowed to testify at all.

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Seventh Circuit

Voluntary Dismissal of Appeal to Avoid Unfavorable Precedent Disallowed

***Albers v. Eli Lilly & Co.*, 354 F.3d 644 (7th Cir. 2004)**

More than a decade after being diagnosed with a malformed uterus that her physician attributed to her mother's ingestion of DES, plaintiff filed a complaint against the drug's manufacturer, Eli Lilly & Company. In response, Lilly brought a motion for summary judgment, arguing that plaintiff's action was barred by the applicable statute of limitations. Agreeing with Lilly, the district court granted Lilly's motion for summary judgment, and plaintiff appealed.

Following the completion of briefing and oral arguments, plaintiff sought to dismiss the appeal voluntarily pursuant to Federal Rule of Appellate Procedure 42(b). The Seventh Circuit noted, however, that Rule 42(b) provides that: "An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." In this case, the parties had not agreed on the terms, and Lilly made clear that it

would not do so. Specifically, Lilly pointed out that plaintiff's counsel had a substantial portfolio of DES cases and was "attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion." *Id.* at 646. In response, plaintiff's counsel essentially conceded that this was the plan, as oral arguments had not gone as expected, and counsel wanted to dismiss the appeal and try again later with a different client or with a different court. *Id.*

Addressing the requested dismissal, the court recognized that, despite a presumption in favor of dismissal, the procedure is not automatic. Indeed, "[o]ne good reason against dismissal is to curtail strategic behavior." *Id.* at 646. Moreover, the court noted that plaintiff had not agreed to pay Lilly's costs or sanctions it may demand. Finally, the amount of public resources invested in the appeal weighed against dismissal. The court concluded that it was denying the motion to dismiss "so that the investment of public resources devoted to this litigation will have some return, and an attempt to make the stock of precedent look more favorable than it really is may be foiled." *Id.*

Interlocutory Review of Class Certification Denial Appropriate to Promote Development of the Law and to Avoid Full Appellate Review

***Allen v. International Truck and Engine Corp.*, 358 F.3d 469 (7th Cir. 2004)**

Plaintiffs, 27 current and former African-American employees of the defendant, brought an action seeking

financial and equitable relief based upon white employees' alleged hostility and harassment, as well as supervisors' failure to respond to their complaints. In addition, plaintiffs sought to be certified as representatives of a class of roughly 350 current and former African-American workers employed during the period covered in the complaint. Although the district court found that the requirements of Federal Rule of Civil Procedure 23(a) were satisfied, it declined plaintiffs' request to represent those similarly situated. Specifically, the district court found that "the presence of individual claims made class treatment of damages imprudent, and the seventh amendment rendered class treatment of the equitable theories improper." *Id.* at 470.

Plaintiffs immediately appealed pursuant to Rule 23(f). Writing for the Seventh Circuit, Judge Easterbrook recognized that the parties' submissions show that "immediate review would promote the development of the law governing questions that have escaped resolution on appeal from final decisions," but also that "the district court committed an error best handled by swift remand." *Id.* at 470. Accordingly, the court granted plaintiffs' petition for interlocutory review and concluded, "[i]t is better to act summarily on this interlocutory matter than to delay the proceedings during full-dress appellate review." *Id.*

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Failure to Recuse Reviewed for Plain Error

Fletcher v. Conoco Pipe Line Co.,
323 F.3d 661 (8th Cir. 2003)

When an affidavit sworn by the trial judge's hunting and camping buddy has been submitted on summary judgment, the Eighth Circuit held that the judge need not recuse himself *sua sponte*. This case arose from a farmers' lawsuit against a pipeline company for damages caused by "stray electricity." The appeal followed the district court's decision to grant summary judgment in favor of the pipeline company.

The farmers argued that the district court judge was required under 28 U.S.C. §455 to recuse himself, based on the appearance of partiality arising from the judge's personal relationship with an affiant. In opposition to the summary judgment motion, the farmers had submitted the affidavit of an attorney who had observed the pipeline company's expert inspection of the farmers' property. The affiant/attorney never entered an appearance in the case. The farmers did not request recusal before or after summary judgment, but submitted an affidavit regarding the judge's friendship with the affiant and his ongoing client relationship with the affiants' law firm. On appeal, the farmers requested that the judgment be vacated and the case reassigned.

The Eighth Circuit noted that, in previous cases, it has considered recusal claims raised for the first time on appeal. When a recusal claim is not presented to the district court, however, the scope of review is not for abuse of discretion, but for plain

error. Under that analysis, appellate review is "confined to the exceptional case where error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (quoting *Chem-Trend, Inc., v. Newport Indus., Inc.*, 279 F.3d 625, 629 (8th Cir. 2002)). Reversal is proper only if substantial rights are affected and a miscarriage of justice would result.

The appellate court then turned to 28 U.S.C. §455(a) to determine whether the recusal claim had been waived, and was therefore unreviewable, or whether the recusal claim was merely forfeited, permitting a plain-error review. Here, the court concluded that waiver did not occur because the alleged social relationship between the judge and the affiant was not disclosed on the record. The court observed that whether the farmers forfeited their recusal claim was "a closer question," *id.* at 664, but reasoned that it need not be resolved, because recusal was not required.

The Eighth Circuit held that generally it would deny a recusal claim alleging only a social friendship between the judge and a witness where a reasonable person would not question the judge's partiality. Here, the judge's friend was an attorney but never entered an appearance. The judge's partiality to his friend could not be reasonably questioned because the judge ultimately granted summary judgment *against* the farmers on whose behalf his friend gave an affidavit. *Id.* at 665. The district court's judgment was affirmed.

Court May Designate Replacement Arbitrator

National American Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462 (8th Cir. 2003)

In this dispute over two reinsurance contracts, the Eighth Circuit affirmed the district court's decision to replace one member of a three-person arbitration panel, after one party's chosen arbitrator resigned for health reasons more than a year into the process. Transamerica sought to replace the entire panel, while National asked Transamerica to appoint a replacement arbitrator. After the parties failed to agree, National sought an order from the district court naming an arbitrator to fill the vacancy, and the court did so. Transamerica appealed, claiming that the Federal Arbitration Act did not authorize the court to appoint a replacement arbitrator.

The Eighth Circuit held that, where the arbitration agreement is silent on how to replace an arbitrator, the district court has authority to designate a replacement under 9 U.S.C. §5. *Id.* at 464–65. The court focused on the sequence of events, and concluded that because each party had selected an arbitrator, participated in arbitration for more than a year, and engaged in active discovery, Transamerica “cannot now use the resignation of its chosen arbitrator to abort the arbitration process.” *Id.* at 465. By this ruling, the Eighth Circuit refused to adopt a rule similar to the Second Circuit's “general rule” that an arbitrator's death triggers reappointment of an entirely new arbitration panel. *Id.* at 465 (discussing *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992)).

Appellate Jurisdiction Cannot Arise from Implied Ruling

Bradford v. Huckabee, 330 F.3d 1038 (8th Cir. 2003)

The denial of a motion to dismiss is not usually immediately appealable because it is not a final order; however, an exception has been carved out for cases involving qualified immunity claims. *Behrens v. Pelletier*, 516 U.S. 288, 307 (1996). In this matter, the Eighth Circuit raised a jurisdictional defect *sua sponte* and held it will not *infer* a denial of a qualified immunity defense by the district court.

The district court had denied a motion to dismiss filed by state officials, but never explicitly ruled on whether the officials were entitled to qualified immunity from claims brought against them in their individual capacities. The Eighth Circuit held that it had no jurisdiction to hear the interlocutory appeal because the district court had not determined the qualified immunity issue. The catch-all conclusion in the district court's order—that the motion to dismiss has been denied “[i]n all other respects”—is not an appealable determination of the issue of qualified immunity.” The court reasoned that, while such a statement *implies* a denial of qualified immunity, “[w]e do not think that such an inference is sufficient for an interlocutory appeal at this point in time.” *Id.* at 1040. The court of appeals remanded for “a proper determination” of the qualified immunity defense. *Id.* at 1041.

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Ninth Circuit

Dozens of Actions Brought by California Thrown Out for Lack of Jurisdiction

Lockyer v. Dynegy, Inc., 2004 WL 1488195 (9th Cir. 2004)

Perhaps hoping for a home-court advantage, the state of California decided not to file claims before the Federal Energy Regulatory Commission (“FERC”), but instead brought state-court actions against dozens of wholesale electricity suppliers, alleging that the power companies fraudulently failed to deliver reserve energy that might otherwise have averted California's 2000–2001 energy crisis, all in alleged violation of the state unfair practices act, Business & Professions Code §17200 *et seq.* Defendants removed to federal court, and California's motion for remand was denied. While interlocutory appeals were pending, the district court dismissed the complaints.

California appealed from the final judgments, and the appeals were consolidated.

The Ninth Circuit affirmed in full. First, it had no trouble finding the suits to be removable, noting that the rate tariffs at issue “directly implicate the federal regulatory regime, were filed with FERC, and concern obligations directly and exclusively arising under regulations issued pursuant to the FPA [the Federal Power Act, 16 U.S.C. §791a *et seq.*]. California's state claim represented a naked attempt to enforce these federal obligations.” *Id.* at *8. The court also gave short shrift to the state's claim of sovereign immunity, agreeing with other circuits that the Eleventh Amendment protection is waived when a state voluntarily files suit in a state court. *Id.* at *12.

Moving to the two bases for the lower court's dismissals, the Ninth Circuit looked first at federal preemption and concluded that "California's claims are preempted because they encroach upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy. . . . [I]f FERC has jurisdiction over a subject, the State cannot have jurisdiction over the same subject." *Id.* at *16, (internal punctuation and citations omitted). Secondly, the court found that the filed-rate doctrine was correctly applied, and that whether California is seeking to enforce the penalty provisions of the tariffs or expand those obligations, it "conflicts with the filed rate doctrine and the exclusive authority conferred to FERC to enforce its tariff." *Id.*

"Law of the Case" Doctrine—No Rehashing of Old Arguments

***Humanitarian Law Project v. U.S. Dept. of Justice*, 352 F.3d 382 (9th Cir. 2003)**

Constitutional issues first raised in an appeal from the partial grant of a motion for preliminary injunction preventing the government from enforcing a statute against plaintiffs that would make it a crime to provide "material support or resources" to a designated "foreign terrorist organization" could not be reconsidered on the later appeal of the permanent injunction in that same matter.

Under the "law of the case" doctrine, an appellate court will not consider matters resolved on a prior appeal; here, after the partial preliminary injunction order was affirmed on appeal and the matter remanded, plaintiffs did not submit additional evidence in support of their motion

for permanent injunction involving the statute, set forth at 8 U.S.C. §1189 and 18 U.S.C. §2339B. After the district court granted the permanent injunction, the Ninth Circuit refused to hear the portion of the cross-appeals dealing with the injunction, as barred by the law of the case. However, it did review other issues before affirming in part and reversing in part. First, it held that certain terms in the statute's definition of "material support" were void for vagueness under the First and Fifth Amendments. Second, the court held that the another provision of the statute should be construed to require the government to "prove beyond a reasonable doubt that the accused knew that the organization was designated as a foreign terrorist organization or... knew of the organization's unlawful activities that caused it to be so designated." *Id.* at 405.

The Court Delineates the "Ministerial Exception" to Harassment Claims

***Elvig v. Calvin Presbyterian Church*, 2004 WL 1636927 (9th Cir. 2004)**

Plaintiff Monica Elvig, an ordained Presbyterian minister, made a formal complaint to her church that her pastor had sexually harassed her, the church took no action to stop the harassment, and the pastor retaliated by verbally abusing and intimidating her. She filed a charge of discrimination with the EEOC, whereupon she was fired and blacklisted from ever finding pastoral employment in any Presbyterian Church in the country. She then filed a second charge, alleging retaliation, with the EEOC.

Her complaint in federal district court under Title VII of the Civil

Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, was dismissed for failure to state a claim in view of the "ministerial exception," which "saves Title VII from unconstitutionality under the First Amendment by requiring that Title VII suits be dismissed when they would impermissibly encroach upon the free exercise rights of churches or excessively entangle government and religion." *Id.* at *1.

Applying its decision in *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), the Ninth Circuit reversed (over an angry dissent). Under the ministerial exception, a church's decisions about *whom to employ as a minister* are protected by the First Amendment. "To the extent Elvig's claims necessarily involve an inquiry into the Church's *decision* to terminate her ministry, those claims cannot proceed in civil court and were properly dismissed," the court held. *Id.* at *6 (emphasis in original).

However, the court did not see insulating the church's employment decisions as foreclosing plaintiff from seeking to hold the church liable for aspects of the alleged sexual harassment and retaliation which are not protected employment decisions. Remanding for further proceedings, the court concluded, "The First Amendment should not require that churches become sanctuaries for sexual harassment by those who act outside of church doctrine." *Id.* at *14.

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Review of Remand Order Must Be Sought by Direct Appeal, Not Petition for Writ

In re: Stone Container Corp., 360 F.3d 1216 (10th Cir. 2004)

The Tenth Circuit analyzed whether a remand order was reviewable and explicitly stated for the first time that review must be taken by direct appeal rather than by petition for writ of mandamus.

Suit was originally filed in state court before being removed to federal court by the 12 defendant companies. All of the defendant companies were identified in the body of the notice of removal, but two company names did not appear under any of the signature blocks of the signatory attorneys. The trial court remanded the case to state court, ruling that the notice was ambiguous regarding the necessary unanimous consent to removal. Defendants filed both a petition for writ of mandamus and an alternative motion for expedited appeal. Plaintiff challenged the court's jurisdiction to review the remand order under either procedure.

The court first discussed whether the remand order was subject to review at all, given the language of 28 U.S.C. §1447(d), which states that a remand order is not reviewable unless the remand is pursuant to 28 U.S.C. §1443. That exception did not apply in this case. However, the court relied on prior case law holding that appellate review is barred by section 1447(d) only when the remand is pursuant to grounds set forth in section 1447(c). See *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998). There-

fore, to determine appellate jurisdiction, the court must independently review the record to determine the actual grounds upon which the trial court issued the remand order. The court deferred its determination of this issue.

The court then considered whether review should proceed via the petition for mandamus or direct appeal. The Tenth Circuit chose to follow the majority view, which interprets the Supreme Court's opinion in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714–15 (1996), as making remand orders final and subject to direct appeal rather than mandamus review. The court dismissed the petition for mandamus as moot and ordered the parties to proceed on appeal.

Many Rules Govern the Timeliness of a Notice of Appeal

United States v. Ceballos-Martinez, 371 F.3d 713 (10th Cir. 2004)

Mathis v. Skaluba, 94 Fed. Appx. 701 (10th Cir. 2004) (unpublished)

Caldwell v. Barnhart, 100

Fed.Appx.724 (10th Cir. 2004)

(unpublished)

Bishop v. Corsentino, 371 F.3d 1203 (10th Cir. 2004)

United States v. Torres, 372 Fed.3d 1159 (10th Cir. 2004)

These recent Tenth Circuit cases serve as reminders for appellate practitioners of the rules that can affect the timeliness of an appeal. The filing of a timely notice of appeal is, of course, a jurisdictional prerequisite to a court's determination of the merits. The Tenth Circuit requires adherence to the Federal Rules of Appellate Procedure—mistakes by parties or counsel are not likely to be seen as justification for an extension of time. In con-

trast, the trial court's failure to follow procedure may provide an appellant with additional time to file an appeal.

In *Ceballos-Martinez*, the appellant attempted to file a *pro se* notice of appeal of his criminal conviction while incarcerated. The notice was five days late and did not include a declaration in compliance with 28 U.S.C. §1746 or a notarized statement regarding the date the appellant deposited the notice with prison officials or his prepayment of first-class postage. Therefore, the court construed the "prisoner mailbox rule" set forth in Federal Rule of Appellate Procedure 4(c)(1) to determine if submission of a declaration or a notarized statement is mandatory or merely two of many ways to prove timely compliance. Even though Rule 4(c)(1) uses the term "may," the court held that submission of a declaration or a notarized statement is mandatory and dismissed the appeal.

In *Bishop* and *Torres*, the court examined the issue of "excusable neglect" as extending the time for filing a notice of appeal. Relevant factors include: (1) the risk of prejudice to the party not seeking an extension; (2) the length of the delay and its likely impact on judicial proceedings; (3) the reason for delay and whether the delay was reasonably within the control of the party seeking an extension; and (4) whether the party seeking an extension acted in good faith. In *Bishop*, the court determined that the appellant was not entitled to additional time to review the record and consult with other counsel, or to obtain a ruling on her motion to proceed *in forma pauperis*. The court noted that the appellant could have filed the notice of appeal in a timely manner

without paying a docket fee, and then withdrawn the appeal later based on the consultation or an adverse *in forma pauperis* ruling. In *Torres*, the court ruled that the trial court abused its discretion by granting appellant's motion for an eight-day extension based on counsel's mistake in construing unambiguous rules of procedure.

In contrast, the appellants in *Mathis* were permitted to appeal an order dated January 28, 2003, via a notice of appeal filed on April 7, 2003, because the trial court had not filed a separate entry of judgment as required by Federal Rule of Civil Procedure 58(a). Under Rule 58(b)(2)(B), the period for filing a timely notice of appeal was therefore extended to 150 days. *Accord, Caldwell* (September 28, 2003, notice of appeal was timely because trial court failed to file separate entry of judgment for April 10, 2003, decision).

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Eleventh Circuit

Several Standards of Review Clarified

Klay v. United Healthgroup, Inc., ___ F.3d ___, 2004 WL

1463452 (11th Cir. June 30, 2004)

Trustees of the Central Pension Fund v. Wolf Crane Service, Inc., ___ F.3d

___, 2004 WL 1418425 (11th Cir. June 25, 2004)

Butcher v. United States, 368 F.3d 1290 (11th Cir. 2004)

In *Klay*, the Eleventh Circuit clarified the abuse-of-discretion standard of review in this appeal from an injunction issued against pending arbitration between doctors and HMOs.

Although it is well established that a court of appeals reviews an injunction for an abuse of discretion, the court in *Klay* outlined the number of different ways an appellant can show that the district court abused its discretion:

A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous. A district court may also abuse its discretion by applying the law in an unreasonable or incorrect manner. Finally, an abuse of discretion occurs if the district court imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large.

Id. at *2 (internal quotations and citations omitted). This list of factors should give hope to any appellant intimidated by the abuse-of-discretion standard.

Trustees of the Central Pension Fund presented a case of first impression for the Eleventh Circuit. The Multi-Employer Pension Plan Amendments Act, 29 U.S.C. §1401, requires arbitration of disputes between an employer and the plan sponsor of a multi-employer plan governed by ERISA. The Eleventh Circuit held that a district court reviewing an arbitration decision under the act should review the factual findings for clear error and the legal conclusions *de novo*. *Id.* at *2-*3. The latter standard is distinct from the "manifest disregard of the law standard" under the Federal Arbitration Act.

Civil practitioners could easily overlook *Butcher*, an important case from

the Eleventh Circuit on the standard for reviewing motions for new trial. The discussion arose in the context of a criminal case, but the court made clear that it reviews rulings on new trial motions "under the same standard in civil and criminal cases." *Id.* at 1297 n.3. The court then explained that, at least with respect to an order granting a new trial, the abuse of discretion standard that applies is really closer to *de novo* review. Judge Carnes's opinion candidly admitted that the court

. . . accord[s] less deference to a district court's grant of a new trial than the "abuse-of-discretion" standard of review implies. To be honest about it, at least insofar as weight of the evidence is concerned[,] the label "abuse-of-discretion" belies the standard of review that we actually apply to grants of motions for a new trial. We may conclude that the district court overreached its authority by granting a new trial if our review of the record reveals that the evidence did not preponderate heavily against the jury's verdict. The grant of a motion for new trial generally is more closely scrutinized than a denial, and the grant of a new trial based on the weight of the evidence is more closely scrutinized than the grant of new trial on other grounds.

Id. at 1297 (internal quotations and citations omitted). Concerned with limiting a trial court's ability to "reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable," *id.*, the court stated, "while we do not conduct pure *de novo* review in these circumstances, the review that we do conduct is not much different

because we want to assure that the judge does not simply substitute his judgment for that of the jury.” *Id.* (internal quotation and citation omitted).

Stay on Appeal: Denial of Motion to Compel Arbitration

***Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004)**

The Eleventh Circuit took sides in the existing circuit split over whether a party who appeals the denial of a motion to compel arbitration is entitled to a stay of the underlying litigation in the district court pending the appeal. The Seventh Circuit has held that a stay is proper during a non-frivolous appeal under 9 U.S.C. §16(a)(1)(A). *Bradford-Scott Data Corp, Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997). The Second and Ninth Circuits have held such a stay is not necessary. *In re Salomon Inc. Shareholders’ Derivative Litigation.*, 68 F.3d 554 (2nd Cir. 1995); *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990). The Eleventh Circuit in *Blinco* sided with the Seventh Circuit and held that “upon the filing of a non-frivolous appeal under 9 U.S.C. §16(a), the district court should not exercise control over the aspects of the case involved in the appeal.” 366 F.3d at 1251.

Notice of Appeal: Specifying Orders Appealed

***Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308 (11th Cir. 2004)**

The court in this appeal liberally construed BellSouth’s notice of appeal to include “unnoticed claims or issues” that were “inextricably intertwined with noticed ones,” where the appellee was not prejudiced. *Id.* at 1313.

Plaintiff sued BellSouth in state court, asserting six state-law claims challenging the filed tariffs that BellSouth charged. BellSouth removed the case under the Federal Communications Act, and the district court dismissed four of the six claims based on the filed-rate doctrine. The district court then declined to exercise supplemental jurisdiction over the two remaining claims and remanded them to state court. On appeal, BellSouth argued that federal jurisdiction should have attached to the remaining two claims. Plaintiff responded by arguing that the court lacked jurisdiction to address the jurisdictional issue because BellSouth’s notice of appeal did not mention the remand order. The court rejected plaintiff’s argument, however, finding it had appellate jurisdiction because the remand order and the implied denial of BellSouth’s motion to dismiss were “inextricably intertwined.” *Id.* The court stated, “Since these issues are so interrelated, Hill is not prejudiced by our consideration of the district court’s grant of her motion to remand because the propriety of [that] decision and its implied decision to deny BellSouth’s motion to dismiss require consideration of the same legal issue: whether federal jurisdiction should have attached to Hill’s two remaining claims.” *Id.*

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Statute of Limitations on Conspiracies

***Barr v. Clinton*, 370 F.3d 1196 (D.C. Cir. 2004)**

Congressman Bob Barr filed a complaint against President William J. Clinton, one of Clinton’s political advisors and publisher Larry Flynt, alleging that the three had conspired to publish information harmful to Barr’s reputation in retaliation for his role in Clinton’s impeachment. The complaint relied upon 42 U.S.C.A. §1985(1), which prohibits conspiracies to interfere with a public official’s ability to perform duties. The district court dismissed the complaint against all three defendants based upon the statute of limitations.

On appeal, the D.C. Circuit affirmed with ease the dismissal of the complaint as to Clinton and his advisor, finding that their alleged acts occurred outside of the three-year statute. The analysis with respect to defendant Flynt was more complicated, however, as his report was published within the three-year period. The district court had relied on older authorities that held that the conspiracy statute ran from the moment of notice of the alleged conduct, and found that, because Barr had prior notice of Flynt’s intent to publish, he was time-barred. The D.C. Circuit disagreed, reasoning that Barr’s prior knowledge of Flynt’s intent to publish did not put him on notice of the exact content nor the intended distribution of the report. The court nevertheless affirmed Flynt’s dismissal on the alternative ground that Barr’s complaint failed to state a claim because Barr failed to allege that the report con-

tained untrue statements or was published with actual malice.

Federal Jurisdiction Cannot Be Defeated by Changing Legal Theories

Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004)

Hearing plaintiffs' appeal from the dismissal of their complaint for failure to state a claim, the D.C. Circuit was faced with the unusual argument by plaintiffs that their claim "had far less merit than the district court believed," such that the trial court never had federal question jurisdiction to begin with. *Id.* at 1193. The goal: to be remanded back to the D.C. Superior Court and thus prevent preclusion of a nearly identical complaint filed in a different federal jurisdiction. It didn't work.

The complaint filed by the Herero, a tribe native to Namibia, alleged that defendants participated in the torture, slavery, and genocide of the Herero by Imperial Germany in the late 19th and early 20th centuries. The complaint did not identify the precise legal basis for these claims, but did summarily posit that jurisdiction was valid under international law as well as the laws of both the District of Columbia and the United States. Defendants removed the complaint to district court, alleging the existence of federal question jurisdiction. The district court subsequently dismissed the complaint against both defendants, and plaintiffs appealed under the theory that the federal court did not have proper jurisdiction because the complaint presented no federal question.

Affirming the dismissal, the D.C.

Circuit held that a federal question properly could be construed from the complaint even though the complaint did not explicitly base its claims on federal law. Because the Herero accused defendants of violating international law, and federal law governs such claims, the court held that federal question jurisdiction existed as long as the complaint was not frivolous or insubstantial. In so ruling, the court acknowledged the absence of controlling precedent on the question as to whether a plaintiff can bring a private cause of action under federal common law for alleged violations of international law.

The D.C. Circuit also noted that the Herero's complaint arguably stated a claim falling under the Alien Tort Act. After defendants removed the complaint to federal court, plaintiff attempted to withdraw its reliance on the ATA. The D.C. Circuit held that a plaintiff cannot defeat federal question jurisdiction simply by changing the underlying legal theory of its complaint.

Court Ruefully Vacates American Soldiers' Judgment against Iraqi Torturers

Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004)

Plaintiffs were American soldiers who had been captured and kept as prisoners of war by the Iraqi government during the 1991 Gulf War. They brought suit against the Iraqi government, its intelligence agency, and then-President Saddam Hussein, alleging injuries from torture. After defendants failed to appear before the federal district court, the court entered default judgments and awarded plaintiffs more than \$959 million in

damages. Two weeks later, the United States filed a post-judgment motion to intervene, seeking to contest the subject matter jurisdiction of the district court in light of legal developments that had occurred in the wake of the United States' invasion of Iraq in March 2003. The court denied the motion and the United States appealed.

The D.C. Circuit first determined whether the United States was an appropriate appellant, a question that hinged upon whether the district court erred in denying the government's motion to intervene. Although recognizing that courts generally refuse to allow intervention sought after entry of final judgment, the D.C. Circuit emphasized that the timeliness of a motion to intervene must be evaluated in light of all surrounding circumstances. In holding that the United States' motion to intervene was timely, the appellate court relied on the United States' strong foreign policy interest in preventing judgments from being entered against the Iraqi government because of its current efforts to rebuild the Iraqi nation.

After determining that the United States had standing to appeal and that the district court's denial of the motion to intervene was an abuse of discretion, the appellate court turned to the question as to whether the POWs were legally entitled to judgment. The POWs had brought suit under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA") and the Flatow Amendment to the FSIA. The court held that these statutes merely confer subject matter jurisdiction to hear suits against foreign governments under limited circumstances; they do not provide a cause of action. Because the complaint failed to

state a proper claim and because plaintiffs' counsel failed to identify any alternative cause of action when asked to do so at oral argument, the court ruefully vacated the district court's judgment and dismissed the case.

Order to Pay Interim Fees May Be Immediately Appealable on Showing of Harm

Pigford v. Veneman, 369 F.3d 545 (D.C. Cir. 2004)

A class of African-American farmers, alleging racial discrimination, brought suit against the United States Department of Agriculture. The parties subsequently entered a settlement agreement, constituting a final judgment, under which the class counsel was entitled to reasonable attorneys' fees and costs. Class counsel then petitioned for fees and costs in addition to those already paid by the government, and the district court ordered the government to advance class counsel a portion of the money they were seeking. The government appealed.

The D.C. Circuit dismissed the appeal, holding first that the post-judgment order was not a final judgment and therefore not appealable. The government, however, advanced the theory that such a post-judgment order for advance payment should be immediately appealable where the payees would be unlikely to repay an overpayment, resulting in irreparable harm to the government fisc. The court rejected this argument, not because the theory of irreparable harm was wrong, but because the government failed to establish that irreparable harm would result in this particular case, given the absence of evidence that class counsel would be

unable to repay any overpayment if the interim award was later reduced.

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Federal Circuit

Denials of Motions to Compel Arbitration Are Appealable

Microchip Technology, Inc. v. U.S. Philips Corp., 367 F.3d 1350 (Fed. Cir. 2004)

Joining the Third, Fourth, and Seventh Circuits, the Federal Circuit concluded that orders denying motions to compel arbitration are appealable under 28 U.S.C. §1292(a)(1) even when the issue of arbitrability has not been decided. The Federal Circuit relied upon section 16 of the Federal Arbitration Act ("FAA"), which allows a party to appeal a decision denying a motion to compel arbitration. Although the Supreme Court had held, prior to the enactment of section 16, that section 1292(a)(1) review was available only if an order denying arbitration would cause serious harm, the Federal Circuit held that section 16 of the FAA evidenced a congressional intent to overrule the Supreme Court's interpretation of section 1292(a)(1).

Sovereign Immunity Is Waived under the APA Only Where No Other Remedy Exists

Christopher Village, L.P. v. United States, 360 F.3d 1319 (Fed. Cir. 2004)

Plaintiffs, former owners of a federally subsidized low-income housing

project, brought suit in a federal district court against the United States Department of Housing and Urban Development ("HUD"), seeking declaratory and injunctive relief under the Administrative Procedure Act ("APA"). The district court granted summary judgment in HUD's favor, and plaintiffs appealed. The Fifth Circuit remanded, instructing the district court to issue plaintiffs' requested declaratory relief, which plaintiffs could rely on as a predicate to seek damages against HUD in the Court of Federal Claims.

Plaintiffs, however, never returned to the district court to obtain the declaratory judgment. Instead, they filed suit in the Court of Federal Claims against HUD for breach of contract, asserting that the Fifth Circuit's decision entitled them to a judgment as a matter of law with regard to liability, under the doctrine of *res judicata*. The Court of Federal Claims issued summary judgment in HUD's favor.

The Federal Circuit held that the initial action brought by plaintiffs in federal district court was in error. For a court to have valid jurisdiction over a suit against the government, the government must have waived sovereign immunity. The APA waives sovereign immunity only where no other adequate remedy exists. Because plaintiffs could have initially brought suit for monetary damages in the Court of Federal Claims, the federal district court did not have proper jurisdiction and, in turn, the Fifth Circuit did not have proper appellate jurisdiction.

Citing the general rule that lack of subject matter jurisdiction is an inadequate ground on which to collaterally attack a court's decision, the Federal

Circuit stated that the Fifth Circuit's lack of jurisdiction did not necessarily destroy the preclusive effect of its decision. Where, as here, however, the court's decision incorrectly assumed a waiver of

sovereign immunity, the decision is void. The court therefore nullified the Fifth Circuit's ruling and affirmed the issuance of summary judgment by the Court of Federal Claims in HUD's favor.

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Writing is easy. All you do is stare at a blank sheet of paper until drops of blood form on your forehead.
— Gene Fowler