Certworthy

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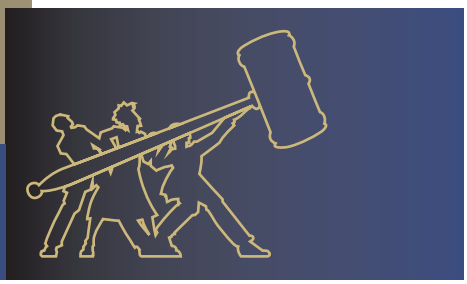

In This Issue...

The Right to Appeal: Are Its Days Numbered?

Ralph W. Johnson, III
Halloran & Sage LLP
Hartford, CT
Johnsonr@halloran-sage.com

In 1994, Professor Thomas E. Baker observed that the structure of the federal courts of appeals was no longer adequate to handle the tasks assigned to them:

> To deny that serious problems exist in the federal intermediate appellate courts — and that they are likely to become worse — is to ignore the enormous increase in the number and complexity of cases that these courts must now decide. For Congress, the federal judiciary, and the legal profession to fail to act to meet these problems would be a serious failure of public responsibility.

Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 Ga. L. Rev. 913, 976 (1994). The problem that Professor Baker and others identified more than a decade ago has not gone away. To the contrary, it has gotten much worse. This article reviews the current status of the crisis and a controversial proposal for addressing it: replacing appeal as of right with a discretionary-review system.

Federal Appellate Litigation: Fact vs. Fiction

Some attorneys have a vision of appellate adjudication amounting to what has been described as the "'Learned Hand Model' — a model in which cases are decided by a panel of collegial judges, following full briefing and oral argument, through a published opinion crafted by one of the judges after receiving considerable input from other circuit judges." Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 688 (2000-2001) (footnote omitted). As demonstrated by the statistics discussed below, "there is no doubt that the modern courts of appeals cannot and do not operate in this manner (to the extent that they ever did so)." *Id.* The current situation is aptly summarized in the comments of former

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Chair

R. Daniel Lindahl
Bullivant Houser Bailey, P.C.
300 Pioneer Tower
888 S.W. Fifth Ave.
Portland, OR 97204
(503) 499-4614
(503) 295-0915 – fax
dan.lindahl@bullivant.com

Vice Chair

Scott P. Stolley
Thompson & Knight
1700 Pacific Ave Ste 3300
Dallas, TX 75201
214-969-1678
214-969-1751 – fax
scott.stolley@tklaw.com

Membership Chair

Douglas J. Collodel
Sedgwick Detert Moran & Arnold
801 S. Figueroa Street, 18th Floor
Los Angeles, CA 90017-5556
(213) 426-6900
(213) 426-6921 – fax
djc1@sdma.com

Membership Vice Chair

Jeffrey A. Cohen
Carlton Fields
4000 International Place
100 S.E. Second Street
Miami, FL 33131-9101
(305) 539-7289
(305) 530-0055 fax
jacohen@carltonfields.com

Marketing Chair

TBA

Amicus Chair

Nancy Ciampa
Carlton Fields, P.A.
4000 International Place
100 S.E. Second Street
P.O. Box 019101
Miami, Florida 33131-9101
(305) 539-7280
(305) 530-0055 – fax
nciam@carltonfields.com

Publications Chair

Raymond P. Ward
Adams and Reese LLP
701 Poydras Street, 45th Floor
New Orleans, LA 70139
(504) 585-0339
(504) 566-0210 – fax
Raymond.Ward@arlaw.com

Publications Vice Chair

Diane R. Crowley
Law Offices of Diane R. Crowley
727 Contra Costa Ave.
Berkeley, CA 94707
(510) 524-1531
drcrowley@juno.com

Program Chair

Scott Burnett Smith
Bradley Arant Rose & White, LLP
200 Clinton Ave. West, Suite 900
Huntsville, AL 35801-4900
(256) 517-5198
(256) 517-5298 – fax
ssmith@bradleyarant.com

Diversity Liaison

Christina Alonso
Carlton Fields, P.A.
4000 International Place
100 S.E. Second Street
P.O. Box 019101
Miami, Florida 33131-9101
(305) 539-7339
(305) 530-0055 – fax
calonso@carltonfields.com

DRI Board Liaison

Patrick Lysaught
Baker Sterchi Cowden
2400 Pershing Road, Suite 500
Kansas City, MO 64108-2504
(816) 471-2121
(816) 472-0288 – fax
lysaught@bscr-law.com

Legislative/Rulemaking Liaison

TBA

Web Page Chair

Diane B. Bratvold
Rider Bennett, LLP
333 South Seventh Street, Suite 2000
Minneapolis, MN 55402
(612) 340-7966
(612) 340-7900 – fax
dbbratvold@riderlaw.com

Corporate Involvement

Mary Massaron Ross
Plunkett & Cooney
Buhl Building
535 Griswold St.
Suite 2400
Detroit, MI 48226
(313) 983-4801
(313) 983-4350 – fax
massaron@plunkettcooney.com

Robert W. Powell
Ford Motor Co.
300 Parklane Towers West
Dearborn, MI 48126-2568
(313) 621-6402
(313) 248-7727 – fax
rpowel12@ford.com

Law Institute Liaison

Kimberly D.Baker
Williams Kastner Gibbs
601 Union Street, Ste 4100
Seattle, WA 98101-2380
(206) 628-6606
(206) 628-6611 – fax
kbaker@wkg.com

Public Relations Contacts

East

Mary Massaron Ross
Plunkett & Cooney
Buhl Building
535 Griswold St.
Suite 2400
Detroit, MI 48226
(313) 983-4801
(313) 983-4350 – fax
massaron@plunkettcooney.com

Central
TBA

West
Michael B. King
Lane Powell Spears Lubersky, L.L.P.
1420 Fifth Ave., Suite 4100
Seattle, WA 98101-2338
(206) 223-7046
(206) 223-7107 – fax
kingm@lanepowell.com

Young Lawyer Liaison
Mike Reitzell
Hancock, Rothert & Bunshoft, LLP
Four Embarcadero Center, Suite 300
San Francisco, CA 94111
(415) 981-5550
mreitzell@hrblaw.com

Elaine LaFlamme
Mager Shafer
401 East Las Olas Blvd., 14th Fl.
Fort Lauderdale, FL 33301
(954) 763-2800
(954) 763-2885 – fax
laflamme@magerlegal.com

Steering Committee
John M. Bredehoft
Venable LLP
8010 Towers Crescent Drive, Suite 300
Vienna, VA 22182
(703) 760-1629
(703) 821-8949 – fax
jmbredehoft@venable.com

Roger W. Hughes
Adams & Graham, L.L.P.
P.O. Drawer 1429
Harlingen, TX 78551-1429
(956) 428-7495
(956) 428-2954 – fax
rhughes@adamsgraham.com

John P. Jacobs
Law Offices of John P. Jacobs
One Towne Sq., Suite 1400
Southfield, MI 48076-3705
(248) 357-5380
(248) 357-5383 – fax
jpjpc@voyager.net

Karen L. Kendall
Heyl, Royster, Voelker
124 S.W. Adams Street, Suite 600
Peoria, IL 61602
(309) 676-0400
(309) 676-3374 – fax
kkendall@hrva.com

Richard L. Neumeier
Morrison, Mahoney LLP
250 Summer Street
Boston, MA 02210-1181
(617) 439-7569
(617) 342-4980 – fax
rneumeie@mail.mm-m.com

Thomas A. Sheehan
Shook, Hardy & Bacon
1200 Main St.
Kansas City, MO 64105-2118
(816) 474-6550
(816) 421-5547 – fax
tsheehan@shb.com

Mary H. Spillane
Williams, Kastner & Gibbs
1301 A. Street, Suite 900
Tacoma, WA 98402
(206) 628-6656
(206) 628-6611 – fax
mspillane@wkg.com

Scott P. Stolley
Thompson & Knight L.L.P.
1700 Pacific Ave., Suite 3300
Dallas, TX 75201
(214) 969-1678
(214) 969-1751 – fax
scott.stolley@tklaw.com

Michael B. King

Michael B. Wallace
Phelps Dunbar LLP
111 E. Capitol St., Suite 600
Jackson, MS 39201-3066
(601) 360-9330
(601) 360-9777
wallacem@phelps.com

Jeffery A. Kruse
Shook Hardy & Bacon
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474- 6550
(816) 421-5547
jkruse@shb.com

R. Daniel Lindahl

Jody R. Nathan
Feldman Franden Woodard Farris & Boudreaux
525 S. Main Street, Suite 1000
Tulsa, OK 74103
918-583-7129
918-584-3814 – fax
Nathan@tulsalawyer.com

Kelly A. Freeman
Noble International
28213 Van Dyke Avenue
Warren, MI 48093
(586) 751-5600
(586) 751-5601 – fax
kfreeman@nobleintl.com

Newsletter Editors
Raymond P. Ward

Annual Meeting Chair
TBA

Expert Witness Chair
TBA

Legislative/Rulemaking Liaison
TBA

State Liaison Chair
TBA

First Circuit

Richard L. Neumeier
Morrison Mahoney, LLP
250 Summer Street
Boston, Mass. 02210-1181
(617) 439-7569
rneumeier@morrisonmahoney.com

Second Circuit

Ralph W. Johnson, III
Halloran & Sage LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103-4303
(860) 297-4646
Johnsonr@Halloran-Sage.com

Third Circuit

Charles W. Craven
Marshall, Dennehey, Warner, Coleman & Goggin
1845 Walnut St.
Philadelphia, PA 19103-4797
(215) 575-2626
ccraven@mdwcg.com

Fourth Circuit

Steven R. Minor
Elliott Lawson & Minor
110-112 Piedmont Ave. (24201)
P.O. Box 8400
Bristol, VA 24203-8400
(276) 466-8400
Sminor@elliottlawson.com

Fifth Circuit

Charles Frazier, Jr.
Cowles & Thompson, PC
901 Main St.
Suite 4000
Dallas, TX 75202-3793
(214) 672-2124
cfrazier@cowlesthompson.com

Sixth Circuit

Sarah M. Riley
Warner, Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, MI 49503-2487
(616) 752-2541
sriley@wnj.com

Timothy Fitzgerald
Gallagher Sharp Fulton & Norman
Seventh Floor, Bulkley Building
Cleveland, OH 44115
(216) 522-1164
fitzgerald@gallaghersharp.com

Seventh Circuit

Jeffrey K. McGinness
Wildman, Harrold, Allen & Dixon, LLP
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2298
mcginness@wildmanharrold.com

Eighth Circuit

Diane B. Bratvold
Rider Bennett, LLP
333 South Seventh Street Suite 2000
Minneapolis, MN 55402
(612) 340-7966
dbratvold@riderlaw.com

Ninth Circuit

Diane R. Crowley
The Law Offices of Diane R. Crowley
727 Contra Costa Ave.
Berkeley, CA 94707
(510) 524-1531
drcrowley@juno.com

Tenth Circuit

Katherine Taylor Eubank
Fowler, Schimberg & Flanagan, PC
1640 Grant Street, Suite 300
Denver, CO 80203
(303) 298-8603
K_eubank@fsf-law.com

Eleventh Circuit

Scott Burnett Smith
Bradley Arant Rose & White LLP
200 Clinton Avenue West, Suite 900
Huntsville, AL 35801-4900
(256) 517-5198
ssmith@bradleyarant.com

DC and Federal Circuits

Rebecca A. Womeldorf
Spriggs Hollingsworth
1350 I St. NW
Washington, DC 20005
(202) 898-5800
Rwomeldorf@SPRIGGS.com

FROM THE CHAIR

Participation, Community, and Respect

R. Daniel Lindahl

Bullivant Houser Bailey PC
Portland, Oregon
dan.lindahl@bullivant.com

Eight years ago, a handful of appellate lawyers from around the country gathered in a windowless conference room in a Baltimore hotel to discuss the future of DRI's Appellate Advocacy Committee. At that time—newly-formed and having only a few members—the committee was more of a concept than a reality.

Having attended that meeting, it is amazing to now behold what emerged from that modest start. The committee now has more than 400 members; it has presented five first-class appellate seminars, and will soon put on another; it has published the indispensable reference work, *A Defense Lawyer's Guide to Appellate Practice*; and through its newsletter, *Certworthy*, and its contributions to *For the Defense*, the committee has added to the body of writing addressing issues important to appellate law and lawyers.

The committee's success is attributable to the energy and wisdom of its chairs, beginning with the dynamic Kelly Freeman, followed by Mary Massaron Ross, Mike King, and most recently, Mike Wallace. Under these outstanding leaders, the committee has grown and prospered.

And now it's my turn. In addition to taking care to not foul-up what my predecessors have created, during my time as chair I plan to emphasize three areas: participation, community, and respect.

Participation: My highest priority is to encourage and facilitate participation in the committee's activities. I believe that a professional committee—whether within DRI or any other organization—should not be a privately-controlled fiefdom of a select group, excluding all others. Therefore, I will work to make sure that *any* committee member who has the interest and willingness to be active *will* have a role in the committee.

Community: One of the benefits of membership in a group such as the appellate advocacy committee is the chance to develop relationships with other lawyers from around the country who share similar interests. Yet the opportunities for face-to-face meetings are relatively few. Through all the means available (*Certworthy*, the committee website, e-mail, the seminar), I hope to enhance the committee's sense of community by making it easier for members to make connections. An important first step in that direction will be the creation of a membership directory. Committee vice chair Scott Stolley is leading that project with the assistance of South Carolina attorney Mitch Brown. You'll soon be hearing more about it.

Respect: I have the good fortune to know many appellate lawyers, and almost without exception, they have two things in common: (1) they like what they do, (2) but they wish appellate lawyers received more respect for their important and challenging role in the civil litigation process. Anyone who has ever handled a complicated appeal will agree: appellate work is *difficult*. A successful appellate lawyer must have superior skills of analysis, expression, and persuasion; contrary to what some lawyers believe, not everyone can do it well. And appellate law is *important*; the appellate courts are, after all, where the law is made. Yet, many appellate lawyers feel they are treated as second-class citizens within their firms. As chair, I will work to advance the image and reputation of appellate work so that it is accorded the respect it deserves.

I look forward to serving you during my term as committee chair. And I invite you to contact me with your suggestions, criticisms, and comments about the committee so that I can do the best job possible for you.

A Lucky Man

Once again, I am pleased to present another excellent issue of *Certworthy*, and once again, the contributors deserve credit for the excellence.

Our lead article, by Ralph W. Johnson, III, addresses the crisis of volume facing the federal Courts of Appeals and a controversial proposal for curing it: replacing the right to appeal with a discretionary-review system. This has received serious consideration from persons in high places, including the late Chief Justice William Rehnquist. Though discretionary review sounds radical, it may be an improvement over the current system, which processes appeals on a virtual assembly line.

Our other feature article, by Eric P. Schroeder and Benjamin T. Erwin, offers valuable information and advice about interlocutory appeals. Most of us appellate lawyers are so used to the final-judgment rule that we forget about the availability of interlocutory appeal. I learned a lot from reading Eric's and Ben's article, and I plan to keep a copy for future reference.

This issue of *Certworthy* features something that we haven't had before: a symposium. We didn't plan it that way. But three writers — Daniel P. Barer, Robert M. Frey, and Ed R. Haden — happened to submit short articles on the same theme: how to liven up a brief. So now, through serendipity, we have our first symposium.

Occupying the Writer's Corner is Matthew S. Lerner, who offers some lessons in what not to do, based on his experience clerking at the New York Court of Appeals. In his spare time, Matt writes his legal blog, *New York Civil Law* (http://nylaw.typepad.com), devoted to appellate law, civil procedure, insurance coverage and defense, and other interesting issues.

This issue finds Roger W. Hughes browsing the bookshelf to review *The Lost German Slave Girl* by John Bailey. The book is the story of a woman, rescued from a life of slavery by the efforts of her lawyers, who lost at trial but won on appeal. Working within a system that legalized slavery — an odious institution — they won their client's freedom through diligent legal research, which uncovered the trial court's legal error and led to reversal and victory. The case is an inspiration to legal researchers and a lesson to anyone who thinks that hours in a law library are a waste of time.

And of course, as usual, we have a fine collection of case summaries from our circuit reporters, gathered and edited by Diane Crowley. Our circuit reporters work hard to choose, from scores of opinions, a select few that are the most interesting, most informative, and most important. Read them, and you'll have a good chance of finding something that will help you on a case you're handling right now.

* * *

I wish to correct an oversight in the last issue of *Certworthy*. The last issue carried a compendium of appellate organizations, and among the organizations listed was the Appellate Advocacy Committee of the ABA's Tort Trial & Insurance Practice Section (TTIPS). We mentioned in the compendium, and in the *Kudos* feature on the back page, that our own Chuck Craven, DRI appellate committee member and long-time *Certworthy* Third Circuit reporter, is editor of the ABA TTIPS appellate newsletter. We neglected to mention several other DRI Appellate Committee members who also hold leadership positions on the ABA TTIPS Appellate Committee, including Richard L. Neumeier, Chair; Mary Massaron Ross, Chair Elect; and Vice-Chairs Laura Anne Foggan, Julia F. Pendery, Daniel F. Polsenberg, Roger Dale Townsend, and David Vandiver Wilson II. To them, and to anyone else I neglected to mention, I apologize.

* * *

Finally, since I have this forum, I want to share with you my own Katrina story, which is marked by some incredible good fortune.

My wife and I did not decide to evacuate from New Orleans until the Sunday morning before the storm hit. Our good fortune started at 10:30 that morning, when I checked my work e-mail and found dozens of offers of shelter from Adams and Reese lawyers in Baton Rouge, Houston, Jackson, Birmingham, and Nashville. It took just one phone call to get a destination: the Jackson home of Holmes and Gayle Adams. We enjoyed the Adamses' hospitality for a week, and then spent a week with Jerry and Susan Sheldon, also in Jackson. By this time, my firm had made plans to re-establish its New Orleans office across the street from our Baton Rouge office. Because Baton Rouge overflowed with evacuees, finding

housing there was difficult. But the effort paid off, and on September 12, I was back at work, among my own colleagues — more good fortune considering that Katrina took away the jobs of countless others.

We were grieved by the terrible things that happened in New Orleans in the aftermath of Katrina. At the same time, we were encouraged by indications that the flood, which covered some 80% of New Orleans, did not reach our house. Those hopes were confirmed on October 8 — more good fortune — when we were finally allowed back into the city after a six-week exile. The storm took off a chunk of the upstairs roof, which let in rain from Katrina and later from Rita, which in turn collapsed the ceiling in one room. And there were water stains on the ceiling in the kitchen below that room. But other than that, the inside of the house was undamaged: five out of seven rooms untouched — more good fortune. Today the house still needs some work inside and outside, but it now sports a new roof and is quite livable.

In sum, we were lucky: we were forced out of our home for only six weeks. Today, months after the storm, most of Katrina's victims still cannot return home. Please remember them and pray for them. And please urge your congressional representatives to fund the rebuilding, so that they can come home.

Raymond P. Ward
Adams and Reese LLP
New Orleans, Louisiana
ray.ward@arlaw.com

Writers should be read, but neither seen nor heard.
— Daphne du Maurier

Reading maketh a full man, conference a ready man, and writing an exact man.
— Sir Francis Bacon

The Right to Appeal, from page 1

Chief Judge Howard T. Markey of the Federal Circuit:

> As performed today, the bureaucratically conducted federal appellate process comprises: (1) screening and track-setting by staff attorneys; (2) review of records and briefs by a law clerk or a staff attorney; (3) oral argument in less than one third of the cases, and then for fifteen or twenty minutes on a side; (4) preparation of opinions by law clerks and staff attorneys; (5) dispositions without opinion in two-thirds of the cases; (6) assistance in each chambers by three law clerks and two secretaries and assistance to all chambers by corps of staff attorneys; and (7) infrequent, short judicial conferences on the cases.

Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. Rev. 371, 376-77 (1988). This assembly-line style of appellate review has one chief cause: the continually mounting volume of cases submitted to the courts of appeals.

The "Crisis of Volume"

In 1990, the Federal Courts Study Committee reported on the difficult caseload faced by the federal courts of appeals. It recognized that "'however people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago.'" Carol Krafka, Joe S. Cecil & Patricia Lombard, *Stalking the Increase in the Rate of Federal Civil Appeals*, 1 (Federal Judicial Center 1995) (quoting Report of the Federal Courts Study Committee, 1990, at 109-110). A review of the most recent statistics confirms that the crisis of volume now threatens the future of the federal courts of appeals.

The Administrative Office's 2004 Report

The statistics contained in the 2004 Annual Report of the Director of the Administrative Office of the U.S. Courts confirm that the crisis of volume is reaching an all-time high. The report, available through the A.O.'s website at www.uscourts.gov, contains several important statistics about the caseload faced by the courts of appeals. [Editor's note: The tables of figures can be found on line at http://www.uscourts.gov/judicialfactsfigures/contents.html.]

For example, during the year ending September 30, 2004, the filings in the twelve regional courts of appeals, (i.e., excluding the Federal Circuit), increased to an all-time high of 62,762: a 3.1% increase 2003, a 14.7% increase from 2000, and a 25.3% increase from 1995. The 3.1% rise from 2003 to 2004 was the ninth consecutive record-breaking year in ten successive years of growth. At the end of fiscal year 2004, there were 51,071 cases pending: a 14.3% increase over 2003, a 26.9% increase over 2000, and a 36.9% increase over 1995.

Between 2003 and 2004, appeals from decisions by administrative agencies skyrocketed from 2,267 to 12,255. The A.O. attributes this dramatic rise to appeals of decisions by the Board of Immigration Appeals. Most of these appeals went to two courts: 5,368 (50%) to the Ninth Circuit and 2,362 (24%) to the Second Circuit. With these increases, administrative agency appeals now constitute 20% of all the filings in the federal appeals courts.

There were 12,506 criminal appeals in 2004, a 4% rise from 2003. Criminal appeals now constitute 20% of all of the appeals pending in the regional courts of appeals.

The 2004 A.O. Report also gives some insight into the workload faced by circuit judges. For example, in 2004, there were 167 authorized judgeships for the regional courts of appeals. With the filing of 62,762 appeals in 2004, each three-judge panel handled, on average, 1,127 cases — more than 21 cases per week.

For the year ending September 30, 2004, 31.5% of federal appeals were terminated after oral argument, while 68.5% of appeals were terminated after submission on the briefs. The highest percentage of terminations after oral argument was found in the Second Circuit (58.9%); the lowest was in the Fourth Circuit (17%).

For the same year, 27,438 decisions were rendered. Of these, 81% were designated as unpublished.

Replacing Appeals as of Right with Discretionary Review

The Right to Appeal

For many, the "right to appeal at least once without obtaining prior court approval is nearly universal…. Although its origins are neither constitutional nor ancient, the right has

become, in a word, sacrosanct." Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62, 62 (1985). Thus, some may be shocked that one of the proposed reforms to the federal courts of appeals — an idea supported by some federal judges — is the elimination of the appeal as of right. The idea is to replace the current system of mandatory jurisdiction with one in which the courts of appeals have the discretion to hear an appeal.

The White Commission and Defining Discretionary Review

On December 18, 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals issued its final report. In its report, the Commission (referred to as the "White Commission," after its chairman, the late Justice Byron R. White) briefly addressed the discretionary-review proposal. Final Report, Commission On Structural Alternatives For The Federal Courts Of Appeals, 70-72 (Dec. 18, 1989) (hereinafter "White Report").

The White Commission examined two types of discretionary review. Under the first type, exemplified by the *certiorari* jurisdiction of the United States Supreme Court, an appellate court is "given an unrestrained choice to refuse to entertain the case or to take it up on its merits. The choice to deny review can be made without regard to the merits, and a denial of review does not imply any view as to whether the lower court judgment is correct or incorrect." *Id*. at 71. Under the second type,

> a party files with the appellate court a petition or application for leave to appeal. The court's authority to grant or deny leave is said to be discretionary. However, a decision to deny leave involves an examination of the merits in a way that a certiorari jurisdiction does not. While the formulation of the standard for denying leave varies, it is essentially that the case presents no issue of arguable merit or no showing of probable error in the trial court proceedings. …, a denial of leave is in functional effect like a decision of a federal court of appeals to send a case through to decision without oral argument and to dispose of it without a full opinion. The similarity is especially marked if the court issues only a one-line affirmance.

Id.

The White Commission did not support the implementation of the *certiorari* type of discretionary review. But for the second type of discretionary review, the Commission concluded that "the case is closer." *Id.* at 72. Nevertheless, it believed that any statute creating a discretionary-review system "should include express wording requiring the court to grant leave to appeal 'if the case presents an issue of arguable merit.' Under this approach, the review might be discretionary with respect to the types of cases that are generally fact intensive and controlled by existing precedent, but occasionally present a question of statutory interpretation that has not been definitively resolved." *Id*. In the end, the Commission was "not persuaded, …, that a shift to an express discretionary jurisdiction for all appeals generally is a good idea." *Id*.

Judge Robert M. Parker

While the White Commission was reluctant to fully support discretionary review, the proposal has supporters within the federal judiciary. Judge Robert M. Parker of the Fifth Circuit is the most recent example. Before his retirement from the federal bench in 2002, he wrote several articles advocating a discretionary-review system.

The first such article appeared in 1994. In it, he and a co-author joined the late Fifth Circuit Judge Alvin Rubin, who had advocated a two-prong approach to solving the crisis of volume:

> If the problem is caseload, there are only two basic ways to deal with it. One is to decrease the total number of cases that are filed in the district courts, thus decreasing the total universe of federal cases and hence the number of judgments from which appeals can be taken. The other is simply not to permit appeals from all of the final judgments and other decisions of district courts and administrative agencies that are now appealable. This might be accomplished by requiring those who wish to appeal to the circuit courts to seek some sort of writ of review. This might be applicable in all cases or only in some, such as diversity cases.

Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 Miss. C. L. Rev. 211, 214 (1994) (citation omitted). They believed it was "clear that the achievement of federal court restoration and conservation requires that both [of Judge Rubin's] approaches be taken. Additionally, [they thought that] the certiorari-like, circuit-level writ of review mechanism should apply to all cases." *Id.*

The following year, Judge Parker continued his support for a discretionary-re-

view system. Writing for the *Texas Tech Law Review*, he declared:

> We are fast-approaching a day of reckoning for the federal courts of appeals. Our appellate courts, in their present form, are slowly losing their ability to address properly the cases brought before them. Simply put, there are more cases to decide than there are judicial resources to decide them, and the quality of review each case receives necessarily has suffered.

Robert M. Parker, *Forward*, 26 Tex. Tech L. Rev. 265, 265 (1995). After discussing some of the other proposed reforms to the federal appellate courts, he turned to discretionary review:

> Since congressional restraint in the area of original federal jurisdiction does not exist at the present time, a more drastic option should be considered — discretionary review in the U.S. Courts of Appeals. Obviously, this option has a price. The move to discretionary review would mean abandoning the ideal of an appeal as of right in all federal cases.
>
> Arguably, however, the appeal as of right has already been significantly undermined by the prevalent use of summary disposition and affirmance without opinion by the courts of appeals. The use of discretionary review, perhaps through a writ of error procedure, would be a more open manner of distinguishing between those cases that deserve significant judicial resources and those that do not. More significantly, discretionary review would allow the courts of appeals to systematically allocate their resources to matters of a fundamentally federal nature.

Id. at 268-69. Acknowledging critics of discretionary review, who maintain that such a system would inappropriately increase the significance of the district courts, Judge Parker responded:

> I believe the increased importance of the district court that seems to concern the critics of discretionary review will, overall, strengthen instead of weaken the system. In my view, the benefits of discretionary review far outweigh its costs, and it is the only proposal that offers, realistically, a long-term solution to the problems facing the courts of appeals. It is time we embraced discretionary review.

Id. at 269.

Two years later, in a 1997 essay, Judge Parker and a co-author provided further insight into their vision of discretionary review. They explained that the "'question is not whether justice (however you define that rather slippery term) shall be rationed, but how and to what extent it shall be rationed.'" Robert M. Parker & Ron Chapman, Jr., Essay, *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived,* 50 S.M.U. L. Rev. 573, 578 (1997). They also expressed their belief that courts "already ration justice, and not all appeals deserve the same level of attention." *Id*.

Judge Parker and his co-author did acknowledge one potential drawback to a discretionary-review system, namely that it could "'compromise the ability of circuits to correct errors and could ration their scarce resources into specific classes of cases which are deemed more worthy of consideration than others.'" *Id*. Nevertheless, the authors believed that the merits of a discretionary-review system outweighed this potential drawback. They found no evidence that such a system "would create a danger that the courts would ignore the low-profile or 'typical' cases." *Id*. at 579. They observed that "to the extent that our 'most vulnerable citizens' might be given 'shorter shrift' by our judicial system, there is no indication that a procedure of discretionary review would be any worse than the present system." *Id*. In their view, both the problem and the need to address it would be the same under either system. *Id*. at 578.

Next, Judge Parker and his co-author emphasized that "[m]aintaining the facade of full deliberation under the current system is time-consuming and expensive. A discretionary system would allow a more honest description of what actually occurs. Furthermore, a discretionary system would improve the quality of the entire appellate process because it would ensure that the deserving cases do receive full deliberative treatment." *Id*. at 579.

They also concluded that a discretionary appellate system would highlight "the importance of having the most qualified jurists possible at the trial court level, as these courts would often have the last word in resolving disputes." *Id*.

As for the sanctity of an appeal as of right, Judge Parker and his co-author flatly stated, "There is no constitutional right to an appeal." *Id.* The language of 28 U.S.C. § 1291 "does not mandate that the courts of appeals actually exercise th[e] jurisdiction [given to them]." *Id.* To the extent that § 1291 confers a right to an appeal, Judge Parker and his co-author

maintained that a discretionary-review system would satisfy that right. *Id.* at 580. In particular, they contended that the right to an appeal can be defined as follows:

> [A]ll that an appeal as of right connotes is that the litigant who lost in the trial court has a right to put his case before an appellate tribunal, and to have that tribunal consider his contentions that the judgment should not stand. It does not necessarily carry with it a commitment to particular procedures.

Id. at 580 (footnote omitted). They believed that a discretionary-review system would fulfill this role. "Even if the court denies review, it still will have considered, to some extent, the litigant's contentions that the judgment should not stand." *Id*.

Judge Parker and his co-author concluded their 1997 essay by calling for adoption of a discretionary-review system as soon as possible:

> In short, the future cannot be put off any longer. The volume crisis is crippling our appellate system, and projections for the future are even worse. The courts must do something now…. The future is here. We had better accept it.

Id. at 582.

Judge Parker's most recent writing about discretionary review appears in a prepared statement dated March 25, 1998 and submitted to the White Commission, In it, he addressed several of the proposals for reforming the courts of appeals. While he continued to advocate discretionary review, he also acknowledged that implementation of the idea may be premature, due to support for the traditional right to appeal:

> A court of appeals system divided into ten circuits of twelve judges each under a system of pure discretionary review could render decisions in a timely manner that are consistent among its litigants and more uniform among the circuits. The objectives of timeliness, consistency and uniformity, however, will be purchased at the price of foregoing plenary review for each case. Full review of every appeal is deeply rooted in our judicial tradition and there is opposition to any proposal that has the effect of eroding that traditional approach. Therefore, many share the view that pure discretionary review is an idea whose time is yet to come.

Chief Justice William H. Rehnquist

The late Chief Justice William H. Rehnquist believed that a system of discretionary appellate review deserves serious consideration. In a 1984 speech, he suggested that "'perhaps, speaking of the federal system, the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only when it is granted in the discretion of a panel of the appellate court.'" Judith Resnik, *Precluding Appeals*, 70 Cornell L. Rev. 603, 605-06 (1985) (quoting Justice Rehnquist's speech). And in a 1992 lecture, he commented that one option for addressing the swelling appellate dockets was to "eliminate the appeal as of right and institute a discretionary appeal process, somewhat like that used by the Supreme Court." William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 11 (1993). He suggested that the adoption of a discretionary appeal process "deserve[d] a careful study and extensive discussion." *Id*.

Judge Donald P. Lay

Judge Donald P. Lay of the Eighth Circuit has long supported discretionary appellate review. *See* Donald P. Lay, Article, *The Federal Appeals Process: Wither We Goest? The Next Fifty Years*, 15 Wm. Mitchell L. Rev. 515, 532 (1989). Twenty-five years ago, he recognized that under the current system of appellate adjudication, the courts of appeals in many instances only provide "an appearance of justice rather than justice itself." Donald P. Lay, Essay, *A Proposal For Discretionary Review In Federal Courts Of Appeals*, 34 SW. L.J. 1151, 1155 (1980-81). More particularly, he maintained that "through the lessening of the full deliberative process, courts of appeals are, in reality, invoking a form of discretionary dismissal without calling it such." *Id*. Thus, he believed that the question to be answered was

> [w]hether the time ha[d] come for society to make a cost analysis and determine whether the cost of the delay in resolving disputes and of the increase in the size of the judicial machinery necessary to handle the torrent of appeals exceeds the value gained in providing the formal recognition and an appearance of a deliberative process and the continuation of formal decisions and written opinions in frivolous and non-meritorious appeals.

Id.

Judge Lay did not take credit for the idea of implementing a discretionary-review system. Rather, he credited Second Circuit Judge Henry Friendly's 1973 monograph, entitled *Federal Jurisdiction: A General View*, for inspir-

ing his suggestion. Judge Friendly had suggested that when a district court had affirmed the action of an administrative agency, an appeal should only proceed by the circuit court's permission.

Judge Lay suggested expansion of Judge Friendly's proposal, "to allow courts of appeals discretionary leave to refuse to review, at least in civil cases, any appeal that on its face does not appear to be substantial or meritorious." *Id.* He proposed to allow a court of appeals to deny review "only in those cases that are patently frivolous or those in which the district court opinion appears on its face to be correct as a matter of law or fact." *Id.* Under his proposal, "each litigant seeking an appeal in any civil proceeding would be required to file a petition for discretionary review with the notice of appeal. The petitions would be limited to ten pages and would set forth the reasons the appeal should be allowed. Each petition would attach a copy of the district court's memorandum and judgment." *Id.* The petition would be considered by a three-judge panel within ten days of its filing, and could be granted by any one panel member. If the panel desired, it could request a response to the petition by the other side. *Id.*

In general, Judge Lay believed that "if the face of the petition present[ed] any colorable issue of dispute or law or present[ed] a serious challenge to the sufficiency of the evidence, the appeal should be allowed." *Id.* at 1156. Moreover, a district court could "certify that an appeal present[ed] a colorable issue of review." *Id.* In those instances where a certification was given by the district court, the parties would bypass the discretionary review process. *Id.* If a petition of review was granted, but the issue raised appeared to be narrow or simple, the circuit court would set the matter down for summary argument without plenary briefing and dispose of the case by opinion or order. *Id.*

Judge Lay maintained that there would be "[n]umerous benefits" from granting the court of appeals the power to deny leave to appeal. *Id.* at 1157. He identified five specific ones:

(1) No increased work load on the appellate courts would result. "[T]he judicial time needed to review petitions for discretionary appeal would be no greater than that which is now spent on screening cases for no argument." *Id.*

(2) "[B]y obviating the need for full review of lengthy briefs and records and the writing of formal opinions in hundreds of cases," the appellate courts would reap "a tremendous saving on judicial time and resources …." *Id.*

(3) The proposed procedure "would tend to place the indigent's petition for review on the same evaluative basis as the appeal filed by the paid litigant." *Id.*

(4) For all cases, the long delay between filing notice of appeal and the appellate decision would be drastically cut.

(5) "[A]ll cases worthy of appeal would be afforded the full deliberative process, including the right to oral argument and written opinion. The recommended procedure would actually provide more thoughtful judicial input into meritorious appeals than previously exists." *Id.*

Judge Lay supported discretionary review because he believed that the "goal of giving full deliberative and expeditious process in all cases worthy of appeal is one worth pursuing." *Id.* at 1158. Thus, he concluded that "as the population continues to increase and interests become more diverse, the grant of discretionary review to the United States Courts of Appeals may be the only procedure that will enable the courts to provide effective appellate review for society." *Id.*

Conclusion

Although the discretionary review proposal may be disconcerting to some, after reviewing the statistics from the A.O., it is apparent that action is needed and that that action must occur sooner, rather than later. A discretionary-review system may be the only option. If appellate attorneys and academics wish to prevent this result, they should focus their efforts on identifying alternative proposals for reform that will end the crisis of volume.

Interlocutory Appeals under 28 U.S.C. § 1292(b): Turning Vinegar into Wine

Eric P. Schroeder
Benjamin T. Erwin
Powell Goldstein, LLP
Atlanta, Georgia 30309
eschroed@pogolaw.com
berwin@pogolaw.com

Petitioning for an interlocutory appeal in federal court can be daunting for at least three reasons. First, the fact you are considering an interlocutory appeal means your client has lost an important ruling. Second, interlocutory appeals are rarely granted. And third, interlocutory appeals are time consuming and involve stringent rules and procedures which will require additional research and effort.

Still, a successful interlocutory appeal can provide great rewards. It can, midstream, change vinegar into wine and reverse the momentum (and outcome) of a case. Below, we discuss the basics of the interlocutory appeal process in federal court and offer tips for preparing a successful interlocutory-appeal petition.

The Federal Interlocutory Appeal Statute

Historically, the final-judgment rule under federal law did not allow a party to appeal a trial court's ruling until a final judgment had been entered in the case. In 1958, however, 28 U.S.C. § 1292(b) was adopted into federal law as a discretionary "interlocutory appeal" procedure, an exception to the final-judgment rule. It states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 1292(b) was proposed by the Judicial Conference of the United States Courts. 1958 U.S.C.C.A.N. 5258. The report of the Judicial Conference reveals the intent and scope of the statute:

> [T]he appeal from interlocutory orders thus provided should and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases, where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided, as in the recent case of Austrian v. Williams, 198 F.2d 697 (2d Cir. 1952). It is not thought that district judges would grant the certificate in ordinary litigation which could otherwise be promptly disposed of or that mere question as to the correctness of the ruling would prompt the granting of the certificate. The right of appeal given by the amendatory statute is limited both by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics, and by the resting of final discretion in the matter in the court of appeals, which will not permit its docket to be crowded with piecemeal or minor litigation.

Id. at 5260-61; *see also id.* at 5259 ("[T]oo great freedom in taking appeals from orders of the district court prior to the final judgment, 'piecemeal appeals' as they are called, may make for delay and increase the expense of the litigation.").

Section 1292(b) requires the entry of a formal order on a contested question of law affecting the case. *See Hericks v. Hogan*, 502 F.2d 795 (6th Cir. 1974) and *Gilpin v. Sherr*, 328 F.2d 884 (3d Cir. 1964) (denying interlocutory appeal petitions where no

formal order had been entered in the record).

Section 1292(b) also requires the district court to certify that an appeal from its order may be had. As stated by the Supreme Court, the certificate-of-review process "serves the dual purpose of ensuring that such review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978). Although no formal "certificate" must be entered into the record, and the district court need not even recite the precise terms of § 1292(b) or cite the statute in its order, two things must be plain: (1) the district court's intention to allow a party to petition for interlocutory review; and (2) satisfaction of § 1292(b)'s requirements. Further, the order certifying the issue for appeal should present the rationale for allowing certification, and, under the statute, must be in writing, or risk remand from the court of appeals for further findings. *See* 16 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3929 n. 33 (2005).

The District Court Certificate of Review

Before a district court may certify an order for interlocutory review, the district court must determine that its ruling meets three requirements: (1) the order must address "a controlling question of law"; (2) there must be "substantial ground for difference of opinion" on that question of law; and (3) resolution of the interlocutory appeal will "materially advance the ultimate termination of the litigation."

"Controlling question of law"

Determining whether a question of law is "controlling" can be difficult. As suggested by § 1292(b)'s legislative history, courts originally applied a stringent and technical determination of what was a controlling question of law, limiting review to big and exceptional cases. Several courts, however, have applied a less stringent test, allowing interlocutory appeal in non-exceptional cases. Now courts often deem a question controlling when appellate reversal of the district court's order would save time for both the court and the parties, and save the parties the significant expense of continued litigation. *See Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991) *and, e.g. Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656 (7th Cir. 1996); *Kuehner v. Dickenson & Co.*, 84 F.3d 316 (9th Cir. 1996). *See also* Wright, Miller & Cooper § 3929 (advocating "flexible approach" to § 1292(b) that does not limit § 1292(b) appeals to "exceptional" cases).

One thing is clear, however: the "controlling question of law" language of §1292(b) means that the right to petition for interlocutory appeal does not extend to review of questions of fact. An instructive recent decision is *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251 (11th Cir. 2004). The Eleventh Circuit in *McFarlin* explained that if the court would be forced to look to the facts of the case or apply settled law to the facts to resolve the petition for interlocutory review on the merits, the petition will be denied. "[W]hat the framers of § 1292(b) had in mind is … an abstract legal issue or what might be called one of "pure" law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'" *Id.* at 1258 (quoting *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000)). Thus, when the question presented is fact-sensitive, the court will likely deny the petition for review. *See Amos v. Glynn County Board of Tax Assessors*, 347 F.3d 1249, 1254 (11th Cir. 2003).

A prime example of the "question of law" versus "question of fact" distinction is when a party appeals the denial of summary judgment. While a ruling by the district court on a unsettled question of law may be appealable, courts of appeals have consistently held that where the controlling question on summary judgment is "whether genuine issues of material fact remain to be tried, the federal scheme does not provide for an immediate appeal." *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 631 (2d Cir. 1991).

Due to the nature of interlocutory appeals, it may be difficult to determine whether a question is case-dispositive when it is first raised, but some general rules can be made: When the determination of a question would make no difference to the course of the litigation, it is not controlling. Conversely, when reversal would terminate the action, or when the district court's order, if erroneous, would be reversible error on appeal after a final judgment, then question is controlling. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1991); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974).

"Substantial difference of opinion"

Where the question of law is controlling, the district court must also believe that there is room for substantial difference of opinion on the issue. Determining whether this difference of opinion exists has not proven difficult for courts. *See North Carolina ex rel. Howes v. W.R. Peale, Sr. Trust*, 889 F.Supp. 849, 852 (E.D.N.C. 1995) (noting that a court can find that there are not substantial grounds for a difference of opinion when the authorities are not unanimous, or even when the only other reported decision disagrees).

Depending upon how important the question at hand is for the present litigation or its impact on future litigation, the degree of the difference of opinion will vary. When an issue appears to have a limited usefulness for future litigation, the court will most likely require a clear split in authority before certifying the question for interlocutory review. Moreover, if the district court's order is in line with the law of its circuit, review will likely not be granted. For example, the Eleventh Circuit in *McFarlin* held that "a question of law as to which [the appellate court is] in 'complete and unequivocal' agreement with the district court is not a proper one for § 1292(b) review." *McFarlin*, 381 F.3d at 1258 (citing *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 788-89 (11th Cir. 1992)).

"Materially advance the ultimate termination of the litigation"

Finally, § 1292(b) requires that the district court be of the opinion that appellate review of the issue will "materially advance" the litigation towards its conclusion. This third requirement relates to the first, requiring a "controlling question of law." When the question presented by the order is controlling, it is often likely that appellate reversal of the trial court's order will significantly shorten the litigation. If, however, it is likely that the question arising out of the order will eventually become moot because of the ongoing litigation, immediate review will probably be denied. *McFarlin* is once again instructive: "This is not a difficult requirement to understand. It means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." 381 F.3d at 1259.

Appellate Review Is Discretionary

Once the district court certifies an order for interlocutory review, the party seeking review must petition the court of appeals for permission to appeal. Fed. R. App. P. 5(a)(1). Under § 1292(b), the petition must be filed within ten days of the date the order is certified for review, *not* from when the order was initially entered. Indeed, a district court may amend its own order to include the necessary certification and "re-open" the ten-day period in which to file a petition for appellate review.

The petition must include the following:

(A) the facts necessary to understand the question presented;
(B) the question itself;
(C) the relief sought;
(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
(E) an attached copy of:
  (i) the order, decree, or judgment complained of and any related opinion or memorandum, and
  (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

Fed. R. App. 5(b)(1). The party opposing the appeal may file a response in opposition within seven days after the petition is served. Fed. R. App. 5(b)(2).

Whether the appeal will be heard is solely within the court of appeal's discretion, although the appellate courts will look to the statutory criteria applicable to the lower court for guidance. The type of discretion held by the court of appeals in considering whether to hear an interlocutory appeal has been compared to the Supreme Court's discretion in controlling its certiorari discretion. Indeed, the court may refuse to hear an appeal that without doubt meets all of the requirements of §1292(b) solely on the grounds of a congested docket. *See Coopers & Lyband v. Livesay*, 437 U.S. 463 (1978). An appeal might be granted or denied with an explanation in a written opinion, but "ordinarily action is taken by simple order and subsequently noted in the opinion on the merits if the appeal is accepted and decided." Wright, Miller & Cooper § 3929, text accompanying nn. 43–46.

Interlocutory Appeals Are Rarely Granted

The current trend in federal courts is to disfavor interlocutory appeals and narrowly construe §1292(b) when considering a petition to review. A recent summation of the stringent requirements for § 1292(b) appeals set

forth by the Eleventh Circuit demonstrates the heavy burden petitioners face when seeking interlocutory review:

> [W]e believe that as a rule an appellate court ought to grant permission for appeal under § 1292(b) only on (1) pure questions of law, (2) which are controlling of at least a substantial part of the case, (3) and which are specified by the district court in its order, (4) and about which there are substantial grounds for difference of opinion, (5) and whose resolution may will substantially reduce the amount of litigation necessary on remand. Even in those circumstances, whether to grant permission for an interlocutory appeal lies in the discretion of the appellate court, which in exercising its discretion should keep in mind that the great bulk of its review must be conducted after final judgment, with § 1292(b) interlocutory review being a rare exception."

McFarlin, 381 F.3d at 1264.

The reality is that fewer and fewer interlocutory appeals are heard by federal courts of appeals, and the likelihood of the appeal being heard, percentage-wise, varies greatly by Circuit. For instance, a 1990 review of interlocutory appeals in federal appellate courts showed that the likelihood of an interlocutory petition's being granted varied from 34% in the First Circuit to 60% in the Eleventh Circuit. Michael E. Solimine, "Revitalizing Interlocutory Appeals in the Federal Courts," 58 Geo. Wash. L. Rev. 1165 (1990). More recent studies show even fewer interlocutory appeals being heard. Between January of 1999 and July of 2000, the Seventh Circuit granted only 6 of the 31 petitions it received. *Ahrenholz v. Board of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). And over the course of two years in the mid 1990's, the Second Circuit only granted 8 of the 35 petitions it received. *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996).

Moreover, even if an appellate court accepts a § 1292(b) appeal, it can revoke its grant of leave to appeal as "improvidently granted." *See. e.g.*, *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 863-64 (2d Cir. 1996) (remanding a § 1292(b) appeal after "further reflection"). Note too that until the court of appeals has decided whether to hear the appeal, the district court can revoke its certification of the appeal. *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001). These cases are instructive for the party opposing the § 1292(b) appeal: in both the district court (until an appeal is accepted, at which point the district court loses jurisdiction over that aspect of the case) and the court of appeals, there is a continuing opportunity to argue that the right to appeal was improvidently granted.

Nonetheless, if the order certified by the district court deals with a matter of first impression, arises from and deals with complex litigation, and presents the possibility that appellate reversal could rapidly advance the conclusion of the litigation, then the court is much more likely to grant immediate review.

Tips for Successfully Seeking Interlocutory Review

To increase the likelihood that an interlocutory appeal will be certified by the district court and permitted by the court of appeals, a few commonsense ideas help.

First, to the extent possible, try to anticipate, identify and highlight possible issues ripe for interlocutory review in the district court *before* the district court rules, and bring the importance of these legal questions to the district court's attention before and after the court rules. One key point raised in the Eleventh Circuit's *McFarlin* decision in denying a petition for review was the district court's failure to identify the key controlling questions of law to review. 381 F.3d at 1264. Although the Eleventh Circuit noted that this failure was not fatal to the petition, it also noted that its review is discretionary, and "[g]iven our caseload, when the district court hands us an entire case to sort through for ourselves we are likely to hand it right back…. If convinced that a particular question does qualify, the district court should tell us which question it is." *Id*. Thus, by laying the groundwork in briefing before the district court, and in requesting a certificate of review on a specific question (or questions) of law, counsel can ease some of the load they will have to carry in filing the petition for appeal if the district court can be persuaded to write an precise certificate of review.

Second, pick your battles wisely, and limit the questions raised for review to one or, at most, two issues. Seek review of the legal question most likely to be accepted by the court of appeals for review, which may or may not be the most important issue to your case. As discussed below, if the district court has made numerous

mistakes, the court of appeals has jurisdiction over the entire district court's order, and not just the legal question presented for review. By no means should you use a shotgun approach of picking numerous issues for interlocutory appeal, hoping that the court of appeals will find one of the issue worthy of review. Rather, pick your best argument and take your shot: you are better served by focusing your argument on one legal question than by diluting a petition with legal questions having little chance of being review on their own.

Third, once you have picked the legal question for review, the chances of interlocutory review can rise and fall on how you frame that question. The question presented should be a short, simple declarative sentence and should be abstract enough so that it can be lifted out of the details of your case and its answer applied with general relevance to other cases in the same area of law. A court of appeals is unlikely to hear an appeal of a complex questions requiring the appeals court to "delve beyond the surface of the record in order to determine the facts." *McFarlin*, 381 F.3d at 1259.

The petition itself should be as short as possible and "front-loaded" with a concise introduction, putting the appeal in context and explaining why the appeal should be heard. This introduction should be simple and short—no longer than four paragraphs or two pages—and should include a factual description of the matter, the controlling legal question, and your best one to three legal arguments why your case is unique and deserves interlocutory review. If you cannot put the appeal in context and explain why review is necessary in that less than two pages, it is unlikely that interlocutory review will be granted because it is unlikely the court of appeals will sift through a lengthy petition and try to extract the appealable issue.

The ability to frame the issue as one of first impression or one that stands to significantly affect future litigation will substantially increase the likelihood that review will be granted. The more your case appears to reshape litigation unrelated to your own, the more likely the chance the court will grant your petition.

Highlight, where appropriate, that appellate reversal of the trial court on this issue could determine the case. When the underlying litigation could be significantly shortened, saving the parties and the courts significant time and money, an appellate court is more likely to seriously consider your petition for review.

Possible Benefits of the Appeal Process

Besides the opportunity to reverse the district court on a key ruling, petitioning for interlocutory review has a number of other possible benefits.

One benefit is possibly staying the district court proceedings pending the outcome of the appeal. Under § 1292(b), a stay is not automatic, but one may be sought from the district court or court of appeals. *See Newton v. Lynch*, 259 F.2d 154, 165 n. 6 (3d Cir. 2001) (stay should be first sought in district court and only pursued in court of appeals if district court refuses to issue stay). The likelihood of receiving such a stay varies greatly with the relationship between the order giving rise to the appeal and the remainder of the litigation. The district court will likely focus on whether granting the stay will materially advance the termination of the litigation, typically granting a stay when the ruling on appeal will dispose of the case. *See O'Brien v. Avco Corp.*, 309 F. Supp. 703 (S.D.N.Y. 1969) (granting stay pending § 1292(b) appeal on question of whether the district court had subject matter jurisdiction.)

Finally, once permitted, an § 1292(b) interlocutory appeal provides the petitioner with an opportunity to reverse the district court's rulings on related questions of law. When an interlocutory appeal is granted, the appellate court has the authority to review the entire order entered by the district court, not just the question certified. '[T]he scope of appellate review is not limited to the precise question certified by the district court because the district court order, not the certified question, is brought before the court.'" *Aldridge v. Lily-Tulip Inc. Salary Retirement Plan Benefits Committee*, 40 F.3d 1202, 1207 (11th Cir. 1994). Although the appellate court will not review issues that have not yet been ruled upon by the trial court, its jurisdiction extends to any question or issue intertwined with the order certified by the trial judge: "[it can] review an entire order, either to consider a question different from the one certified as controlling or to decide the case despite the lack of any identified controlling question." *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Indeed, the court of appeals can even consider other district orders which are "inextricably intertwined" with the certified order, even if these orders would not be otherwise appealable

until after final judgment. *E.g. United Transp. Union Local 1745 v. City of Alberquerque*, 178 F.3d 1109, 114-15 (10th Cir. 1999).

Thus, a well-framed petition for an interlocutory appeal can serve as a Trojan Horse, gaining appellate review of a number of rulings by the district court that would have otherwise been unreviewable until after final judgment. This makes the interlocutory appeal a powerful weapon and capable of turning a case around for your client.

Conclusion

Although gaining interlocutory review is difficult and rare, the rewards are great. By anticipating and preparing for an interlocutory appeal before a district court issues an unfavorable ruling, by carefully choosing the disputed question of law, and by precisely framing that question and the reasons for review it in a short, powerful statement, you may be able to change vinegar into wine.

Don't use words too big for the subject. Don't say "infinitely" when you mean "very"; otherwise you'll have no word left when you want to talk about something really infinite.
— C.S. Lewis

Say It with Feeling: Aim for the Heart, or Go for the Gut

Daniel P. Barer
Pollak, Vida & Fisher
Los Angeles, California
dpb@pvandf.com

You know the mantra: Trials are won on the facts; appeals are won on the law. Trials are won by passion; appeals by reason. An argument to the jury is an exhortation; an argument to an appellate court is a conversation between smart attorneys.

All true in their way. Yet all misleading. An appellate brief that only appeals to the head – one with an argument as intricately constructed as Swiss clockwork, yet is bloodless and soulless – will almost never muster the persuasive power of one that also appeals to the heart; or at least goes for the gut.

Here is why. Suppose your appeal turns – as many of the best ones do – on a first-impression issue of law. Say a new statute has been passed, and it has never been judicially interpreted. You craft a brilliant argument that logic, reason, legislative intent, and the existing statutory scheme all compel the conclusion that your client should win. The plaintiff's counsel mounts an equally-brilliant riposte that establishes beyond dispute that her client should win.

Stare decisis will only get you so far. It's the appellate court. It can make new law.

What will tip the balance in your favor? What will persuade the appellate court that ruling for your client is the right thing to do? Justice and equity will.

Most judges become judges at least in part because they want to see justice done. For that matter, most people want justice to prevail – they just have different ideas of what constitutes "justice." Most judges also want to do equity. If you look beneath all of those Latin maxims of equity, the concept boils down to the right person – the one who's diligent, honest, most in need, and least destructive – winning.

That is the factor you miss when you draft an appellate brief that only appeals to reason: You have to show *why* the court should resolve intellectual impasses in your client's favor. You must show that if the appellate court rules for you, its judges can go home with a light heart and a clean conscience, kiss their respective spouses or significant others, pat their respective pets on the head, and sleep the sleep of the just. And you must also show that if the court rules for your opponent, justice will not be done.

How do you do that?

First, you need to give some thought as to why you think your client should win. And there should be some reason beyond the check you (hopefully) receive periodically from that client. Imagine that you have to justify your client winning to someone whose opinion you care about. What would you tell him or her?

And it's always best if the reason is something you actually believe – not a corporate line you're parroting. Odds are that you won't be able to dig down and find the best arguments for your client to win unless you really believe in your heart (or your gut) that your client should win.

Of course, that does not mean filling your briefs and oral arguments with repeated assertions about why you feel – or why your client feels – your client should win. The appellate judges really don't give a good damn how you or your client feels about anything. They certainly won't take your feelings into consideration when deciding the case.

Instead, the key – the trick – the art – is to make the *judge* feel, in the judge's heart or gut – that your client should win. You want to choose your facts and craft your argument to lead the judge to conclude for himself or herself that justice and equity favor you. The only way to do that is to use your reason for winning as your theme and your refrain as you write your fact statement and organize your argument.

Finding and broadcasting the reason you should win sometimes comes easier to plaintiffs than defendants. The plaintiff's theme is often easy: Plaintiff has been injured, defendant

injured him, and defendant must pay. In response, a mere "my client didn't do it" probably won't carry the same emotional resonance. And the job gets particularly tough where the plaintiff had a meritorious case, and the defendant won through some procedural trap, such as an insufficient filing fee or a blown statute of limitations.

If you get stuck, here are some suggested themes that can appeal to the heart or the gut of your audience:

- *The False Accusation*: Being accused of doing wrong when you are in fact innocent is a terrible feeling. If you can persuade the judge to feel your client's pain in bearing this false accusation, you've accomplished a lot more than a mere protestation that "I didn't do it."
- *Plaintiff's Lack of Diligence*: The theme of many cases decided on procedural grounds is that plaintiff (or plaintiff's lawyer) had the last clear chance to avoid the pitfall by looking up the right way to do things, investigating better, paying better attention, or taking prompt remedial action. Relief from procedural error often hangs on excusable neglect: the plaintiff or lawyer made the mistake despite exercising reasonable diligence. If you can show that plaintiff could have avoided the quicksand – or could have escaped it through quick action – you'll make the appellate court feel a lot better about ruling for your side.
- *The Unavoidable Consequence*: The flipside of lack of diligence is where your client was acting with reasonable diligence or care, and yet could not avoid the act of which plaintiff complains.
- *Just Doing My Job*: Your client's work or acts serve an important function to society; and plaintiff is causing an interference out of proportion to the importance of that plaintiff's individual injury.
- *Public Policy*: Appellate-court decisions cast a long shadow. Published decisions (and in some jurisdictions, unpublished ones) shape the law for states, regions, or the nation. If you can persuade the court to feel in its collective heart or gut that a decision in your client's favor, writ large, will serve society, and one against your client will harm society, that court is more likely to resolve logic deadlocks in your favor.

These are just suggestions. The reasons your client should win are as diverse as the cases themselves. The starting place is to decide, at the outset, why your court should be able to look its collective self in the mirror after ruling for your client. The reasons should follow.

A judge is a law student who marks his own examination papers.
— H.L. Mencken

"Tell Me a Story!"

Robert M. Frey
Butler Snow O'Mara Stevens & Cannada, PLLC
Jackson, Mississippi
bob.frey@butlersnow.com

Fans of the discontinued comic strip "Calvin and Hobbes" may recall that Calvin's father is a patent attorney. In one strip, he is interrupted at his paper-covered desk by a telephone call: "Hi, Dad! It's me, Calvin. Will you tell me a story?" Calvin's dad fairly shouts how busy he is but Calvin works on his Dad's guilt, and in the final panel, Dad gives in.

Everyone loves a good story. Your first job as an advocate is simply to get your audience to attend to what you are saying or writing. If you will tell a story, and tell it well, your judge will attend.

Your second task is, of course, to persuade. Here, too, a well-told story helps. Even after we make all allowances for the cold rationality preached in law school, it remains true that the judge whose heart hopes that your client will prevail may find it easier to see that the law and the facts are indeed on your side. A properly-told story can thus prepare the ground. For example, before getting to the limitations issue, why not tell the story of plaintiff sitting on her hands for years after she learned that, contrary to what the loan officer supposedly told her, credit insurance was not required on her loan?

The art of constructing the story is beyond the scope of this article, but generally speaking, one should prefer illuminating details to conclusory adjectives. Prefer "No matter how early the employees might arrive, they would find the door open, the lights on, and the smell of fresh coffee coming from the break room, because Jane, the owner, was always the first one there," to "Jane was a very hard worker." Or prefer "When Jane took over the company, the first thing she did was put a vending machine in the employee lounge, and take out the refrigerator that the previous owner kept stocked with Cokes," to "Jane was a grasping miser."

And while it would be easy to overdo this, bear in mind that not every detail needs to be relevant in the strictest sense. Consider a semi-recent state supreme court case, in which the issue was the enforceability of an arbitration agreement. The opinion includes this passing observation: "On Christmas Day, 1997 [defendant] called [plaintiff] and told him to come into its office the next day. [defendant] terminated its contract with [plaintiff] on December 26. . . ." Irrelevant, and "merely" background, but we may be sure that the story of a Christmas ruined by the foreboding telephone call made it easier for the court to accept plaintiff's position on the enforceability of the arbitration agreement.

Whatever your story, the goal is to tell it in such a way that any rightly constructed human hearing it will be moved in the right direction. A classic example is the story that the prophet Nathan told to King David before confronting David about the Bathsheba matter. (If it's been a while since you read it, you can find this famous gem of advocacy in 2 Samuel, chapter 12.) Once David's heart had been moved, his mind could not help but follow.

"Ah, but there's no story in *my* case," you protest. This takes us back to the Calvin strip. In the fourth panel, when Calvin's harried dad relents, he looks down at the paper in his hand and begins: "Right. Right. This is the story of the hydraulic pump (Fig.1), the wheel shaft flange (Fig. 2), and the evil patent infringement."

The joke, of course, is that a patent case can't be a much of a story (for the record, Calvin agrees; "I want a ***good*** story" he protests), but is this really true? After all, isn't every patent infringement case the story of a greedy parasite, devoid of original ideas, attempting to feed off of a true genius? Or if you will, the story of a greedy and overreaching patent holder, attempting to keep a true genius from occupying his rightful place in the sun? Acme Lumber Company's failure to deliver a load of 2 x 4s on a certain date is a "breach of contract case," but more than that it's the story of how John and Jill Jones, and the little con-

struction company that they had built from nothing, were *depending* on that delivery, and how badly they were hurt when the Acme salesman's word and handshake turned out to be worthless. Or if you will, the story of how John and Jill are attempting to keep their already-failing business afloat by turning an honest failure of communication with the Acme salesman into an undeserved windfall.

Your case has a story in it. Guaranteed. If the story does not immediately manifest itself it will often do so when you try giving a three-minute summary of the case to someone who knows nothing about it.

Stories hold our attention. And they move our hearts. But they do even more. We are all familiar with seeing a situation in terms of a more-or-less standardized, or universal, story line — ignorant, arrogant boss makes himself look good at the expense of smart, hard-working subordinate, for example. But according to one researcher, artificial-intelligence expert Roger Schank, the story label does not merely *fit* the facts; once selected it *controls* them. Professor Schank tells of a woman reflecting on a married couple whom she knew, the wife having abandoned the career for which her husband had sacrificed so much. The woman "decided that the marriage of her two friends was an example of a betrayal story."

> [O]nce she decided to see their situation as one of betrayal, she didn't need to see it any other way. Aspects of the relationship between the two people unrelated to betrayal, or that contradicted the notion of betrayal, were forgotten. Seeing a particular story as an instance of a more general and universally known story causes the teller [and hearer] of the story to forget the differences between the particular and the general. ....In other words, the concept of betrayal becomes what she knows about this situation. It controls her memory of the situation so that new evidence of betrayal is more likely to get admitted into memory than contradictory evidence.

Tell Me a Story: Narrative and Intelligence (Northwestern University Press 1990) at p. 148. Professor Schank goes on to point out that the actual facts of the marriage could easily have been seen in a quite different light: "if the teller had chosen to see it that way," it "could easily have been" a story of the husband's devotion to his wife.

Hold my attention. Lead me to hope that your client wins. Make it easy for me to see the facts the way you see them. *Tell me a story.*

It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law... a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.
— Henry Brougham

Use a Picture to Tell Your Story

Ed R. Haden
Balch & Bingham LLP
Birmingham, Alabama
ehaden@balch.com

Words have limits. In certain appeals, a picture – a chart or a diagram – can convey an argument with more impact than words.

One of the best brief writers ever, Colonel Fred Wiener, recommended "stressing any inconsistencies in the case against you . . . making full use of that most deadly of all comparisons, the parallel column technique." Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* 114-15 (2001). The opportunity to use the parallel-column technique arose in an *amicus* brief filed in support of an application for rehearing that addressed the award of mental anguish damages. One justice on the state supreme court had authored the opinion upholding a sizeable mental anguish award based on very little evidence of emotional distress. To illustrate to the other members of the state supreme court how excessive the mental anguish damages were, the *amicus* brief took a page out of Colonel Wiener's book. It included a chart that compared the opinion on rehearing, *Jackson*, with two prior cases authored by other justices who would be voting on that rehearing.

MENTAL ANGUISH AWARDS BY THE ALABAMA SUPREME COURT

	Kyles (Alpha, J.)	***Oliver*** (Beta, J.)	***Jackson*** (Author, J.)
Cause of Action	Malicious Prosecution	Misappropriation of Funds	Insurance Fraud
Loss of Liberty	Arrested and jailed.	None.	None.
Public Humiliation	Home searched by officers in front of family, cursed at by officer.	None.	None.
Physical Symptoms/ Professional Treatment	Cried.	Sought counseling.	None.
Fear/Worry	No evidence.	About losing opportunity to buy home.	About paying unexpected future premiums for policies that were valuable and in effect.
Economic Damages	$4,000	$7,200	$2,340
Mental Anguish Damages	$11,000	$67,800	$97,660
Ratio of Economic to Mental Anguish Damages	**1:3**	**1:9**	**1:42**

On rehearing, the supreme court withdrew the old opinion that had affirmed the award of mental anguish and related punitive damages, reversed the trial court's judgment on the tort claims giving rise to those damages, and remanded for entry of a judgment as a matter of law for the defendant on those claims. *See Alfa Life Ins. Corp. v. Jackson*, 2004 Ala. LEXIS 118 (Ala. 2004) (affirming award of mental an-

guish and punitive damages), *withdrawn on rehearing*, 2004 Ala. LEXIS 311 (Ala. 2004), *corrected on rehearing*, 2005 Ala. LEXIS 5 (Ala. 2005).

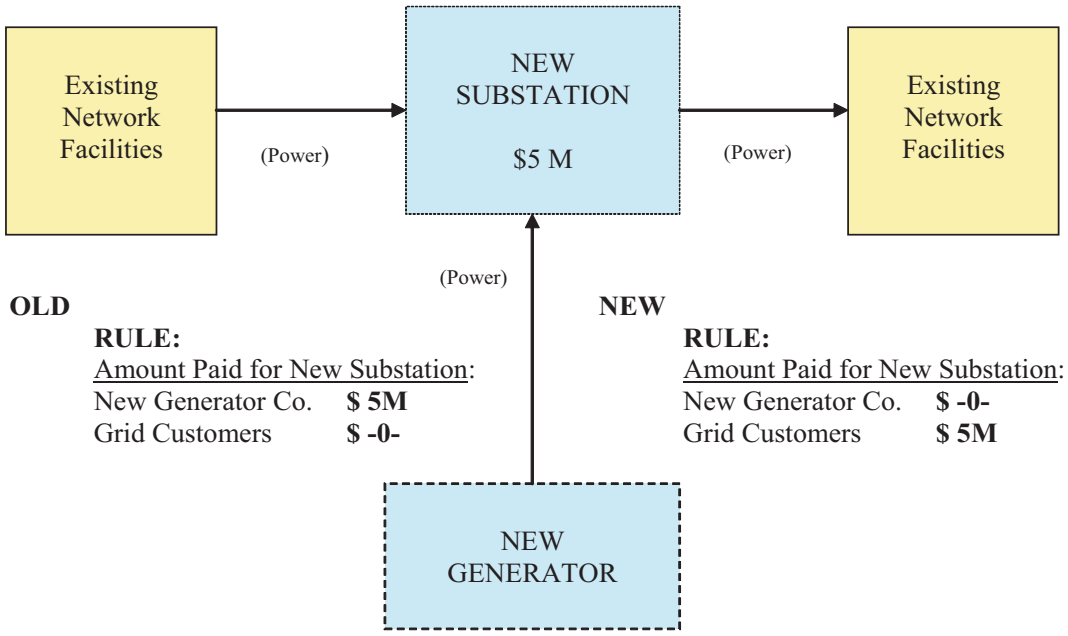
In a case dealing with an intervening cause issue, the plaintiff/appellee, David Moore, argued that the record said what it did not. The defendant/appellant's reply brief compared Moore's assertions with the record in a chart that included the following:

MOORE'S BRIEF	RECORD
"As previously shown, David Moore did not intentionally sever the guy wire." Appellee's Br. at 51-52 (no citation to record).	David Moore's cross examination: Q. So that if you grabbed the guy wire like this and you start twisting, it's going to break off a little piece of that grip wire just this long, isn't it? A. Yes, sir. It's apparent that one piece did break off. Q. **And that you, David Moore, broke it off?** A. **Yes, sir**. R. Supp. II at 278-279 (emphasis added).

The court agreed that Moore's action did constitute an intervening cause and reversed and rendered judgment for the defendant. *See Alabama Power Co. v. Moore*, 899 So. 2d 975 (Ala. 2004).

In an administrative case before the D.C. Circuit, two energy companies argued that the Federal Energy Regulatory Commission ("FERC") had changed its rule regarding who had to pay for a new substation used to connect a new generator to an existing transmission grid. FERC argued that it had not made any change and tried to bury the court in complex engineering classifications for various types of equipment, including substations. The energy companies responded with a diagram, similar to the one below. The diagram showed that a new substation, regardless of the engineering label placed on it, functioned to connect a new generator to an existing transmission network. The diagram also showed that FERC's new approach changed who paid for the new generator from the company that owned the new generator to the customers of the transmission grid:

IMPACT OF THE CHANGE IN FERC'S RULE



RULE CHANGE COSTS GRID CUSTOMERS $5M PER SUBSTATION

The D.C. Circuit vacated FERC's order, which had held that there was no change, and remanded for a further explanation. *See Entergy Servs. v. FERC*, 391 F.3d 1240, 1251 (D.C. Cir. 2004).

In each case, it is important that a picture be simple and legible so that it conveys your intended message to the judges. Having another lawyer in your firm who is unfamiliar with the case look at your chart or diagram and state what it conveys to him is prudent.

Judges read hundreds of briefs every year. They, like any human being, notice a picture simply because it stands distinct amidst an endless sea of words. If what they notice is convincing, that picture could win your case.

It is dangerous to be right when the government is wrong.
— Voltaire

Recent Developments

***Bujol v. Entergy Services, Inc.*: Good Samaritan Doctrine in Parent-Subsidiary Context — Revisited and Reaffirmed**

On January 19, 2006, the Louisiana Supreme Court issued its long-awaited decision on rehearing in *Bujol v. Entergy Services, Inc.* The result: reaffirmation of its original decision and a big win for three committee members from New Orleans: Louis C. LaCour, Jr. and Robert N. Markle, both of Adams and Reese LLP, and Joseph C. McReynolds of Deutch, Kerrigan & Stiles, LLP. *Bujol v. Entergy Servs., Inc.*, 2004 La. LEXIS 1784, 2004 WL 1157413, *on rehearing*, 2006 La. LEXIS 143, 2006 WL 137361.

In its prior decision, reported in *Certworthy* at 16 (Summer 2004), the court addressed, for the first time, the contours of § 342A of the Restatement, Torts (2nd) — the so-called "Good Samaritan Doctrine" — in the context of a parent-subsidiary relationship. The case arose from a flash fire at an oxygen-producing facility operated by the subsidiary. The fire horribly burned three of the subsidiary's employees, killing one of them. The two who lived and the survivors of the one who died sued the parent corporation. They alleged that, by issuing certain safety recommendations to its subsidiaries, the parent had assumed a "duty of safety" for the employees of the subsidiaries. But the parent failed to ensure that this particular subsidiary knew about and implemented the safety recommendations. Had it done so, the plaintiffs alleged, the employees would not have been injured.

At trial, the jury held the parent liable and awarded compensatory and punitive damages totaling $158 million. The intermediate appellate court affirmed. *Bujol v. Entergy Servs., Inc.*, 833 So.2d 947 (La. Ct. App. 2002, on reh'g 2003).

In its original decision, the Louisiana Supreme Court reversed the lower courts' judgments, and on rehearing, re-affirmed that decision. The court's original decision 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 original decision was rendered by a 6:1 majority, and so did not seem a likely candidate for rehearing. What prompted rehearing? The standard of review. Because the jury had not been properly instructed on the prerequisites for liability under § 324A, the court, in its original decision, applied *de novo* review. In their applications for rehearing, the plaintiffs argued for application of manifest-error review. The court granted rehearing "because at least some of the justices in the original majority's decision were concerned" that they had applied the incorrect standard of review.

In the end, the court found that it reached the same result regardless of which standard was applied. The court found the record "devoid of evidence from which the jury could reasonably have concluded that [the parent] 'affirmatively undertook' to provide a safe working environment at [the subsidiary's plant]."

This decision is an important legal development for businesses organized as parent and subsidiary corporations. It allows the parent to freely share safety information with subsidiaries without fear of incurring Good Samaritan liability for having made the effort. But this decision also provides a lesson to appellate lawyers about the importance of the standard of review. Though the plaintiffs lost this decision, consider what they accomplished: faced with a 6:1 decision against them, they persuaded the court to grant rehearing by convincing some of that six-justice majority that they may have applied the wrong standard of review.

Circuit Reports

First Circuit

"Hopeless" Motions Not Sanctionable

***Obert v. Republic Western Ins. Co.*, 398 F. 3rd (1st Cir. 2005)**

A precedent-setting decision on Federal Rule of Civil Procedure 11 sanctions has emerged from a series of lawsuits, trials and appeals dating back to a 1985 vehicular accident. At the first trial, in 1987, a jury awarded $3 million to Joseph Fratus, and at the second trial, in 1994, Fratus sued Western Republic, insurer of another party, and prevailed on two claims. After cross appeals, the First Circuit remanded the insurance issues, and the case was assigned to Judge Ronald Lagueux. After two years, Republic settled out, leaving Joseph Obert, the driver who struck Fratus, still liable for a portion of the original judgment. On July 3, 2001, Obert filed suit in Rhode Island district court, claiming that Republic breached various duties to him; on that same day, Republic filed an action in the Massachusetts district court, seeking a ruling that Obert was not an insured. After Obert's attorney designated the two earlier lawsuits as related cases, the clerk's office reassigned the matter, this time sending it back to Judge Lagueux.

On August 3, 2001, Obert filed a motion in the Rhode Island case for a temporary restraining order and preliminary injunction to bar Republic from pursuing its Massachusetts lawsuit. Judge Lagueux summoned counsel to a conference in his chambers. Obert's attorney argued the litigation belonged in Rhode Island, and Judge Lagueux made clear he agreed and expressly declined to issue a TRO, pending the decision on transferring or dismissing the Massachusetts action. When Republic's attorney tried to explain that the policy limited coverage, Judge Lagueux refused to pursue the issue, noting that Republic had previously misbehaved in his courtroom in the earlier Fratus case by relying upon a back-dated endorsement.

On September 5, 2001, Republic filed a motion asking Judge Lagueux to recuse himself because his impartiality might reasonably be questioned or, in the alternative, to retransfer the case to another judge, and mentioned Judge Lagueux's comments during the in-chambers conference. Judge Lagueux not only denied the motion but ordered the three Massachusetts attorneys to show cause why their pro hac vice status should not be revoked. (190 F.Supp.2d 279.)

Following the show-cause hearing, Judge Lagueux issued an order finding that two of the attorneys had violated local ethics rules and that all five defense counsel and their firms had violated Rule 11. (264 F. Supp. at 112) He imposed sanctions of $31,000 in attorneys' fees and revoked the pro hac vice status of two of the attorneys.

After the case settled in 2004, all defense counsel appealed, and the First Circuit vacated the sanctions in their entirety. Referring to the findings of the district court that four statements in the questioned affidavit were "untruthful," the court began by noting that the Rhode Island rules of ethics defines "untruthful" as "knowingly false." 398 F.3d at 143. Examining the statements, the First Circuit concluded that the affidavit was not knowingly false as to any material fact, although there may have been one inaccuracy and one "dubious. . . piece of lawyer characterization." *Id.*

The court then addressed "the least serious, but best grounded, of the charges against defense counsel, namely, that the motion to recuse in this case was objectively frivolous." *Id.* at 144. Agreeing that the motion to recuse "had no chance of success," the court then stated:

Counsel every day file motions that are hopeless, just as they make hopeless objections in trials and hopeless arguments to the judge. Perhaps a court *could* sanction counsel under Rule 11 for many such hopeless motions, but doing so routinely would tie the courts and counsel in knots.

Id. at 146 (emphasis in original). The court noted that the show-cause order was prompted not by concerns over frivolouness, but by what were perceived by the lower court to be misrepresentations by counsel, and that "[b]ecause there were no proven lies, we think that the Rule 11 findings cannot stand." *Id.* at 147.

Erroneous Removal of Counsel Does Not Warrant Reversal

***Young v. City of Providence, ex rel. Napolitano*, 404 F.3rd 4 (1st Cir. 2005); *Young v. City of Providence, ex rel. Napolitano*, 404 F.3d 33 (1st Cir. 2005)**

Plaintiff, the administratrix of the estate of an off-duty police officer mistakenly shot and killed by two fellow officers, lost her action against the city and the police department after the district court judge, offended by a

comment, removed two of plaintiff's attorneys from the case mid-trial. Although the First Circuit found that the removal was erroneous, vacated all sanctions and restored the attorneys' the pro hac vice status, it refused to reverse the judgment.

Plaintiff's lead counsel, high-profile attorney Barry Scheck, planned to rely on a diagram of the scene in his opening statement, but a dispute arose about its accuracy. Counsel entered a stipulation to use the diagram, but moved for relief from the stipulation after further developments again suggested inaccuracy. The supporting memorandum stated in part that "Plaintiff, moments before her opening, was informed by the Court she had to agree to defendants' stipulation." 404 F.3d at 36-37. The district court ruled that this statement was a misrepresentation of what the court had said and imposed Rule 11 sanctions against all three of plaintiff's counsel, formally censuring Scheck and revoking his and another attorney's pro hac vice status immediately. The district court then granted summary judgment to defendants, holding that there was insufficient evidence that they had caused the underlying constitutional violation or possessed the requisite level of fault (deliberate indifference) to allow the case to go to a jury.

Two appeals to the First Circuit, argued and decided on the same days, followed. In *Young, supra,* 404 F. 3rd 33, the court relied upon the passage cited above from *Obert v. Republic Western,* 398 F.3d at 146, in stating that Rule 11 should not be invoked for slight cause. Reading the questioned statement as a whole, the court concluded that it "did no more than say, albeit inartfully, that the trial judge had required the stipulation to be signed as a condition of using the diagram in the opening, " and vacated all sanctions against the attorneys. 404 F.3d at 41.

This acknowledgement that the attorneys should not have been removed from trial did not change the outcome of the case, however. In the second appeal, *Young, supra,* 404 F.3d 4, the court determined that the wrongful removal of the two attorneys did not warrant automatic reversal of the verdict, as the record revealed no prejudice to Young because another attorney, who had been "deeply involved in all proceedings in the case," continued with the trial. *Id.* at 25.

Richard L. Neumeier
Morrison Mahoney LLP
Boston, Massachusetts
rneumeier@morrisonmahoney.com

Second Circuit

Appellate Jurisdiction: Sanctions Award

***Pannonia Farms, Inc. v. USA Cable*, 426 F.3d 650 (2d Cir. 2005)**

Plaintiff Pannonia Farms, Inc. claimed that it was the owner of intellectual property rights in Sir Arthur Conan Doyle's writings and the common law trademarks in the characters of Sherlock Holmes and Dr. Watson. Pannonia sued defendant USA Cable in connection with a television drama based on those characters. The district court granted USA Cable's motion for summary judgment and for attorney's fees and sanctions under Rule 11.

On appeal, the Second Circuit affirmed the granting of summary judgment. However, it dismissed the appeal from the award of Rule 11 sanctions against Pannonia and its attorneys. Although it noted that there was a question as to whether the district court afforded Pannonia the requisite procedural safeguards under Rule 11, the Second Circuit held that it could not consider that portion of the appeal because the district court had not yet fixed the amount of the sanctions to be awarded. As such, the district court's order was not final under 28 U.S.C. § 1291 as to either the Rule 11 sanctions or the attorney's fees and costs.

Appellate Jurisdiction: Partial Claims

***Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005)**

Plaintiff Rabbi Jacob Joseph School held bonds issued by the Argentinean Province of Mendoza. The school brought an action against the province, seeking to prevent it from consummating an offer to exchange existing bonds for new ones. Following an adverse decision in a related case, the district court ruled that all but one of the school's claims were foreclosed by that decision. The survival of the last claim notwithstanding, the parties submitted letters to the district court which it construed as motions to dismiss the complaint. Subsequently, the district court dismissed all of the school's claims with prejudice, except for one, which it dismissed without prejudice.

The school appealed and moved for consolidation of its appeal with the appeal in the related case. The prov-

ince opposed consolidation and sought dismissal of the school's appeal for lack of appellate jurisdiction.

At the outset of its analysis, the Second Circuit noted that an immediate appeal is available to a party willing to suffer voluntarily the district court's dismissal of the whole action with prejudice. In particular, the court recognized that "a party who loses on a dispositive issue that affects only a portion of his claims may elect to abandon the unaffected claims, invite a final judgment, and thereby secure a review of the adverse ruling." 425 F. 3d at 210. This procedure "furthers the goal of judicial economy by permitting a plaintiff to forego litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end." *Ibid.* Conversely, an immediate appeal is unavailable to a plaintiff who seeks review of an adverse decision on some of its claims by voluntarily dismissing the others without prejudice. A plaintiff who voluntarily dismisses his action without prejudice "may reinstate his action regardless of the decision of the appellate court, [so] permitting an appeal is clearly an end-run around the final judgment rule." *Id.*

At oral argument on the motion to dismiss the appeal, the school would not abandon the remaining claim with prejudice. Instead, it argued that the general rule stated above and set forth in *Chappelle v. Beacon Commc'ns. Corp.,* 84 F.3d 652, 654 (2d Cir. 1996) was prudential rather than jurisdictional. As a matter of prudence, the school urged the Second Circuit to overlook the contrivance that brought the appeal to it, because doing so would allow the appeal to be heard in tandem with the nearly identical issues presented in the related appeal. In support of its argument, the school cited *Great Rivers Coop. v. Farmland Indus.*, 198 F.3d 685, 689 (8th Cir. 1999). The Second Circuit was not persuaded and concluded that *Chappelle* established a jurisdictional rule. Accordingly, it granted the province's motion and dismissed the appeal.

Rule 54 Certification

***Grand River Enterprises Six Nations, Ltd. v. Pryor,* 425 F.3d 158 (2d Cir. 2005)**

This appeal involved challenges to certain state statutes enacted pursuant to the $206 billion master settlement agreement settling litigation between 46 states, the District of Columbia, five U.S. territories and four major tobacco companies. Appellants, three tobacco companies, appealed from an amended judgment dismissing all of the non-New York defendants for lack of personal jurisdiction and all of the causes of action attacking the statutes, except an antitrust claim. Defendant-appellees, 31 current and former state attorneys general, contended that the district court improperly granted certification under Rule 54(b) of the Federal Rules of Civil Procedure.

With regard to appellees' claim that the district court abused its discretion in granting certification, the Second Circuit held that the district court had properly concluded that certification might avoid a duplicative trial, should the decision denying personal jurisdiction or dismissing the non-antitrust claims be reversed.

Appellees argued that the district court gave insufficient weight to the availability of relief in state courts to the appellants. Specifically, they asserted that "Plaintiffs have always been able to challenge the validity of the statutes at issue in this case by interposing their claims as defenses to actions brought by the Defendants in state courts to enforce those statutes." 425 F.3d at 165. The Second Circuit rejected this argument, concluding that the states offered no support for the awkward argument that certification is inappropriate because the appellants could gain relief by raising their claims as defenses in hypothetical state lawsuits. As the district judge recognized, it would make no sense to try the antitrust count against New York State alone if the dismissals of the other states or the other claims turned out to be an error. Accordingly, the Second Circuit concluded that this was "precisely the type of 'danger of hardship or injustice, . . to which Rule 54(b) [wa]s directed." *Ibid.*

Ralph W. Johnson, III
Halloran & Sage LLP
Hartford, Connecticut
johnsonr@halloran-sage.com

Third Circuit

Public Employee Speech: Qualified Immunity and Policymakers

***McGreevy v. Stroup*, 413 F.3d 359 (3d Cir. 2005)**

A former public school nurse filed First Amendment retaliation claims against a school district and its superintendents, who were sued in their official and individual capacities. The district court granted summary judg-

ment on the individual capacity claims, holding that the balancing test it was required to apply precluded a finding that the law was clearly established. On that point, the Third Circuit reversed and ruled that a resolution of the balancing test in favor of the employee meant that the law was clearly established and that qualified immunity was not available.

At trial, the district court granted judgment as a matter of law on the defendants' official capacity claims and on the claim against the school district, holding that the school board was the sole policymaker. The appellate court reversed, holding that although the school board is the final policymaker regarding dismissal of employees, the superintendent is the final policymaker over ratings determinations, which were the basis of the action taken against the employee.

Preserving Issues: Requested Jury Instructions

***Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336 (3d Cir. 2005)**

Under Federal Rule of Civil Procedure 51(c)(1), parties must object to proposed jury instructions "on the record, stating distinctly the matter objected to and the grounds of the objection." Underscoring the meaning of this rule, the Third Circuit held that a written request for a jury instruction and an alleged off-record discussion of that request, which the other side and the trial court said did not happen, was not enough to preserve an objection that the requested instruction had not been given.

Efficacy of Notice of Appeal: Attaching the Wrong Order

***Benn v. First Judicial District of Pennsylvania*, 416 F.3d 233 (3d Cir. 2005)**

The district court entered two orders in this case on the same day, one relating to one defendant and the other to two other defendants. When plaintiff filed his notice of appeal, he did not specify which order was the target, and attached a copy of the wrong one to his notice. After the notice period expired, he filed a corrective notice of appeal which had a copy of the order he wanted to appeal attached to it.

The Third Circuit rejected the argument that, because the procedural rules do not require an attachment of the order that is the subject of the appeal, the court could and should disregard the incorrect order attached to the original notice. Despite this ruling, it then held that it had jurisdiction regardless of appellant's mistake, as a notice "may be construed as bringing up an unspecified order for review if it appears from the notice of appeal itself and the subsequent proceedings on appeal that the appeal was intended to have been taken from the unspecified judgment, order, or part thereof." 426 F.3d at 237.

Appealability: Fee Awards in Ongoing Environmental Cases

***Interfaith Community Organization v. Honeywell International, Inc.*, 426 F.3d 694 (3d Cir. 2005)**

A fee award is not appealable until it is reduced to a definite amount — but what about fees in *ongoing* cases? A jurisdictional question arose from additional fee orders that followed a fee award already under appeal in this matter. Three subsequent orders awarded fees for litigation over the first fee application and another related to fees for monitoring the cleanup which the court had ordered along with the original fee award.

Accepting the reasoning of the Ninth Circuit in *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), the Third Circuit concluded that,

> …in a complex and ongoing action such as this, [28 U.S.C.] § 1291 should not act as a bar to our exercise of jurisdiction over a fee award which resolves all fee claims for the period leading up to a verdict. In so holding, we do not decide whether we will have jurisdiction over any possible appeals from future fee awards, but note our agreement with the sentiment expressed in *Gates* that a district court is well-advised to group such awards so as to allow for meaningful appellate review.

426 F.3d at 702-03.

Appealability: Order Staying Action

***Wilderman v. Cooper & Scully, P.C.*, 428 F.3d 474 (3d Cir. 2005)**

The district court ordered a stay of a declaratory judgment action to ensure that the federal action would not "duplicate or interfere with" a lawsuit filed in Texas, and required defendant to report on the status of the Texas suit every sixty days. Plaintiffs appealed that order and also petitioned for a writ of mandamus to dissolve it. The Third Circuit dismissed the appeal and denied the writ petition.

The opinion emphasized that some orders which stay actions are appealable, while others are not. The difference lies in the effect of the order. An

order which "amounts to a dismissal of the suit" or which "puts the plaintiff out of court" by "surrender[ing] jurisdiction of a federal suit to a state court" is appealable. 428 F.3d at 476. In the Third Circuit, "stays involving 'parallel parties and parallel claims,' in which the state decisions are likely to preclude the federal claims, are typically appealable." *Ibid.* On the other hand, an order which simply *delays* the action is not appealable.

In holding that the order in this case was not appealable, the court noted that plaintiffs conceded that the state and the federal cases would have virtually no impact on each other, as the causes of action are different, and the parties are not "parallel," and the same facts are not at issue in both. Because the district court's stay does not dismiss but simply delays the federal suit until the state litigation comes to a "clearer resolution," it was not appealable, the court held. *Id.* at 478.

Charles W. Craven
Marshall, Dennehey, Warner, Coleman & Goggin
Philadelphia, Pennsylvania
ccraven@mdwcg.com

Fifth Circuit

Timely Notice of Removal

***City of Clarksdale v. BellSouth Telecomm., Inc.*, 428 F.3d 206 (5th Cir. 2005)**

The city filed suit against BellSouth in a Mississippi state court on December 23, 2003, and its process server left the citation in an inbox at the office building of BellSouth's agent for service of process on December 24th; that office did not reopen until December 29th. BellSouth filed a notice of removal on January 28, 2004. Title 28 U.S.C. § 1446 requires a defendant to file a notice of removal within thirty days after *receipt* of the initial pleading. Accordingly, BellSouth's January 28th notice of removal would be timely if service occurred on December 29th, but not on December 24th. The city moved to remand to state court. The district court denied the motion, finding that service of process could only have occurred on December 29th, rendering the removal notice timely.

The Fifth Circuit affirmed, explaining that, because no one vested with apparent authority to accept papers was present on December 24th, there was no one to notify BellSouth that it was being sued. According to the court, "leaving the papers in a basket on a day when no one would or could process them cannot . . . constitute service until such time as the office reopens and the papers can be processed and sent to the principal." 428 F.3d at 213.

Medical Malpractice and Sovereign Immunity

***Guile v. United States*, 422 F.3d 221 (5th Cir. 2005)**

Plaintiff's wife committed suicide while a patient in a psychiatric ward at a United States Army medical center while her psychiatrist was on vacation, the nurse on duty was asleep, and the technician charged with checking on her failed to do so. Plaintiff filed suit against the United States, the psychiatrist and others. At the close of evidence, the district court dismissed claims against the United States and granted a motion for judgment as a matter of law after the jury found the psychiatrist 25 percent liable.

On appeal, the Fifth Circuit affirmed the judgment in favor of the psychiatrist. Under Texas law, medical-negligence cases require expert testimony to show both a breach of a standard of care and that such breach was a proximate cause of the alleged harm. Plaintiff's expert stated generally that "'in totality' *all* breaches by *all* the multiple actors involved combined to cause Mrs. Guile's suicide," and could not guarantee that Mrs. Guile would not have committed suicide even if she received the care that he testified was appropriate. 422 F.3d at 228.

Additionally, the court affirmed dismissal of the claims against the United States (primarily for negligent supervision of the company providing psychiatric care), holding that those claims fell within the discretionary-functions exception to the limited waiver of federal government sovereign immunity under the Federal Tort Claims Act (FTCA). The court explained that, under that exception, the United States retains sovereign immunity under for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680. The court determined that the claims against the United States were based on discretionary functions, and rejected the argument that medical judgments were not covered by this exception.

Employment Contracts

***Cooper Tire & Rubber Company v. Farese*, 423 F.3d 446 (5th Cir. 2005)**

An employee of Cooper Tire was terminated for alleged embezzlement. In exchange for not filing criminal charges, Cooper Tire required the employee to execute a separation agreement that included a stringent non-disparagement clause. During negotiations, the employee executed an affidavit containing false and disparaging statements about Cooper Tire which was eventually used in litigation against Cooper Tire and leaked to the media. Cooper Tire sued the lawyers and law firms involved in using the affidavit on claims based, in part, on the existence of the separation agreement. The district court granted summary judgment for the defendants, holding that, under Mississippi law, non-disparagement clauses are void *per se* for illegality, and the separation agreement was unconscionable, as these agreements aid and protect illegal enterprises by discouraging employees from informing authorities of alleged illegal actions by their employers, and enable unscrupulous employers to conceal illegal acts.

The Fifth Circuit vacated the judgment, rejecting the argument that non-disparagement clauses are void *per se* on public policy grounds, and concluding instead that the "mere possibility that an employer *could* use a non-disparagement clause to hide illegal activity is, therefore, insufficient to void the clause." The court also held that the separation agreement was neither procedurally nor substantively unconscionable under Mississippi law. First, the court found the agreement not procedurally unconscionable because it advised the employee to obtain counsel, she was in fact represented by counsel, and the agreement contained terms favorable to the employee. Secondly, the clause was not found substantively unconscionable because the employee received numerous significant concessions in negotiating the agreement.

Parent and Child – Vicarious Liability

***Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005)**

After a father told his 20-year-old son, who was having a few drinks at the house with friends, to "wrap things up" and went off to bed, the young men decided to use lumber from the garage to make a giant cross and then burned it on a neighbor's yard. When the offended African-American neighbors sued, a jury found the son and a friend liable for $10 million in damages, but also found that the father's delegation of authority to his son to "wrap things up" was not a proximate cause of the cross-burning. Arguing that they were entitled to recover against the father as principal, the neighbors moved to amend the judgment. The court agreed, finding that, as a matter of law, the father was vicariously liable for his son's conduct.

Applying Texas agency law, the Fifth Circuit reversed, holding that "there are no facts in the record suggesting that it was foreseeable to [the father] that his son would commit an act of racial terrorism upon receipt of authority to 'wrap things up.'" 426 F.3d at 765. The court also reasoned that, under Texas law, an agent's "serious criminal activity" is almost never taken within the scope of authority granted by the principal, and the district court's finding that the father was vicariously liable for the criminal acts of his son was clearly erroneous.

Charles Frazier, Jr.
Cowles & Thomson, PC
Dallas, Texas
cfrazier@cowlesthompson.com

Sixth Circuit

Expert Testimony

***Brown v. The Raymond Corp.*, 432 F.3d 640 (6th Cir. 2005)**

The Sixth Circuit (with one judge concurring on the state law issue) affirmed the district court's exclusion of the plaintiff's expert testimony under Rule 702, and also affirmed the application of the "prudent-manufacturer" test under state law in granting summary judgment to the defendant in this diversity case. Plaintiff, operator of a forklift manufactured by defendant, collided with another forklift, sustaining injuries which required amputation of his foot. His allegations against the defendant included claims that the forklift was sold in an unreasonably dangerous condition, came with inadequate warnings, and had an improperly working brake.

The Sixth Circuit affirmed the exclusion of the testimony of plaintiff's proposed design expert. The offered expert, who was both a lawyer and industrial engineer, opined that the defendant could have identified the problem with the forklift that caused the injuries to the plaintiff and eliminated this hazard, but admitted that he had no forklift expertise and had no alternate design to offer. The court found that, under Rule 702, this expert was properly excluded on the ba-

sis that he was unreliable and would not aid the trier of fact.

Qui Tam Actions

***Walburn v. Lockheed Martin Corp.*, No. 04-3458, 431 F.3d 966 (6th Cir. 2005)**

The Sixth Circuit held that the district court incorrectly dismissed an employee's qui tam action against the defendant plant operator under the first-to-file jurisdictional bar of the False Claims Act ("FCA") because the prior action filed did not encompass his allegations, but then affirmed the dismissal on the basis that the employee's action against defendant was barred by the FCA's prior public disclosure rule.

Plaintiff was an operator at a uranium plant where the employees were required to wear dosimeters to monitor the radiation exposure, and alleged that defendant changed the recording of the dosimeters to maintain its government accreditation. Because another qui tam relator had sued Lockheed shortly before plaintiff did, the trial court held that plaintiff's claims were barred under the first-to-file rule.

The Sixth Circuit had previously required FCA actions to specify fraud with particularity under Rule 9(b) and had held that a complaint that fails under Rule 9(b) does not have preclusive effect over subsequent FCA actions. Accordingly, the court held that plaintiff's claims were not barred by the first-to-file rule, as the first qui tam action made only very broad and vague allegations of fraud, whereas plaintiff's later action specifically alleged certain actions.

However, the court found that plaintiff's qui tam action was still jurisdictionally barred by the prior disclosure provision, requiring a plaintiff be the *true* "whistleblower" in order to recover. Plaintiff had previously filed a civil action against his employer, making many of the same allegations as in his qui tam action, and the court found the second action was based on the same allegations as the first, barring the qui tam suit.

Sexual Harassment and Retaliation

***Keeton v. Flying J, Inc.*, 429 F.3d 259 (6th Cir. 2005), pet. for rehrg. en banc filed Dec. 1, 2005**

Plaintiff applied to be an associate manager at a Flying J travel plaza restaurant. He agreed to relocate, and was moved to Tennessee for training. After training, the plaintiff was made an associate manager at a restaurant in Walton, Kentucky. There, his supervisor made unwanted sexual advances. When he rejected those advances, she fired him for "not supporting" her. When the plaintiff called another manager at a different Flying J restaurant 120 miles away, and reported the situation, that manager reinstated him and offered him a position at his restaurant. Keeton relocated immediately, but had to also maintain his Walton residence because his wife had suffered a back injury requiring surgery, and she could not move. After a jury trial, the district court denied the employer's motion for judgment as a matter of law and entered judgment for plaintiff on the claim of sexual harassment leading to a tangible employment action.

The employer appealed, and the Sixth Circuit vacated the portion of the verdict that the plaintiff's initial termination was a tangible employment action, as it lasted only two hours after it was reversed by the second manager. But the Sixth Circuit did hold that, as to the transfer which may necessitate a relocation, there was a factual issue and the jury could have found that it was an adverse employment action. Accordingly, the court affirmed the denial of the employer's motion for judgment as a matter of law.

Circuit Judge Gilman dissented, saying the decision abandoned precedent by holding "that a purely lateral transfer that carries with it no change in salary, benefits, responsibilities, or prestige is an adverse employment action when undertaken as a solution to a supervisor's discriminatory conduct." 429 F.3d at 266. He stated further that it was contrary to the en banc decision in *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 791 (6th Cir.2004), which defined the inquiry for determining whether the victim of alleged discriminatory conduct has suffered an adverse employment action by asking if he or she had suffered "a materially adverse change in the terms of her employment." *Ibid.*

Enforcement of Arbitral Awards

***Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701 (6th Cir. 2005)**

Plaintiff appealed the removal to federal court of an action to vacate an arbitration award, and the award's confirmation.

Defendant initiated arbitration and obtained an award against plaintiff, who sought to vacate it. The Sixth Circuit held that defendant properly removed plaintiff's state action to vacate under the Convention on the Recognition and Enforcement of For-

eign Arbitral Awards. Despite a choice-of-law clause, the Sixth Circuit held that the Federal Arbitration Act provided the review standard, and confirmed the award.

Sarah M. Riley
Warner Norcross & Judd LLP
Grand Rapids, Michigan
sriley@wnj.com

Eighth Circuit

A Change in the Law: Denying Recall of Mandate Not Law of Case

***Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897 (8th Cir. 2005).**

Following a change in governing law, a district court may order relief from an injunction, even though the appellate court has previously denied a motion for the same relief. In 2003, the United States Supreme Court held that ERISA did not preempt two Kentucky statutes that require health care insurers to admit qualified providers into the network if they are willing to meet the terms and conditions of participation. *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003). Four years earlier, in *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr.*, 154 F.3d 812 (8th Cir. 1998) ("*Prudential I*"), the Eighth Circuit had affirmed a district court decision granting a permanent injunction against the enforcement of a similar statute in Arkansas because it was preempted by ERISA.

Following the Supreme Court's ruling, defendants in *Prudential I* filed with the Eighth Circuit a motion to recall the mandate and lift the injunction. The court summarily denied the motion without comment. Defendants then moved to dissolve the injunction pursuant to Federal Rule of Civil Procedure 60(b)(5). The district court dissolved the injunction, holding that the "significant shift in the law as a result of the *Miller* decision meets the requirement of an extraordinary circumstance" for the purposes of Rule 60(b)(5). *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr.*, No. 95-514, slip op. at 5 (E.D. Ark. Feb. 12, 2004).

Plaintiffs appealed, contending that the district court should not have considered the motion because the Eighth Circuit previously denied a motion on the same ground. The Eighth Circuit disagreed, holding that under the limited circumstances of the case, the district court had not erred, as it could reasonably infer that the denial of the motion to recall the mandate was not on the merits "but rather an invitation for the parties to present their claims before the district court first." 413 F.3d at 904. Therefore, the court's prior summary denial was not the law of the case, did not have *res judicata* effect, and did not affect the subsequent motion under Rule 60(b)(5).

"Excusable Neglect" Does Not Include Attorney Carelessness

***Noah v. Bond Cold Storage*, 408 F.3d 1043 (8th Cir. 2005)**

The district court dismissed his complaint with prejudice after plaintiff Noah failed to comply with the scheduling and trial order requiring him to file a designation of each incident of discriminatory treatment by June 1, 2004. He did not file, seek an extension, or seek permission to file late. The district court issued an order to show cause why his case should not be dismissed and again Noah did not respond. 408 F.3d at 1044.

Following the dismissal of the complaint, Noah's attorney filed two motions to set aside the dismissal under Rule 60(b)(1), arguing first in the first motion that he "intended to file the list electronically…but mistakenly did not do so before he left for vacation in late June" and in the second that his "busy schedule diverted his attention." *Id.* The district court denied both motions; Noah's notice of appeal was only timely as to the second.

The Eighth Circuit's review was limited to whether the district court abused its discretion. *Id.* at 1045. Under Rule 60(b)(1), a court may grant relief from a judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect." *Id.* The court determined that a showing of good faith or some reasonable basis for failing to comply with the rules was necessary in order to find "excusable neglect," and succinctly stated, "[i]t is generally held that 'excusable neglect' under Rule 60(b) does not include ignorance or carelessness on the part of the attorney." *Id.* The court found no abuse of discretion in the district court's decision, and affirmed, noting that an "attorney's failure to follow the clear dictates of a court order does not amount to excusable neglect." *Id.*

Presumption of Delivery for E-Mail Notification

***American Boat Co., Inc. v. Unknown Sunken Barge*, 418 F.3d 910 (8th Cir. 2005)**

The Eighth Circuit held that a presumption of delivery should apply to e-mail notification of orders, but then reversed the judgment against appel-

lants and remanded for an evidentiary hearing to determine whether appellants had adequately rebutted this presumption.

American Boat sued the United States for negligently failing to maintain the navigable channel of the lower Mississippi River. The district court granted summary judgment in favor of the government, and subsequently denied American Boat's motion to amend the judgment, thereby triggering the 60-day appeal period. 418 F.3d at 911-12. However, none of American Boat's counsel received notice of this order, neither local counsel, who had signed up with the court's then-new electronic case filing ("ECF") system, nor trial counsel, who failed to received a paper copy through the mail. *Id.* at 912.

Because American Boat did not learn of the order until after the time for appeal had passed, they filed a motion to reopen the time for filing an appeal under Federal Rule of Appellate Practice 4(a)(1)(B). *Id.* The district court denied the motion, finding that American Boat had not overcome the presumption that the order had been delivered as indicated in the district court docket. *Id.* at 914. The court also denied two subsequent motions to reconsider. *Id.* at 912-13.

On appeal, the Eighth Circuit agreed that a presumption of delivery applies to e-mail, but concluded that American Boat had produced sufficient evidence to warrant an evidentiary hearing to rebut that presumption. *Id.* at 914. The court observed that the ECF system was new and subject to "a certain number of 'glitches,'" and none of the attorneys (including one of the government's attorneys) had received a paper notice by mail. *Id.* Accordingly, the case was remanded to determine whether American Boat should be permitted to reopen the time to file an appeal.

Diane Bratvold
Rider Bennett, LLP
Minneapolis, Minnesota
dbratvold@riderlaw.com

Ninth Circuit

Standards for Mandamus, Old and New

***Kenna v. United States District Court for the Central District of California,* —- F.3d —, 2006 WL 156736 (9th Cir. (Cal.))**

When a statute confers the right to be "reasonably heard," it usually encompasses filing papers with the court, but the Ninth Circuit, in a case of first impression, held that the reference in the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(3), to the right of a victim to be "reasonably heard" before sentencing means the right to *speak aloud* in the courtroom – and the refusal of a district court to allow such speech was error.

Moshe and Zvi Leichner, father and son, swindled dozens of victims out of nearly $100 million, and both pled guilty on the same three counts. More than sixty of their victims submitted written impact statements and, at Moshe's sentencing hearing, several victims, including petitioner W. Patrick Kenna, spoke about "retirement savings lost, businesses bankrupted and lives ruined" by the crimes. The court then sentenced Moshe to 20 years in prison. When Zvi appeared for sentencing three months later, however, the court denied the victims the right to speak, essentially telling them that the court had heard it all before, even after one victim protested to the court that developments in the preceding 90 days had injured them further. Zvi received a sentence of only eleven years.

Kenna then petitioned for a writ of mandate under the CVRA, seeking an order vacating Zvi's sentence and directing the district court to allow victims to speak at the resentencing. The result was extraordinarily unusual – the Ninth Circuit not only granted the writ in a published opinion (written by Circuit Judge Alex Kozinski), it set forth standards for mandamus review unique to this statute and even stated that it was "in the process of promulgating procedures for expeditious handling of CVRA mandamus petitions" in the future. 2006 WL 156736 at 5.

As to the meaning of "heard," the court was impressed not by the ambiguous caselaw but by the legislative history, in which the sponsors stated that the statute's primary purpose is "to allow the victim to appear personally and directly address the court." Adopting this position, the court stated that "Limiting victims to written impact statements . . . would treat victims as secondary participants in the sentencing process. The CVRA clearly meant to make victims full participants." *Id.* at 4.

Having decided that the district court had erred in not allowing speech, the court turned to the question of whether this error justified mandamus relief. "We normally apply strict standards in reviewing petitions for a writ of mandamus, in large part to ensure that they not become vehicles for interlocutory review in

routine cases," the court stated. "To this end we grant the writ only when there is something truly extraordinary about the case. . . . This may well be such a case. . . ." *Id.* at 5. After all, the court noted, petitioner raised a question of first impression, the district court clearly erred and petitioner had no other means of vindication. But there was even more good news for petitioner: "[T]he CVRA contemplates active review of orders denying victim's rights claims *even in routine cases*. . . . [W]e *must* issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error." *Id.* at 5, emphasis added.

The court then turned to the scope of the remedy, holding first that it would be "imprudent and perhaps unconstitutional" to vacate Zvi's sentence without giving him an opportunity to respond. Accordingly, the court granted the petition, ordering the district court to deem timely a motion by any victim to reopen the sentencing and, if that motion is granted, to conduct a new hearing at which victims will have the right to speak.

Senior Circuit Judge Daniel M. Friedman took the unusual step of filing an opinion dubitante, agreeing that the writ should issue but expressing doubts about the "broad sweep" of the opinion. In particular, Judge Friedman was concerned about the inferences that a victim has an absolute right to speak at sentencing, no matter what the circumstances, and that the right to be "reasonably heard" does not allow a district court to impose "reasonable" limits on how many victims may speak at a given hearing.

Interlocutory Appeal; Qualified Immunity

***Kennedy v. City of Ridgefield,* 411 F.3d 1134 (9th Cir. 2005)**

Kimberley Kennedy brought a civil rights claim under 42 U.S.C. § 1983 against the city and a police officer after the officer's investigation of Kennedy's complaint about a neighbor was followed by the neighbor's breaking into her home, shooting her and killing her husband. The officer moved for summary judgment, claiming qualified immunity. The district court denied the motion, and the officer appealed.

Kennedy argued first that the Ninth Circuit had no jurisdiction to hear the appeal. As a general rule, interlocutory appeals from determinations of qualified immunity are permissible, and are *immediately* appealable when, as here, the defendant is a public official and the issue appealed is whether the facts demonstrate a violation of clearly established law. The court acknowledged an exception where there is a genuine issue of fact for trial, but found that this exception did not defeat jurisdiction here because the disputed facts were not the basis of the officer's appeal, but rather represented an "abstract issue of law relating to qualified immunity" falling within the court's jurisdiction. The court, concluding that the officer heightened the danger and acted with deliberate indifference to that danger, affirmed that he was not entitled to qualified immunity.

Appellate Jurisdiction and Discretionary Decisions

***Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005)**

This petition for review of a decision of the Board of Immigration Appeals turns on a review of decisions of the United States Attorney General. While 8 U.S.C. § 1252(a)(2)(B) precludes a direct review of the Attorney General's *discretionary* decisions, a court may consider the predicate legal issues as to whether the law was properly applied. Here, the question (whether an alien satisfied the continuous-presence requirement) is a factual inquiry guided by legal standards – and thus *a non-discretionary* decision, over which the court has appellate jurisdiction.

Diane R. Crowley
The Law Offices of Diane R. Crowley
Berkeley, California
drcrowley@juno.com

Tenth Circuit

Rule 58 — Separate Document Requirement

***Clymore v. United States*, 415 F.3d 1113 (10th Cir. 2005)**

The Tenth Circuit held that a notice of appeal was timely where a separate judgment was never entered in accordance with Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 58. This appeal arose out of the prisoner appellant's pro se motion for return of property seized as the result of his arrest. The district court granted summary judgment to the government on April 18, 2002, but failed to have its order entered as a separate judgment. Appellant filed two motions for reconsideration which were denied, and then filed his notice of appeal on September 19, 2002.

The government argued that the notice was untimely even if the first motion for reconsideration tolled the time for an appeal of the summary

judgment ruling. The court of appeals disagreed, noting that the time for appeal under Federal Rules of Appellate Procedure ("Fed.R.App.P.") 4(a)(1) and 4(a)(7) begins to run only after the entry of a separate judgment in accordance with Fed.R.Civ.P. 58. Under the version of Rule 58 in effect prior to December 1, 2002, orders not entered as judgments in a separate document remained appealable. The separate-document requirement could be waived to allow an appeal to go forward, but not to defeat appellate jurisdiction. The December 1, 2002, amendment of Rule 58 added a 150-day rule whereby a separate judgment is deemed entered 150 days from the entry of the order if the district court fails to otherwise file a separate document. The court of appeals did not have to decide which version of Rule 58 applied, because the notice of appeal was timely filed under either version.

Appellate Jurisdiction to Determine Lower Court's Jurisdiction

***In re: Marsha McQuarrie Lang*, 414 F.3d 1191 (10th Cir. 2005)**

The Tenth Circuit held that it did not have jurisdiction to address appellant's argument that the bankruptcy court's orders exceeded its jurisdiction where appellant's appeal to the intermediate-level Bankruptcy Appellate Panel (BAP) had been untimely. The appeal arose out of an adversary proceeding in which the bankruptcy court found the debt at issue to be nondischargeable and awarded a money judgment to the creditor against the debtor-appellant. Appellant's appeal to the BAP was untimely, so she sought an extension of time to file a second, timely notice of appeal. The bankruptcy court denied the motion because the appellant failed to show the *excusable* neglect required for such relief.

Appellant then filed a notice of appeal to the BAP regarding the bankruptcy court's denial of the motion for extension of time. The BAP affirmed that ruling, and appellant filed this appeal to the Tenth Circuit, attacking the bankruptcy court's jurisdiction to issue the original judgment in the adversary proceeding as well as its ruling regarding the motion for extension. Appellant argued that the issue of federal court jurisdiction could be raised at any stage of the proceedings.

The circuit court rejected this argument as an overgeneralization regarding the appealability of jurisdictional issues, emphasizing that "a court's threshold determination of its jurisdiction is a prerequisite to any judicial action." 414 F.3d at 1195. Therefore, the court of appeals was required to determine the scope of its own appellate jurisdiction before addressing any issue regarding the lower court proceedings, including the bankruptcy court's jurisdiction to enter judgment in the adversary proceeding.

In this case, appellant's appeal to the Tenth Circuit was limited to the issues raised by the bankruptcy court's denial of the motion for extension and the BAP's affirmation of that ruling. The court did not have jurisdiction to address the untimely-appealed merits of the adversary proceeding. "An unsuccessful motion to cure an untimely appeal cannot itself be the vehicle for review of the matter not timely appealed." *Id.* at 1196. This result was not affected by the fact that the untimely appeal was to the BAP rather than the Tenth Circuit – to hold otherwise would permit "a party to cure an untimely appeal to one court by appealing the resultant dismissal of that appeal to the next higher court while actually seeking review of the underlying ruling of the trial court." *Id.* Appellant's post-judgment motion for extension was a proper subject of appeal independent of the judgment. Having determined the proper scope of its appellate jurisdiction, the court adopted the BAP's decision affirming the denial of the motion for extension, and refused to reach any other issues raised in appellant's briefs.

Quick Practice Pointers

Under Fed.R.App.P. 38, sanctions must be requested by separate motion. *Nard v. City of Oklahoma City*, No. 04-6277, 206 U.S. App. LEXIS 24267 (10th Cir., Nov. 9, 2005) (unpublished) (court declined to consider one sentence request for sanctions set forth in answer brief). Even pro se litigants must comply with Fed.R.App.P. 28 regarding the content of briefs and demonstrate respect for the judicial system. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836 (10th Cir. 2005) (pro se appellant forfeited right to review by failing to make any citations to the appellate record or to relevant legal authorities; in addition, court declined possible discretion to explore merits of appeal where appellant's conclusory arguments unjustifiably and offensively attacked trial court's integrity).

Fed.R.Civ.P. 54(b) certification requires claim being appealed to be separate and distinct from claim remaining in trial court. *Jordan v. Pugh*,

425 F.3d 820 (10th Cir. 2005) (First Amendment challenge of federal regulation for vagueness was not sufficiently separate from challenge based on overbreadth; court of appeals lacked jurisdiction over improperly certified issue).

The appellant has the responsibility under Fed.R.App.P. 10 and Tenth Circuit rules to provide a sufficient record to determine all issues raised on appeal, including relevant evidence presented to the trial court by the appellee. *Sumler v. The Boeing Company*, 143 Fed. Appx. 925 (10th Cir. 2005) (unpublished) (court of appeals affirmed summary judgment for appellee where appellant failed to include appellee's exhibits to summary judgment briefing in appellate record).

Katherine Taylor Eubank
Fowler, Schimberg & Flanagan, P.C.
Denver, Colorado
K_eubank@fsf-law.com

D.C. Circuit

Finality for Purposes of Appeal; Attorney Work-Product Doctrine

***Judicial Watch, Inc. v. Department of Justice,* 432 F.3d 366 (D.C. Cir. 2005)**

The Department of Justice ("DOJ") appealed from the district court's orders requiring the DOJ to produce in response to a Freedom of Information Act ("FOIA") request "any reasonably segregable portion" of e-mail communications protected by the work-product doctrine. In rejecting the DOJ's argument that "defendants need not even *attempt* to separate factual material from documents protected by the work-product privilege," the district court emphasized that it was not dictating what, or even how much, information must be released. *Judicial Watch, Inc. v. DOJ,* 337 F. Supp.2d 183, 185 (D.D.C. 2004). The district court granted the DOJ's motion for stay pending appeal.

As a threshold matter on appeal, the D.C. Circuit panel rejected plaintiff Judicial Watch's claim that appellate review was premature. Judicial Watch contended that, because the orders required the DOJ to undertaken certain actions, the outcome of which was not yet known, the orders were neither final nor appealable. The panel reasoned that, because the orders required production of the e-mail communications in some redacted format, the district court had unequivocally rejected the DOJ's position regarding the scope of substantive protection afforded by the work-product doctrine under Exemption 5 of FOIA, codified at 5 U.S.C. § 552(b)(5).

On the merits, the D.C. Circuit clarified the controlling caselaw in the circuit and held that the attorney work-product doctrine, enunciated in Federal Rule of Civil Procedure 26(b)(3) and incorporated in Exemption 5 of FOIA, did not distinguish between factual and deliberative material. Accordingly, the court found that if the work-product doctrine applied, the entirety of a document's contents, *i.e.,* facts, law, opinions, and analysis, were all exempt from disclosure under FOIA.

In reaching its decision, the D.C. Circuit rejected the district court's conclusion that the circuit's law on the issue was "unclear," notwithstanding a statement in *Schiller v. NLRB,* 964 F.2d 1205, 1209 (D.C. Cir. 1992) stating that "the segregability requirement applies to all . . . documents and all exemptions in the FOIA." The panel determined that the *Schiller* decision did not speak clearly on the issue of segregation and was inconsistent with the law of the circuit as expressed in *Martin v. Office of Special Counsel,* 819 F.2d 1181, 1187 (D.C. Cir. 1987) and *Tax Analysts v. IRS,* 117 F.3d 607, 620 (D.C. Cir. 1997), decided post- *Schiller.*

Personal Jurisdiction over Foreign Persons

***Mwani v. Bin Laden,* 417 F.3d 1 (D.C. Cir. 2005)**

The D.C. Circuit held that the district court could exercise personal jurisdiction over defendants Osama bin Laden and al Qaeda, even though defendants' whereabouts or addresses were unknown, because plaintiffs perfected service of summons pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 4(f)(3), such service was authorized by the long-arm provision of Fed. R. Civ. P. 4(k)(2), and defendants had sufficient contacts with the United States. In so holding, the D.C. Circuit addressed Fed. R. Civ. P. 4(k)(2) for the first time.

Plaintiffs, all Kenyan victims or others injured by the August 7, 1998, truck bomb explosion outside the United States Embassy in Nairobi, Kenya, filed suit for compensatory damages and other relief against defendants pursuant to the Alien Tort Claims Act. The district court dismissed the action for lack of personal jurisdiction because plaintiffs failed to show, by the preponderance of the evidence, that defendants had sufficient contacts with the forum to permit exercise of jurisdiction under the District of Columbia's long-arm statute.

The D.C. Circuit reversed, finding that the district court erred in apply-

ing a preponderance of the evidence standard to the threshold jurisdictional question, and concluding instead that plaintiffs could make a *prima facie* showing of personal jurisdiction based on their pleadings, bolstered by such affidavits and such written materials as they could obtain. The panel determined that plaintiffs perfected service of summons pursuant to Fed. R. Civ. P. 4(f)(3) by publishing notices in local and overseas newspapers as directed by the district court. The panel also held that the Federal Rules of Civil Procedure's own long-arm provision, Fed. R. Civ. P. 4(k)(2), authorized the service of summons. The D.C. Circuit noted that this provision, enacted in 1993, corrected a gap in the enforcement of federal law. Prior to the rule's enactment, personal jurisdiction could not be exercised over nonresident defendants who had sufficient contacts with the United States to justify application of United States law, but who had insufficient contacts with any single state to support jurisdiction under state long-arm statutes.

Finally, the panel reasoned that plaintiffs made a *prima facie* showing that defendants had sufficient "minimum contacts" with the United States *as a whole* to satisfy due process given evidence that defendants had "engaged in unabashedly malignant actions directed to and felt in" the United States, including the orchestration of the Nairobi embassy bombings to "cause pain and sow terror" in the United States, the 1993 bombing of the World Trade Center, and other various plots to bomb targets in the United States.

Rebecca Womeldorf
Spriggs & Hollingsworth
Washington, DC
RWomeldorf@SPRIGGS.com

Federal Circuit

Choice of Law Regarding Provision in Consent Judgment

***International Rectifier Corp. v. Samsung Electronics Co., Ltd.*, 424 F.3d 1235 (Fed. Cir. 2005)**

In a case of first impression, the Federal Circuit held that issues concerning the award of attorney fees pursuant to a consent judgment provision are governed by regional circuit law and, if relevant, state law. The majority rejected plaintiff's argument that *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1299 (Fed. Cir. 2004) broadly held that all attorney fee awards in patent cases are governed by Federal Circuit law. The panel agreed with defendants that regional circuit law (in this instance, Ninth Circuit and California law) should apply here because interpretation of an attorney fee provision in a consent judgment was not unique to patent law. In so holding, the Federal Circuit relied on *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365-66 (Fed. Cir. 2001), in which the Federal Circuit applied regional circuit law to resolve a challenge of an arbitration fee award pursuant to a settlement agreement of a patent infringement dispute.

Standing

***Sicom Systems Ltd. v. Agilent Technologies, Inc.*, 427 F.3d 971 (Fed. Cir. 2005)**

The Federal Circuit affirmed the district court's dismissal of plaintiff's patent infringement action because plaintiff was not an "effective patentee" and therefore lacked standing to sue under the Patent Act. The Federal Circuit found that plaintiff's patent license was ineffective to support standing despite an explicit conveyance of the exclusive right to sue for commercial infringement of the patent. The Federal Circuit noted that a licensee has no standing to sue unless it holds all substantial rights to the patent.

Plaintiff argued that having the exclusive right to sue commercial infringers was dispositive of the standing issue because it could bring suit on its own without joining the licensor as a necessary party. Defendants argued that plaintiff had no substantial rights to the patent because defendant did not own the patent and was not the licensor.

In determining whether plaintiff had been assigned all substantial rights to the patent, the Federal Circuit weighed the rights transferred to plaintiff versus those retained by the patent owner. The Federal Circuit found that the patent owner transferred fewer than all substantial rights to plaintiff because the owner retained the right to sue for non-commercial infringement, required plaintiff to obtain its consent on certain actions, including settlement of litigation, and prohibited plaintiff from sublicensing or assigning rights without prior approval. Accordingly, the Federal Circuit concluded that plaintiff had no standing to sue under the Patent Act absent joinder of the patent owner.

Rebecca Womeldorf
Spriggs & Hollingsworth
Washington, DC
Rwomeldorf@SPRIGGS.com

Style Points for Exemplary Briefs: A Former Court Attorney's View

Matthew S. Lerner
Goldberg Segalla LLP
Albany, New York
mlerner@goldbergsegalla.com
http://nylaw.typepad.com

One attribute that sets an excellent brief apart from a good brief is the writer's attention to certain style points. Points of style are often a matter of a judge's writing idiosyncrasies; they are usually unwritten and informal. These style points seem negligible in isolation; however, attention to these details provides more support and credibility to your argument in a judge's or clerk's subconscious. The following discussion contains a few of the more common style points that have stuck with me from my clerkship with the New York Court of Appeals.

A brief writer's obvious goal is to avoid offending his or her audience, yet doing so is not uncommon. This offensive writing often appears when the writer is discussing the case's procedural posture, as well as analogizing or distinguishing the procedure of other cases. In describing how the case has made its way up to the appellate level, writers frequently refer to the court or courts below as "lower" courts. Albeit a picayune point, its impact resonates. Describing the *nisi prius* court or intermediate appellate court as "lower" implies inferiority and might unintentionally convey a lack of respect for the judges' fellow jurists. Frequently, the judges of the court to which you are arguing were previously judges on the courts below. You can easily avoid an unintentional slight by denominating the court as "the court below" or just simply stating the court's official name.

Another practice that conveys a lack of respect to judges is the excessive use of emphasis on words or sentences, *i.e.,* bolding, italicizing, underlining or the excessive use of exclamation points. I unfortunately saw, and still see, writers who use more than one device to emphasize a word or sentence.

A writer's occasional underline of a particular word or phrase in a statute or regulation can prove effective. However, writers who emphasize large sections of their briefs offend and annoy judges and their clerks in two ways. First, the excessive emphasis insults the readers by implying that they were not paying attention until encountering the emphasized passage. Second, excessive emphasis often equates to stylistically weak writing. The habit frequently undercuts rather than strengthens the point, distracting the reader. You can just as easily call attention to an argument's nuances or important points through clear, concise writing. A well-reasoned argument contained in a crafted sentence will, no doubt, have more impact on the reader than the overuse of punctuation, underlining, or bolding.

A writer's use of words that demand how the court will act in that particular case also borders on disrespect. Our role as attorneys is persuading courts with cogent arguments, not dictating orders to the courts. Therefore, the use of phrases such as, "the court must reverse the trial court's holding" is not only empty, but also offensive. You will fare better by using words such as "should" in arguing a particular position. This more reserved language demonstrates deference to the court without appearing ambivalent or weak.

A writer's use of hyperbolic terms similarly provides empty phrases and a lack of analysis. Some writers attempt to strengthen their point by stating that the issue or conclusion is "clear" or "obvious." Those words provide no help to judges or their clerks because the sentences in which those words are usually contained are frequently unsupported and sometimes incorrect. This point is best demonstrated within the context of a certiorari motion or an argument to a state's highest court. In most cases, the court would not be considering the issue unless it was unclear or unsettled. The use of those empty phrases not only wastes precious space in the brief; it also gives the impression that the

writer does not truly understand the issue or its larger implications.

Writers also waste valuable brief space by using clichés as part of their arguments. There are many dangers to using clichés in a brief. First, they are generally expressions that provide little support to the argument. Second, many clichés and quotes have been bastardized and, more often than not, are quoted incorrectly. A misquoted cliché is sometimes viewed as a humorous, innocent mistake; more frequently it detracts from the writer's credibility. Finally, except in the most appropriate places, the use of clichés can convey an informal tone to otherwise formal writing. Unless the cliché is right on target, you should avoid using it.

On a similar point, a writer's use of obscure and ancient legal sources to impress the court usually backfires. During my clerkship, a citation to Lord Coke or William Blackstone was rarely helpful in deciding a nuance on a legal issue. The quotations were usually not on point and appeared disingenuous. Indeed, a quotation from a more recent, relevant case carries more currency than an archaic allusion that is remotely tied to the issue.

During my clerkship, I saw a number of rhetorical questions throughout the pages of many briefs. These rhetorical questions were rarely used effectively. As a general rule, a brief's purpose is to answer a court's questions, not provide them with more questions. Writers frequently used rhetorical questions to point out the inconsistencies or illogical results of their adversary's argument. However, a better technique might be to set forth in a declarative sentence why your adversary's argument will lead to logical inconsistencies or unintended consequences. A declarative sentence provides the court with a definite position on the point.

Throughout our careers, we appellate attorneys constantly strive to learn the art of writing the perfect brief. Attention to these and other small style points will help us achieve that elusive goal. The courts will certainly appreciate our attention to detail.

The law is not so much carved in stone as it is written in water, flowing in and out with the tide.
— Jeff Melvoin

John Bailey's *The Lost German Slave Girl*

Roger W. Hughes
Adams & Graham, L.L.P
Harlingen, Texas
rhughes@adamsgraham.com

I almost passed this book by. I bought it only because I thought it would survey the laws and legal systems supporting slavery in the antebellum South, something the author states was his original project. Bailey's preface states he changed course when his research turned up a celebrated 1844 lawsuit in New Orleans over whether Mary Miller, a local slave girl, was actually Salome Muller, a German immigrant. Reading the case file galvanized Bailey to write a complete history of the parties that illuminates the slave-owning system and New Orleans society in a way that a treatise could not. Once I resisted my dislike for "dramatized" histories, I found one that intertwined intense personal struggle in the legal system of slavery with how lawyers used trial and appellate skills to vindicate rights.

In 1843, a German immigrant thought she recognized Mary Miller, a slave working in a New Orleans cabaret, as Salome Muller, the daughter of the immigrant's childhood friend in Germany. The meeting was more than seeing her friend's likeness in a slave girl. Extreme poverty in Germany in 1816 led a large group of Germans to sell themselves as indentured servants for passage to New Orleans. The boat's provisions were poor and many died onboard. The final outrage came when the boat docked in New Orleans. The boat captain literally locked them onboard so that he could sell (or "redeem") their contracts to plantations to pay for the voyage. Families faced either starvation or being split up. The German residents of New Orleans protested greatly, but the legal system could do little. Eventually, the Muller family was split up and "redeemed" to various plantations.

Mary Miller's light skin and birthmarks fit Salome Muller's description. When friends of the Muller family from the voyage declared her to be Salome, the entire German community rose up to support her bid for freedom — a dangerous act because harboring a fugitive slave was a crime.

She changed her name to Sally Miller and sued her owner to be declared white and born free. While such suits were common in the South, this one was incendiary.

Miller's current owner had bought her from John Fitz Miller, a rich plantation and mill owner. Fitz Miller came from a wealthy Philadelphia family and had made his own fortune in New Orleans from construction and speculation. He claimed he purchased Mary Miller from a traveling slave merchant and gave her to his mother. Later, his mother sold her back to him and he sold her to the cabaret owner.

Sally Miller's allegations devastated Fitz Miller. First, selling a white woman into slavery was a serious crime, much as child molestation is today. Second, the charge involved his mother, thereby implicating his entire family. In short, the civil suit branded him and his family with a serious, degrading act. Naturally he hired the best lawyers money could buy in New Orleans.

The bench trial occurred in district court in New Orleans' Vieux Carre in May 1844. The courtroom was packed. The German community rallied to Sally Miller; the New Orleans' upper crust stood with Fitz Miller. Both parties faced a difficult battle. Sally Miller's claims depended on circumstantial evidence about which plantations "redeemed" the Muller family members and testimony from immigrants that she resembled Salome and her mother. Against this, Fitz Miller had his own problems. His paper trail on buying Mary Miller was weak and the traveling merchant had disappeared. Important witnesses died or disappeared during trial.

After a two-month trial, the judge gave a lengthy judgment for Fitz Miller. As plaintiff, Sally had the burden to prove she was not born slave. The opinion's tone was conciliatory to the German community, but it concluded that the plaintiff's evidence was largely circumstantial, too weak to carry that burden.

The appeal was classic appellate strategy. Sally Miller's attorney buried himself in the Louisiana Supreme Court's law library, poring over opinions from its current justices. He dis-

covered an opinion from that court written while Louisiana was still a territory. This case stated every lawyer's favorite rule: a legal presumption. It held that if the putative slave appeared "white," a presumption existed that he or she was born free and the owner had to rebut with direct evidence the person was born of a slave woman. Her lawyer hammered the theme that this "presumption of freedom" should remain the law. The Chief Justice skewered Fitz Miller's lawyer in oral argument by forcing him to admit that Sally Miller indisputably appeared white and there was no direct evidence she was born of a slave woman. The ensuing reversal was an appellate lawyer's dream: in a case based on circumstantial evidence, a legal presumption saved the client from a life of slavery.

This celebrated victory had mixed results. Sally Miller was free and her case received national publicity; however, she lacked the money to sue to free her children. Fitz Miller spent large sums to clear his name in the court of public opinion and even tried a bill of review to vacate the judgment based on new evidence; after another celebrated trial, the same judge denied his petition for lack of evidence. His appeal was denied, but the Louisiana Supreme Court noted in dicta that he knew nothing of her German heritage.

Bailey concludes that an unbiased review of the evidence would lead a modern reader to conclude Sally Miller was not Salome Muller; nonetheless, he asserts that her true identity does not matter because she is an example to every woman who refuses to accept slavery. A slave woman's owner could sell her children. She could not legally be educated. In many states, rape laws did not protect her. Freedom was a deeply personal change in condition.

Sally Miller's attorney never questioned the slave laws or their basic tenets; the rule he advocated rested on the horror of slavery for a German girl rather than of slavery for any woman. Still, the system afforded Miller/Muller a door to freedom, one unlocked through her lawyer's skill and her own personal determination. I do not have to agree with the presumption-of-freedom's rationale to appreciate its consequences. Affirming the important value of human freedom, even when done within a system that upholds slavery, can have important results that endure after that system ends.

We shall never understand one another until we reduce the language to seven words.
— Kahlil Gibran

SUBCOMMITTEE REPORT

Appellate Advocacy Amicus Subcommittee

During the past year the Amicus Subcommittee continued to recruit new members who are willing to write amicus briefs. We also had the opportunity to inform DRI's Amicus Committee of an important standing issue from the Sixth Circuit and the committee sought our assistance on several projects. The subcommittee continues to be ready to assist in drafting and filing any amicus briefs that DRI may choose to file and looks forward to working DRI in 2006.

Nancy Ciampa, Chair
Carlton Fields, P.A.
Miami, FL
nciampa@carltonfields.com

Former Committee Chair Mike Wallace Nominated to U.S. 5th Circuit

On February 8, 2006, President Bush nominated Michael B. Wallace to a seat on the United States Court of Appeals for the Fifth Circuit.

For years, Mike has been actively involved in the DRI Appellate Advocacy Committee. He served as committee vice-chair from 2001-2003, and as chair from 2003-2005. Twice, he has served on the faculty of the DRI Appellate Advocacy Seminar. At the March 2000 seminar, held in New Orleans, he gave a presentation on whether and how to seek a new trial. And at the October 2001 seminar, held in San Francisco, he gave a presentation on techniques for managing a voluminous appellate record.

Mike received his B.A. from Harvard University in 1973, and his J.D. from the University of Virginia in 1976. From 1976 to 1977, he clerked for Mississippi Supreme Court Justice Harry Walker, and from 1977 to 1978, he clerked for U.S. Supreme Court Associate Justice William Rehnquist. From 1980 to 1983, he served as counsel to Trent Lott, who was then Republican Whip of the United States House of Representatives. In 1984, President Reagan appointed him as a director of the Legal Services Corporation, which he served as chairman from 1989-1990. In 1999, he served as Special Impeachment Counsel to Senator Lott for the impeachment trial of President Clinton. Since 1986, he has been a partner of Phelps Dunbar LLP in Jackson, Mississippi, practicing in the areas of appellate litigation, commercial litigation, and regulatory and governmental matters.

We congratulate Mike on his nomination, and wish him good luck and lots of friendly questions during the Senate confirmation hearings, expected to occur within the next few months.