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## An Annotated Bibliography on Federal Appellate Practice and Procedure

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLES

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### AN ANNOTATED BIBLIOGRAPHY ON FEDERAL APPELLATE PRACTICE AND PROCEDURE\*

Thomas E. Baker\*\*

The materials in this bibliography are arranged by: treatises; textbooks; studies and books; manuals; symposia; and articles and annotations. The articles and annotations are grouped topically. Works are listed alphabetically by author. Especially important sources for studying and understanding appellate jurisdiction are noted with an asterisk. Each entry appears only once even if it might fit into more than one category.

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\* This annotated bibliography is derived, with permission, from Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeals* (2d ed., Fed. Jud. Ctr. 2009), but this version is substantially expanded and revised. The earlier version can be found at [http://www.fjc.gov/public/pdf.nsf/lookup/primjur2.pdf/\\$file/primjur2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/primjur2.pdf/$file/primjur2.pdf) (accessed June 11, 2009; copy on file with Journal of Appellate Practice and Process).

\*\* Professor of Law, Florida International University College of Law; coeditor of *Appellate Courts: Structures, Functions, Processes, and Personnel* (2d ed., Lexis-Nexis Publishing Co. 2006) (with Daniel J. Meador & Joan E. Steinman); Fellow, American Academy of Appellate Lawyers.

The author thanks the following student research assistants: Alberto Alonso, Rigers Gjyshi, Stephanie Novak, and Michelle White. Brooke Terpenning deserves special appreciation for her painstaking efforts at formatting and cite checking. Thanks also go to Jan Stone and Janet Reinke in the FIU law library, for their good-natured assistance, and Fred Dingley at the College of William & Mary, for his determined initiative to update this research while the author was a visiting professor there.

## I. TREATISES

\* James Wm. Moore & Daniel R. Coquillette, *Moore's Federal Practice* (3d ed., Matthew Bender 1997): 33 vols.; once considered the preeminent treatise on federal jurisdiction and procedure; volumes 19 and 20 cover appeals to the courts of appeals, but the treatise is better for issues on district court jurisdiction; organization and presentation of material are not up to earlier editions; still comprehensive; a good place to begin research.

Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed., Aspen Law & Business 2002 & Supp. 2007): 3 vols.; once considered the preeminent treatise; primarily devoted to administrative law, but also covers administrative procedure.

Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance and Procedure* (3d ed., West Group 1999): 5 vols.; an up-to-date analysis and synthesis of constitutional law; a superior resource on the constitutional aspects of federal jurisdiction; the popular one-volume student hornbook is keyed to this treatise.

\* Charles Alan Wright, Arthur R. Miller & Andrew D. Leipold, *Federal Practice & Procedure* (4th ed., Thomson West 2008): 78 vols.; the best and most usable multi-volume treatise on federal courts; updated continuously with supplements; volumes 15A, 15B, 16, and 16A cover the courts of appeals; each section amounts to a knowledgeable and thorough lecture on the topic with comprehensive and exhaustive citations; the sixth edition of Wright & Kane's student hornbook (2002) is a masterful highlight of this set.

## II. TEXTBOOKS

\* Ruggero J. Aldisert, *The Judicial Process—Text, Materials and Cases* (2d ed., West Publ. Co. 1996): a thoughtful jurist examines his craft; a mixture of jurisprudence and procedure.

Lea Brilmayer & Jacob Corre, *An Introduction to Jurisdiction in the American Federal System* (Michie Co. 1986): designed as a student guide to some of the more esoteric questions of jurisdiction.

Robert C. Casad & William B. Richman, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (3d ed., Lexis Law Publg. 1998 & Supp. 2006): a comprehensive treatment of all aspects of district court jurisdiction in civil actions, including constitutional limits and rules of procedure; very thorough on the original jurisdiction of the district courts.

\* Gregory A. Castanias & Robert H. Klonoff, *Federal Appellate Practice and Procedure in a Nutshell* (Thomson West 2008): a practical overview of federal appellate procedures; a useful student guide; a concise reference for attorneys.

Erwin Chemerinsky, *Federal Jurisdiction* (5th ed., Aspen Publishers 2007): a discussion of the law and policy involved with current jurisdictional issues; focus is more on the district court level and federal-state issues; a comprehensive and thorough student guide written by a masterful teacher and prolific academic.

Robert M. Cover, Owen M. Fiss & Judith Resnik, *The Federal Procedural System: A Rule and Statutory Source Book* (Foundation Press 1991): an innovative casebook that takes a theoretical approach to understanding federal court jurisdiction; a post-modern, meta-theory approach.

David P. Currie, *Federal Courts—Cases and Materials* (4th ed., West Publg. Co. 1990): an effort at modern organization to emphasize major contemporary themes such as civil rights jurisdiction; note materials seek to deepen analysis; includes a statutory appendix.

Donald L. Doernberg, C. Keith Wingate & Donald H. Zinger, *Federal Courts, Federalism and Separation of Powers* (3d ed., West Group 2004): a comprehensive and thorough casebook with a traditional approach.

William N. Eskridge, Jr., Philip P. Frickey, Henry Melvin Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (rev. ed., Foundation Press 1994): a re-publication of a classic law school text that defined process jurisprudence as a school of legal thought.

\* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (5th ed., Foundation Press 2003): more than a casebook, an encyclopedic reference work, packed with history and theory; an exhaustive treatment of the federal courts in a new 1,638-page edition.

Howard P. Fink, Linda S. Mullenix & Mark V. Tushnet, *Federal Courts in the 21st Century* (3d ed., LexisNexis 2007): a blend of history and constitutional law with practice and procedure; a casebook that describes the current state of the federal courts and considers their future.

Arthur D. Hellman & Lauren K. Robel, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* (LexisNexis 2005): comprehensive and unified treatment of litigation of federal issues in state courts and in federal courts; this casebook includes cases, notes, questions and problems.

Peter W. Low & John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* (5th ed., Foundation Press 2004): a modern treatment that de-emphasizes procedure and emphasizes themes of federalism; provides extended notes; includes a thorough bibliography of secondary authorities.

Robert J. Martineau, Kent Sinclair, Michael E. Solimine & Randy J. Holland, *Cases and Materials on Appellate Practice and Procedure* (2d ed., Thomson West 2005): a casebook on

appellate practice and procedure with an emphasis on appellate litigation.

\* Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* (2d ed., LexisNexis 2006): a comprehensive course book on all aspects of appellate practice and procedure; includes detailed chapters on the United States Courts of Appeals and the Supreme Court.

James William Moore, *Moore's Federal Practice Rules Pamphlet Part I* (Matthew Bender): a handy desk reference of rules and statutes published annually.

Linda S. Mullenix, Martin H. Redish & Georgene M. Vairo, *Understanding Federal Courts and Jurisdiction* (Matthew Bender 1998): a concise student handbook on federal courts and federal procedure.

John E. Nowak & Ronald D. Rotunda, *Constitutional Law* (7th ed., Thomson West 2004): a handbook keyed to the author's multi-volume treatise; helpful on the constitutional aspects of federal court jurisdiction.

James E. Pfander, *Principles of Federal Jurisdiction* (Thomson West 2006): a law student hornbook; provides up-to-date explanations of the leading principles of federal jurisdiction.

Richard J. Pierce, Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process* (4th ed., Foundation Press 2004): a student hornbook that is an abbreviated version of, with citations to, the multi-volume treatise; a ready introduction to administrative procedures.

Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (2d ed., Michie Co. 1990): a collection of essays on federal-state issues; a much cited and thoughtful treatment by a leading scholar of the federal courts.

Martin H. Redish & Suzanna Sherry, *Federal Courts, Cases, Comments and Questions* (6th ed., Thomson West 2007): a comprehensive casebook that includes the latest court decisions and scholarly literature.

Thomson West, *Federal Rules of Civil Procedure: 2008-2008 Educational Edition* (Thomson West 2008): a handy desk reference of rules and statutes.

Laurence H. Tribe, *American Constitutional Law* (3d ed., Foundation Press 2000): an original synthesis from the author's orientation; a good resource for constitutional limits on federal court jurisdiction; the author has since abandoned his plan for a second volume.

Michael L. Wells, William P. Marshall, & Larry W. Yackle, *Cases and Materials on Federal Courts* (Thomson West 2007): up-to-date casebook by three leading federal courts scholars; emphasizes broad constitutional themes.

\* Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* (6th ed., West Group 2002): modestly intended as a hornbook for law student use, but one of the most frequently-cited texts in judicial opinions; includes references to the multi-volume treatise that is one of Charles Alan Wright's great testaments as a scholar; if a library could buy only one federal courts volume, this would be it.

Charles Alan Wright, John B. Oakley & Debra Lyn Bassett, *Federal Courts Cases and Materials* (12th ed., Foundation Press 2008): traditional casebook that emphasizes jurisdiction and procedure; notes are sparse; mostly opinions; teaches the subject of federal courts for lawyers.

### III. STUDIES AND BOOKS

\* Administrative Office of the U.S. Courts, Annual Reports of the Director of the Administrative Office of U.S. Courts: detailed statistics; available over time for comparisons and trend

analyses; the mother lode of stats; enough to satisfy any federal court wonk.

American Bar Association, Action Commission to Reduce Court Costs and Delay (1978): proposed several intramural procedural reforms to make appellate procedure more efficient and less judge-labor intensive; relied on the belief that appellate judges could do more work, if they worked more efficiently; issued subsequent reports and research findings intended to reduce court costs and delays, including *Final Report of the Action Commission to Reduce Court Costs and Delay* (ABA 1984), and *Project Reports and Research Findings Supporting The Final Report of the Action Commission to Reduce Court Costs and Delay* (ABA 1984).

American Bar Association Standing Committee on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth* (ABA 1989): expressed concern that the seemingly inexorable trend towards more appeals of greater complexity would overwhelm the courts of appeals; urged continued study; encouraged consideration of various proposals addressing intercircuit conflicts, limited en bancs, subject matter panels, and appellate case management techniques.

American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (ABA 1994): comprehensive standards dealing with all aspects of appellate procedure.

American Bar Foundation, *Accommodating the Workload of the United States Courts of Appeals* (Am. Bar Found. 1968): expressed concerns for growing appellate caseload; recommended various intramural procedural reforms to increase efficiency; contemplated splitting circuits and adding judgeships.

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (ALI 1969): one of the earliest studies of the modern federal court system;



recommended that a narrowing of subject matter jurisdiction at the district court level would result in a decrease in the case load demand at the appellate level.

Carl Baar, *Judgeship Creation in the Federal Courts: Options for Reform* (Fed. Jud. Ctr. 1981): a study of the steps in the decisionmaking to create new federal judgeships.

\* Thomas E. Baker, *Rationing Justice on Appeal: the Problems of the U.S. Courts of Appeals* (West Publ. Co. 1994): a comprehensive study by the author of this bibliography; surveys the literature on the courts of appeals; chronicles studies and proposal for reform.

Deborah J. Barrow, Gary Zuk & Gerard S. Gryski, *The Federal Judiciary and Institutional Change* (U. Mich. Press 1996): a political science account of the partisan and institutional changes on the federal bench.

Lawrence Baum, *The Puzzle of Judicial Behavior* (U. Mich. Press 1997): a pioneering work in the field of judicial behavior.

Gordon Bermant, Patricia A. Lombard & Carroll Seron, *The Cases of the United States Court of Appeals for the District of Columbia Circuit* (Fed. Jud. Ctr. 1982): examines the relative judicial and administrative burdens produced by various case types in the D.C. Circuit; the study confirms that the burden arising from the quantity of material presented to the court for consideration is greater in administrative agency cases than in other case types.

Gordon Bermant, Edward Sussman, William W. Schwarzer & Russell R. Wheeler, *Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications* (Fed. Jud. Ctr. 1993): tracks the debate over capping the size of the federal judiciary by limiting the number of authorized judgeships.

\* Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale U. Press 1921): a classic account of how an appellate judge decides; written by an historic Justice of the Supreme Court who previously sat with great distinction on a state high court.

\* Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* (West Publ. 1976): a classic scholarly account of appellate courts, their history and development; published after a national conference in 1975.

Joe S. Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project* (Fed. Jud. Ctr. 1985): describes the series of procedural innovations adopted by the Ninth Circuit from 1980 to 1982.

Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (Fed. Jud. Ctr. 1987): study of the summary calendar.

Jonathan M. Cohen, *Inside Appellate Courts: the Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* (U. Mich. Press 2002): analyzes how the courts of appeals adapted to increasing workloads; explores the idea of judicial culture in those courts.

\* Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* (W.W. Norton 1994): an insightful account of how appellate courts function; written by one of the leading appellate jurists of his generation.

Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (1973) (reprinted in 62 F.R.D. 223): the “Hruska Commission” report, part I; recommended various intramural reforms to improve the efficiency of appellate procedures.

Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations*

*for Change* (1975) (reprinted in 67 F.R.D. 195): the “Hruska Commission” report, part II; recommended the creation of a new national court of appeals to decide appeals referred from the Supreme Court and appeals transferred from the courts of appeals; the division of the Fifth Circuit and the creation of the Eleventh Circuit, in 1981, can be traced to this report.

\* Commission On Structural Alternatives for the Federal Courts of Appeals, *Commission on Structural Alternatives for the Federal Courts of Appeals: Final Report* (1998): popularly-known as the White Commission after its chair, Justice Byron White; congressionally-created; reported on proposals to divide the Ninth Circuit; analyzed proposals for revising the appellate structure of all the courts of appeals.

Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford U. Press 2007): comprehensive study; includes bibliographical references.

Department of Justice Committee on Revision of the Federal Judicial System, *The Needs of the Federal Courts* (1977): recommended some reductions of original jurisdiction; proposed the creation of administrative courts under Article I to hear appeals from federal agencies.

William Domnarski, *In the Opinion of the Court* (U. Ill. Press 1996): an exploration of the reporting and writing of judicial opinions.

Samuel Estreicher & John Sexton, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* (Yale U. Press 1986): a comprehensive assessment of the federal appellate court system, with an emphasis on the role of the Supreme Court.

*The Federal Appellate Judiciary in the Twenty-first Century* (Cynthia Harrison & Russell R. Wheeler, eds., Fed. Jud. Ctr. 1989): as its title suggests, contemplates what the new century will bring for the federal appellate courts; an edited book of essays by lawyers, judges, and academics.

\* Federal Courts Study Committee, Judicial Conference of the United States, *Report of the Federal Courts Study Committee* (1990): this committee was appointed by Chief Justice Rehnquist at Congress's request in response to increasing delays in processing cases due to quickly increasing caseloads; the report sets out the committee's description of problems, and its proposed structural and managerial reforms to the federal court system; summarizes relevant figures underlying their proposals; a separate volume (Part III of the report) has more detailed analysis and background memoranda written by staff and consultants.

Federal Judicial Center, *Appellate Court Caseweights Project* (Fed. Jud. Ctr. 1977): an attempt to develop estimates of relative workload in the courts of appeals without detailed timekeeping by judges; the experiment had judges estimate the relative workload associated with various appeal types, and their estimates were used to calculate case weights; concluded that the weighted caseloads produced by this method were not useful measures of appellate workload; cautioned that the method could not be adequately assessed given the inconsistencies in the appellate court statistical reporting.

Federal Judicial Center, *Central Legal Staffs in the United States Courts of Appeals: A Survey of Internal Operating Procedures* (Fed. Jud. Ctr. 1978): a discussion of the use of staff attorneys in each court, based on reports prepared by senior staff attorneys.

Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court* (Fed. Jud. Ctr. 1972) (reprinted in 57 F.R.D. 573): the "Freund Committee" report; championed the creation of a new national court of appeals that would screen petitions for certiorari to the Supreme Court and decide conflicts among the circuits; the proposal was controversial and nothing came of it.

Federal Judicial Center, *Template for Chief Circuit Judges' Deskbooks* (Fed. Jud. Ctr. 2001): responding to requests from chief judges and as a follow-up to a 2000 conference for

appellate judges, the FJC developed this common template that each circuit could use to develop its own deskbook for the chief judge; provides a comprehensive list of activities that chief judges perform in the administration of the courts of appeals.

Steven Flanders & James E. Langner, *Comparative Report on Internal Operating Procedures of United States Courts of Appeals* (Fed. Jud. Ctr. 1973): a description of procedures in six stages of the appellate process: notification, documentation, argumentation, decision, publication, and mandate; also describes procedures related to judicial conferences, councils, committees, and circuit executives; bar admission and regulation; court support personnel, staff attorneys, and libraries.

Jerry Goldman, *Measuring a Rate of Appeal* (Fed. Jud. Ctr. 1973): preliminary study; out of date.

Arthur D. Hellman, *Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem, Final Report: Phase I* (Fed. Jud. Ctr. 1991): reports on an empirical study of the uniformity in federal law across the circuits.

Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* (U. Va. Press 2006): investigates the circumstances when a judge is likely to write a separate concurring or dissenting opinion.

\* Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (Comm. On Long Range Planning 1995): the Third Branch developed and adopted this long range planning document.

David E. Klein, *Making Law in the United States Courts of Appeals* (Cambridge U. Press 2002): explores the legal and behavioral facets of how the courts of appeals are situated as an intermediate court of error correction.

Carol Krafka, Joe S. Cecil & Patricia Lombard, *Stalking the Increase in the Rate of Federal Appeals* (Fed. Jud. Ctr. 1995): a study of the increase in the number of appeals and the increase in the rate of appeals.

Ashlyn K. Kuersten & Donald R. Songer, *Decisions of the U.S. Courts of Appeals* (Garland Publ. 2001): outlines the structures and procedures of the courts of appeals; provides longitudinal data on litigants; utilizes statistical programs and databases; includes tables and charts.

Karl N. Llewellyn, *How Appellate Courts Decide Cases* (Brandeis Lawyers' Socy. 1951): a classic; included for its history and timelessness as well as out of a sense of nostalgia.

Thomas B. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (Greenwood Press 1978): describes how lawyers interact with appellate courts.

\* Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States* (Fed. Jud. Ctr. 1993): commissioned by Congress; hypothesizes various futures for the federal courts and contemplates the various proposals to reform them.

Judith A. McKenna, Laural L. Hooper & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* (Fed. Jud. Ctr. 2000): detailed consideration of intramural procedures of appellate case management, such as the screening, nonargument calendar, and decisions without published opinions.

Daniel J. Meador & Jordana S. Bernstein, *Appellate Courts in the United States* (West Publ. Co. 1994): compact handbook on the appellate courts, state and federal.

Rita M. Novak & Douglas K. Somerlot, *Delay on Appeal: A Process for Identifying Causes and Cures* (ABA 1990): evaluates the causes and cures for appellate delay against the ABA Standards for Appellate Courts.

*Judges On Judging: View from the Bench* (David M. O'Brien ed., 3d ed., CQ Press 2009): a collection of essays about appellate judging written by judges.

Anthony Partridge & E. Allan Lind, *A Reevaluation of the Civil Appeals Management Plan* (Fed. Jud. Ctr. 1983): an early study of case management procedures in the courts of appeals.

\* Richard A. Posner, *How Judges Think* (Harvard U. Press 2008): the smartest jurist of his generation not to have served on the Supreme Court focuses his considerable intellect on the craft of judging; an intellectual tour de force.

\* Richard A. Posner, *The Federal Courts—Challenge and Reform* (Harvard U. Press 1996): a successor edition—the subtitle to the prior edition was “Crisis and Reform”; one of the leading federal judges of this generation examines the workload and work ways of the federal courts with an emphasis on the courts of appeals.

Tim Reagan et. al., *Citations to Unpublished Opinions in the Federal Courts of Appeals* (Fed. Jud. Ctr. 2005): comprehensive study of the practice.

*Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Arthur D. Hellman, ed., Cornell U. Press 1990): a collection of essays analyzing the reforms taken by the Ninth Circuit in response to its unusually large caseload, and speculating on how useful those reforms could be for other federal courts of appeals.

Richard L. Revesz, *Distinctive Practices of the Second Circuit* (Found. Fed. B. Council 1989): examines the local legal culture of the Second Circuit.

William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals* (Fed. Jud. Ctr. 1982): early study of the use of unpublished opinions.

Christopher E. Smith, *Judicial Self-Interest: Federal Judges and Court Administration* (Praeger 1995): examines how judges develop judicial policies and how they go about reforming the courts.

Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, *Continuity and Change on the United States Courts of Appeals* (U. Mich. Press 2000): uses the National Science Foundation database of courts of appeals decisions; a comprehensive examination of the trends in appointments, changes in workload, increased levels of conflict, and regional differences among the courts of appeals.

Maxwell L. Stearns, *Appellate Courts Inside and Out* (Geo. Mason U. Sch. of Law 2003): law and economics working papers.

Donna Stienstra & Joe S. Cecil, *The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking: A View From the Tenth Circuit* (Fed. Jud. Ctr. 1989): these appellate ADR programs have been implemented in most, if not all, of the remaining circuits since this study.

Stephen L. Wasby, *Appellate Courts and Judicial Administration* (Inst. Ct. Mgt. 1981): study of judicial administration.

William L. Whittaker, *Comparative Study of the Internal Operations and Process of Three U.S. Courts of Appeals* (Fed. Jud. Ctr. 1972): summarizes and compares the local appellate procedures in three courts of appeals.



G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford U. Press 1976): one of the leading accounts of the formation and evolution of American judicial traditions.

G. Edward White, *The Appellate Opinion as Historical Source Material* (Am. Bar Found. 1971): a prominent legal historian examines judicial opinions as history.

Larry W. Yackle, *Reclaiming the Federal Courts* (Harvard U. Press 1994): a critique of how the courts have closed the door to the federal courthouse by invoking case or controversy doctrines such as standing.

#### IV. MANUALS

\* *Chambers Handbook for Judges' Law Clerks and Secretaries* (Fed. Jud. Ctr. 1994): a successor volume combining two separate previous volumes; provides an overview of chambers operations and the work of the federal courts; a nuts-and-bolts account.

\* Steven A. Childress & Martha S. Davis, *Standards of Review* (3d ed., Matthew Bender 1999): 2 vols.; the most thorough, comprehensive, and up-to-date treatment of standards of review; gives separate treatment for civil, criminal, and administrative matters.

\* Harry T. Edwards & Linda A. Elliot, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions & Agency Actions* (Thomson West 2007): describes the doctrinal frameworks informing the various standards of review; examines the relevant statutes and applicable rules of procedure; focuses on leading Supreme Court decisions.

Richard A. Givens, *Manual of Federal Practice* (5th ed., Lexis Law Publ. 1998): provides two good chapters on appellate practice and procedure; guides an attorney through the steps of an appeal.

\* Eugene Gressman, Robert L. Stern, Kenneth S. Geller & Stephen M. Shapiro, *Supreme Court Practice: For Practice in the Supreme Court of the United States* (9th ed., Bureau of Natl. Affairs 2007): the Bible of Supreme Court practice; provides a detailed treatment of review of courts of appeals; many topics are analogous to jurisdiction of the courts of appeals, such as finality and extraordinary writs.

Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (5th ed., LexisNexis 2005): 2 vols.; designed to guide the practitioner through the post-AEDPA world of habeas procedure; chapters 34-38 detail the appellate stages up to certiorari.

\* David G. Knibb, *Federal Court of Appeals Manual: A Manual on Practice in the United States Courts of Appeal* (5th ed., Thomson West 2007): a practical guide for attorneys who will be bringing cases to the U.S. courts of appeals; sections written in a Q&A format but with thorough answers; primarily covers procedural matters, but does devote some space to more substantive issues, such as standard of review.

Herbert Monte Levy, *How to Handle an Appeal* (4th ed., P.L.I. 1999): a good practitioner's guide to appellate jurisdiction and practice; additional emphasis on advocacy skills; chapter 11 is specifically devoted to the courts of appeals.

Frank O. Loveland, *The Appellate Jurisdiction of the Federal Courts* (W. H. Anderson Co. 1911): too far out of date to rely on, except for historical research.

Roy B. Marker, *Federal Appellate Jurisdiction and Procedure* (Callaghan & Co. 1935 & Supps. to 1938): too far out of date to rely on, except for historical research.

Robert J. Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* (Lawyers Coop. Publ. Co. 1983 & Supps. to 1994): "modern" connotes last twenty-five years; covered both state and federal civil appeals; scholarly and

practical; well researched, with extensive citations and cross-references; not being updated.

Paul P. O'Brien, *Manual of Federal Appellate Procedure* (Pernau-Walsh Print. Co. 3d ed. 1941): a compilation of rules and statute with brief commentary; out of date.

Roscoe Pound, *Appellate Procedure in Civil Cases* (Little, Brown & Co. 1941): provides an extensive history and comparative material; only one chapter devoted to the "present century"; presents proposals for reform; useful for perspective and history.

Thomas W. Powell, *The Law of Appellate Proceedings: in Relation to Review, Error, Appeal, and Other Reliefs Upon Final Judgments* (T. & J.W. Johnson & Co. 1872): noteworthy as the earliest attempt at a separate treatise on appeals; too far out of date to rely on, except for historical research.

\* George K. Rahdert & Larry M. Roth, *Appeals to the Fifth Circuit Manual* (Butterworth Legal Publishers 1977 & Supps. to 2005): 2 vols.; very comprehensive guidelines to appellate practice and procedure; detailed reference and synthesis to U.S. Code, Federal Rules of Appellate Procedure, local rules, internal operating procedures, etc.; cited here as being representative of other circuit-by-circuit manuals, written for practitioners, that provide valuable and quick reference.

\* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West 2008): a new masterpiece on appellate advocacy; the best stylist on the Supreme Court and the leading guru on legal usage collaborate to create an instant classic.

Standing Committee on Continuing Education of the Bar, American Bar Association, *Appellate Advocacy* (Peter J. Carre, Azike A. Ntephe & Helen C. Trainor eds., ABA Prof. Educ. Publications 1981): a collection of essays and speeches by lawyers and judges on appellate practice; a good compilation on the nature of the appellate process; little on jurisdiction.

Robert L. Stern, *Appellate Practice in the United States* (2d ed., Bureau of Natl. Affairs 1989): a comprehensive handbook on the appellate process, with emphasis on brief writing and oral argument.

Neva B. Talley-Morris, *Appellate Civil Practice and Procedure Handbook* (Prentice-Hall 1975): designed for the general practitioner; first part covers state systems and second part covers federal appeals; very basic.

\* Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* (3d ed., West Group 1999): current and thorough; the jurisdiction portion elaborates the important topics; presents well-chosen and helpful citations; coauthored by one of the premier appellate lawyers of this generation.

Paul G. Ulrich, *Federal Appellate Practice 9th Circuit* (2d ed., West Group 1999): 2 vols.; another example of the comprehensive reference books commercially available to attorneys taking appeals to the various courts of appeals.

Frederick Wiener, *Briefing and Arguing Federal Appeals*—with an appendix of late authorities including references to the Supreme Court's 1967 rules (Bureau of Natl. Affairs 1967): emphasizes appellate advocacy; the best treatment of its kind; regrettably dated; this is how a first-rate appellate lawyer viewed the appellate process.

\* Larry W. Yackle, *Postconviction Remedies* (Lawyers Coop. Publ. Co. 1981 & Cumulative Supp. to 2007): the writ of habeas corpus is pure procedure, and this is the best single volume on the great writ.

Elijah N. Zoline, *Federal Appellate Jurisdiction and Procedure* (Clark Boardman Co. . 2d ed. 1924): too far out of date to rely on, except for historical research.

## V. SYMPOSIA

\* *2005 National Conference on Appellate Justice*, 8 J. App. Prac. & Process 65 (2006): co-sponsored by the American Academy of Appellate Lawyers, Federal Judicial Center, and the National Center for State Courts; includes comprehensive statistical tables; selected presentations and addresses; this national conference brought together jurists, lawyers, and academics to consider the current state of appellate courts.

*Annual 10th Circuit Survey*, Den. U. L. Rev.: an annual symposium issue.

*Annual Review of Criminal Procedure Decisions of the Supreme Court and the Courts of Appeals*, Geo. L.J.: an annual symposium.

*The Bicentennial Celebration of the Courts of the District of Columbia Circuit*, 90 Geo. L.J. 545, 545-834 (2002): several articles describing the impact of the Court of Appeals for the District of Columbia on administrative law.

\* *Civil Appellate Jurisdiction: Part I*, 47 Law & Contemp. Probs., Issue 2 Spring 1984, at 1, 1-248; *Civil Appellate Jurisdiction: Part II*, 47 Law & Contemp. Probs., Issue 3 Summer 1984, at 1, 1-179: written in the form of a restatement of the law; Part I is a valuable research tool and able synthesis; Part II adds a comparative perspective to include Canada, France, and Germany.

*Eighth Circuit Survey*, Creighton L. Rev.: a regular feature.

*Eleventh Circuit Survey*, Mercer L. Rev.: an annual symposium issue.

*Federal Courts Law Review*: an electronic law review published on line; editorial board consists of U.S. magistrate judges and law school professors.

*Fifth Circuit Symposium*, Loy. L. Rev.: a regular feature.

*Fifth Circuit Survey*, Tex. Tech L. Rev.: an annual symposium issue.

*Ninth Circuit Survey*, Golden Gate U. L. Rev.: an annual symposium issue.

*Seventh Circuit Review*, Chicago-Kent L. Rev.: semi-annual online journal analyzing recent decisions of the Seventh Circuit.

\* *The Supreme Court \*\*\*\* Term*, Harv. L. Rev.: an annual symposium; each November issue is devoted to selected decisions from the preceding term.

Symposium, *Managing the Federal Courts; Will the Ninth Circuit be a Model for Change?* 34 U.C. Davis L. Rev. 315, 315-592 (2000): discusses the Ninth Circuit's experiences and their implication for the future operation of the federal courts of appeals in general.

Symposium, *Ninth Circuit Conference*, 48 Ariz. L. Rev. 221, 221-367 (2006): a symposium organized to discuss issues affecting the Ninth Circuit in particular, such as "limited" en banc rehearings, caseload, and reversals by the Supreme Court.

Symposium, *Restructuring Federal Courts*, 78 Tex. L. Rev. 1399, 1399-1866 (2000): a symposium discussing the effects that recent legislation such as the Anti-Terrorism and Effective Death Penalty Act (AEDPA) have had on judicial review of immigration and criminal appeals.

*Third Circuit Review*, Villanova L. Rev.: an annual symposium issue.

## VI. ARTICLES &amp; ANNOTATIONS

*A. Background and Overview*

*History of the courts of appeals; future of the courts of appeals; the principle of limited jurisdiction; rules of precedent.*

Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539 (1998): a comprehensive account of the doctrine complete with extensive citations of authority.

Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 Ga. L. Rev. 913 (1994): examines the many alternative proposals for revising the federal appellate structure to meet future needs for greater appellate capacity.

Paul D. Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C. L. Rev. 411 (1987): traces the history and function of civil appeals.

Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 Ga. L. Rev. 507 (1969): a general exploration of the relationship of federal trial court and appellate court.

Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267 (2005): comprehensive summary of standards of review on appeal.

Frank B. Cross, *Decisionmaking in the U.S. Courts of Appeals*, 91 Cal. L. Rev. 1457 (2003): applies various legal and political theories to the courts of appeals; the study concludes that legal and political factors are statistically significant determinants of decisions, with legal factors having the greatest impact, while strategic and litigant-driven factors have no significance.

Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeals* (Fed. Jud. Ctr. 2006): describes the ways in which videoconferencing is used in the courts of appeals.

Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705 (2006): a brief but thoughtful discussion of the history of Fed. R. App. P. 32.1, which allows attorneys to cite unpublished/nonprecedential opinions in their briefs.

Michelle Migdal Gee, *What Standards Govern Appellate Review of Trial Court's Conditional Ruling, Pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure on Party's Motion for New Trial*, 52 A.L.R. Fed. 494 (1981).

Alan R. Gilbert, *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. Fed. 274 (1978).

Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Affect" on the United States Courts of Appeals*, 32 Fla. St. U. L. Rev. 357 (2005): applies social science theories to try to explain the high percentage (approximately ninety percent) of affirmances in the courts of appeals.

Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541 (1989): analyzes Ninth Circuit decisions and concludes that its case law is not as inconsistent as has been claimed by some commentators.

Mark Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 Ariz. St. L.J. 395 (1987): a good discussion of removal-remand appealability.

Marie Leary, *Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals* (Fed. Jud. Ctr.



2002): this report was prepared at the request of the Judicial Conference Committee on Appellate Rules as they considered proposing a uniform rule on en banc voting procedures for the courts of appeals.

Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion*, 64 N.C. L. Rev. 993 (1986): a general and theoretical treatment of the relationship between trial court and appellate court.

Robert J. Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63 Marq. L. Rev. 163 (1979): a broad overview of the appellate process and components of that process; provides general citations.

Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023 (1987): a thoughtful and complete consideration of this critical issue for scope of review.

Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655 (1995): the author was the secretary to the Judicial Conference Standing Committee on Rules of Practice and Procedure of the United States Courts; provides a history of the rulemaking process for federal courts and describes the process today.

Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. Chi. L. Rev. 603 (1989): gives a brief history of the creation of non-regional, subject-specific courts of appeals; argues for the creation of more of these kinds of courts; uses caselaw data to show that some subjects are already concentrated in specific regional courts of appeals.

Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 Am. U. L. Rev. 581 (1992): the author, who was the Assistant Attorney General in the DOJ's Office for

Improvements in the Administration of Justice; offers an insider's history of the creation of the U.S. Court of Appeals for the Federal Circuit.

John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the “Clearly Erroneous Rule” Being Avoided?* 59 Wash. U. L.Q. 409 (1981): an evaluation of this rule from the perspective of a federal district judge.

Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* (Fed. Jud. Ctr. 2d ed. 2006): a reference guide on mediation and settlement conference programs in the thirteen federal courts of appeals.

Charles W. Nihan & Russell R. Wheeler, *Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures* (Fed. Jud. Ctr. 1982): describes how chief judges discharged their administrative responsibilities in the early 1980s; based on interviews with chief judges, circuit executives, and other court personnel.

Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. Rev. 573 (1997): suggests that the courts of appeals have evolved their procedures to a de facto certiorari system and recommends that it should be made a de jure system of discretionary appeals.

Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978): a general treatment of scope of review of discretion.

Jean F. Rydstrom, *Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for “Any Other Reason”*, 15 A.L.R. Fed. 193 (1973).

Bruce M. Selya, *Publish and Perish: The Fate of The Federal Appeals Judge in the Information Age*, 55 Ohio St. L.J.

405 (1994): First Circuit Judge Selya proposes reducing the number of officially published decisions in response to courts' increasing caseload.

Suzanna Sherry, *Logic Without Experience: The Problem of the Federal Appellate Courts*, 82 Notre Dame L. Rev. 97 (2006): discerns a subtle but contradictory trend in recent appellate decisions to expand federal jurisdiction while at the same time contract judicial discretion.

Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 Minn. L. Rev. 1363 (2006): examines the implications for the federal court system of the tendency of the Supreme Court to grant review in fewer and fewer cases.

Joan Steinman, *After Steel Co.: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 Wash. & Lee L. Rev. 855 (2001): focuses on the Supreme Court decision disapproving of the concept of hypothetical jurisdiction; explores some of the remaining questions left open.

Student Author, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351 (1961): examines various bases of review.

Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099 (2002): an overview of federal rulemaking procedure, including the Federal Rules of Appellate Procedure.

Carl Tobias, *A Divisional Arrangement of the Federal Appeals Courts*, 43 Ariz. L. Rev. 633 (2001): critiques a proposal to split the Ninth Circuit into regional divisions and to do the same for other Circuits should they reach a certain size.

John F. Wagner, Jr., *Construction and Application of Rule 60(b)(5) of Federal Rules of Civil Procedure, Authorizing Relief From Final Judgment Where Its Prospective Application Is Inequitable*, 117 A.L.R. Fed. 419 (1994).

*B. Procedures Related to the Exercise of Subject-Matter Jurisdiction*

*Derivative jurisdiction; scope of review; standing to appeal; sources of appeals; locus of appeals; notice of appeal; transferring appeals; miscellaneous procedures.*

Debra Lyn Bassett, “*I Lost at Trial—in the Court of Appeals!*”: *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 Hous. L. Rev. 1129 (2001): a critical examination of the phenomenon in the title.

Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1 (1989): looks at the first five years of the Federal Circuit’s case law and reviews its appellate procedures and sense of appellate jurisdiction.

*Effect of Filing of Notice of Appeal on Motion to Vacate Judgment Under Rule 60(b) of Federal Rules of Civil Procedure*, 62 A.L.R. Fed. 165 (1983).

Roger P. Freeman, *Sufficiency of “Designation” Under Federal Appellate Procedure Rule 3(c) of Judgment or Order Appealed from in Civil Cases by Notice of Appeal Not Specifically Designating Such Judgment or Order*, 141 A.L.R. Fed. 445 (1997).

Alan R. Gilbert, *Composition of Record on Appeal from District Court Under Rule 10(a) of Federal Rules of Appellate Procedure*, 33 A.L.R. Fed. 588 (1977).

Mark H. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399 (1986): discusses limitations on the time to appeal; criticizes the current approach to treat timeliness as jurisdictional.

Phillip E. Hassman, *Right of Class Member, in Class Action Under Rule 23 of Federal Rules of Civil Procedure, to Appeal from Order Approving Settlement with Class*, 30 A.L.R. Fed. 846 (1976).

Allan Ides, *The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed*, 143 F.R.D. 307 (1992): discusses the actions a district court can take in a case after the notice of appeal has been filed.

David A. Johns, *Construction of Provision in Rule 4(a) of Federal Rules of Appellate Procedure (Formerly Civil Procedure Rule 73(a)), Making an Exception as to Time for Filing Notice of Appeal from District Court to Court of Appeals in Civil Case "If the United States or an Officer or Agency Thereof is a Party"*, 9 A.L.R. Fed. 611 (1971).

Sara L. Johnson, *Effect of Party's Failure to File Timely Objections, Under 28 USCS § 636(b)(1), to Magistrate's Findings or Recommendations on Right of Review in Appellate Court*, 80 A.L.R. Fed. 921 (1986).

Janet Boeth Jones, *Tolling of Time for Filing Notice of Appeal in Civil Action in Federal Court Under Rule 4(a)(4) of Federal Rules of Appellate Procedure*, 74 A.L.R. Fed. 516 (1985).

Teresia B. Jovanovic, *Standing of Attorney to Appeal Federal Court Order Denying, or Limiting Amount of, Attorney's Fees to Client*, 72 A.L.R. Fed. 417 (1985).

Daniel A. Klein, *When Will Premature Notice of Appeal Be Retroactively Validated in Federal Civil Case*, 76 A.L.R. Fed. 199 (1986).

Marie Leary, *Analysis of Briefing Requirements in the United States Courts of Appeals* (Fed. Jud. Ctr. 2004): the FJC prepared this report to assist the Judicial Conference Advisory Committee on the Federal Rules of Appellate Procedure to evaluate reported problems with and potential amendments to Rules 28 and 32 on the content and cover of briefs.

Bruce I. McDaniel, *Plaintiff's Right to Appeal Adverse Judgment on One Cause of Action as Affected by Acceptance of*

*Remittitur on Another Cause of Action*, 41 A.L.R. Fed. 856 (1979).

Jonathan Remy Nash, *Resuscitating Deference to Lower Court Judges' Interpretations of State Law*, 77 S. Cal. L. Rev. 975 (2004): a brief history of federal appellate courts' standard of deference to district courts on interpretations of state law; concludes that such deference is well-ingrained.

Brian H. Redmond, *Jurisdiction of United States Court of Appeals for Federal Circuit Under 28 U.S.C.A. § 1292 and 1295*, 97 A.L.R. Fed. 694 (1990).

William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996): argues that the increased workload of the courts of appeals has effectively turned them into certiorari courts; calls for the creation of many more circuit judgeships.

Elizabeth I. Rogers, *The Phoenix Precedents: The Unexpected Rebirth of Regional Circuit Jurisdiction Over Patent Appeals and the Need for a Considered Congressional Response*, 16 Harv. J.L. & Tech. 411 (2003): analyzes developments in the case law that have allowed regional courts of appeal to re-establish jurisdiction over certain types of patent appeals from the Federal Circuit; argues that Congress should act to re-establish the Federal Circuit's jurisdiction over these matters.

Jean F. Rydstrom, *Appellate Review of Order Denying Extension of Time for Filing Notice of Appeal Under Rule 4(A) of Federal Rules of Appellate Procedure*, 39 A.L.R. Fed. 829 (1978).

Joan E. Schaffner, *Federal Circuit "Choice of Law": Erie Through the Looking Glass*, 81 Iowa L. Rev. 1173 (1996): critiques the Federal Circuit's choice-of-law doctrine that defers to regional courts of appeals law on legal issues not within their exclusive jurisdiction within cases; recommends that the Federal

Circuit exercise independent judgment on all issues within a case for which it has jurisdiction.

Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas*, 1994 Wis. L. Rev. 9 (1994): Ninth Circuit Judge Schroeder voices her concern that appellate courts are using procedural techniques so that they do not have to state what the law is on an issue.

Ralph V. Seep, *Sufficiency of "Specificity" of Designation of Parties to Appeal in Notice of Appeal Under Federal Rule of Appellate Procedure 3(c)*, 103 A.L.R. Fed. 648 (1991).

Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure—A Bridge Over Troubled Water—Or Just Another Trap?* 157 F.R.D. 587 (1994): discusses the amendments to the appellate rule; outlines the requirements for a notice of appeal; establishes the timeline for taking an appeal.

Joan Steinman, *Irregulars: the Appellate Rights of Persons Who Are Not Full-fledged Parties*, 39 Ga. L. Rev. 411 (2005): examines non-party appeals in various settings, such as class actions and shareholder derivative suits.

Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 Hastings L.J. 1337 (1998): survey of the case law regarding pendent appellate jurisdiction over interlocutory appeals.

Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Court*, 38 Ga. L. Rev. 813 (2004): a comprehensive treatment of standing to appeal and the right to defend a judgment in the courts of appeals.

Elizabeth Williams, *What Claims Fall Within Limitation Imposed by § 113(h) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42

*U.S.C.A. § 9613(h) on Judicial Review of Cases Arising Under CERCLA*, 116 A.L.R. Fed. 69 (1993).

### *C. Appeals from Final Decisions—Civil*

*Final decision requirement; collateral order doctrine; twilight zone doctrine; partial final judgments.*

*Appealability, Under 28 USCS § 1291, of Order Awarding or Denying Attorneys' Fees*, 73 A.L.R. Fed. 271 (1985).

Stuart Minor Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Tex. L. Rev. 269 (1999): analyzes the role facts play in jurisprudential tests; discusses how appellate courts should handle situations in which the facts have substantially changed since the case was heard at the trial court.

Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment through Voluntary Dismissal of Peripheral Claims*, 48 Mercer L. Rev. 979 (1997): examines how some courts of appeals have allowed appeals of some orders after the parties have obtained a voluntary dismissal of the remaining aspects of the case.

Carleton M. Crick, *The Final Judgment As a Basis for Appeal*, 41 Yale L.J. 539 (1932): explores the venerable common-law origins of the finality requirement.

Russell J. Davis, Annotation, *Necessity of Statement of Reasons Underlying District Court's Decision to Grant Certification Under Rule 54(b) of Federal Rules of Civil Procedure*, 32 A.L.R. Fed. 772 (1977).

Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292 (1966): decries laxity regarding finality brought on by statutory changes and changed judicial attitudes.



Loeb H. Granoff, *F.R.A.P. Rule 37—Postjudgment Interest—A Source of Continuing Confusion*, 176 F.R.D. 590 (1998): discusses circuit split in interpreting Fed. R. App. P. 37, involving interest on a judgment.

Michael D. Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 Cornell L. Rev. 207 (1984): a thorough exegesis on appealability issues concerning attorney's fees.

Wesley Kobylak, Annotation, *Appealability of Federal Court Order Denying Motion for Appointment of Counsel for Indigent Party*, 67 A.L.R. Fed. 925 (1984).

Mark A. Kromkowski and Jonathan J. Van Handel, Student Authors, *The Collateral Order Doctrine As Applied to Discovery Requests—the Third Circuit's Kelly v. Ford Motor Co.*, 73 Notre Dame L. Rev. 1119 (1997): examines how discovery orders can be appealed under the collateral order doctrine.

John P. Ludington, *Appealability of Orders in Government Civil Antitrust Actions*, 10 A.L.R. Fed. 607 (1972).

Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717 (1993): considers the desirability and efficacy of defining finality by court rulemaking.

Bruce I. McDaniel, *Appealability Under "Collateral Order" Doctrine of Order Staying or Dismissing, or Refusing to Stay or Dismiss, Proceedings in United States District Court Pending Federal or State Administrative Determination*, 40 A.L.R. Fed. 740 (1978).

Bruce I. McDaniel, *Order on Motion to Disqualify Counsel As Separately Appealable Under 28 USCS § 1291*, 44 A.L.R. Fed. 709 (1979).

John C. Nagel, Student Author, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 Duke L.J. 200 (1994): recommends that the Supreme Court exercise its rulemaking authority to define appealability for interlocutory appeals.

Peter M. Ossorio, Student Author, *Tightening the Collateral Order Doctrine*, 50 U. Mo. Kan. City L. Rev. 99 (1981): an analysis of the Supreme Court holding that a district court order denying a motion to disqualify opposing counsel does not create a right of immediate appeal, thus restricting the collateral order doctrine.

Troy Anthony Price, Student Author, *Appellate Procedure—Orders Disqualifying Counsel Are Not Immediately Appealable Under the Collateral Order Exception to 28 U.S.C. § 1291*, 8 UALR L.J. 531 (1986): a good treatment of this issue.

Milton Roberts, *Appealability of Discovery Order as “Final Decision” Under 28 USCS § 1291*, 36 A.L.R. Fed. 763 (1978).

Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23 (2005): the Reporter for the Advisory Committee on the Federal Rules of Appellate Procedure describes the history leading up to the proposal of FRAP 32.1, allowing citation of unpublished/nonprecedential opinions, and analyzes the arguments for and against the proposed rule; this article was published before the formal approval of the amendment, but it offers a good summary of much of the policy discussion surrounding this rule.

Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. Colo. L. Rev. 1 (1997): criticizes the increasing number of local rules created by the courts of appeals; suggests guidelines for determining when creating a local rule is proper; discusses means by which extraneous local rules can be stricken.

Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part I: Justiciability and Jurisdiction* (Original and Appellate), 42 UCLA L. Rev. 717 (1995): analyzes whether a party whose case has been consolidated with other, still-ongoing cases has an immediate right of appeal, and whether their time to appeal can be extended to match that of the consolidated other cases.

Student Author, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 Minn. L. Rev. 1247 (1980): an overview of this specialized court's jurisdiction.

Student Author, *Appellate Review of Stay Orders in the Federal Courts*, 72 Colum. L. Rev. 518 (1972): sketches the origins of the stay order—§ 1292(a) & (b); concludes that federal trial court discretion in granting or denying stays has been diminished.

Mitchell Waldman, *Application of "Fugitive Disentitlement Doctrine" in Federal Civil Actions*, 176 A.L.R. Fed. 333 (2002).

#### *D. Appeals from Interlocutory Orders—Civil*

*Entitled interlocutory appeals; permissive interlocutory appeals.*

Daniel J. Adelman, Student Author, *Time Is of the Essence: The Case for Amending 28 U.S.C. § 1292(b) to Permit Interlocutory Appeals in Criminal Cases*, 1986 Ariz. St. L.J. 727: a good discussion of the policy and practice of permissive interlocutory appeals.

Bergeron, Pierre H., *District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 Emory L.J. 1365 (2002): discusses the debate over how frequently interlocutory appeals should be made, and what system should be used to govern interlocutory appeals; argues that district courts should dismiss the case rather than

stay the proceeding when compelling arbitration to allow an immediate appeal.

John A. Bourdeau, *Appealability, Under 28 U.S.C.A. § 1292(a)(1), of Order Approving or Refusing to Approve Proposed Settlement*, 156 A.L.R. Fed. 575 (1999).

Kathleen Brame, Student Author, *Civil Procedure—Interlocutory Appeals: Orders Denying Disqualification of Counsel Are Not Appealable Pursuant to the Collateral Order Exception*, 56 Tul. L. Rev. 1035 (1982): a fairly comprehensive review of the topic.

Richard A. Campbell, Student Author, *Appealability of Orders Denying Attorney Disqualification—A Look Beyond Firestone*, 1982 U. Ill. L. Rev. 975: a good treatment of the topic.

John A. Glenn, *Appealability of Order Staying, or Refusing to Stay, Proceedings in Federal District Court Pending Arbitration Proceedings*, 11 A.L.R. Fed. 640 (1972).

Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175 (2001): argues that the current set of exceptions to the final judgment rule created by a mix of legislative and judicial decisions is adequate and need not be replaced by a system of discretionary review of interlocutory orders.

Alexander Holtzoff, *Interlocutory Appeals in the Federal Courts*, 47 Geo. L.J. 474 (1959): presents the initial academic reactions to permissive interlocutory appeals and provides analysis of the legislative history.

Wesley Kobylak, *Review of Federal Judge's Grant or Denial of Motion to Recuse*, 64 A.L.R. Fed. 433 (1983).

Michael R. Lazerwitz, Student Author, *The Perlman Exception: Limitations Required by the Final Decision Rule*, 49

U. Chi. L. Rev. 798 (1982): an examination of subpoenaed party intervenor's right to immediate appeal.

Bruce I. McDaniel, *Appealability of Federal Court Order Granting or Denying Stay of Arbitration*, 31 A.L.R. Fed. 234 (1977).

Karen N. Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 Hastings L.J. 829 (1984): a sophisticated treatment of the topic, with alternative theoretical models.

John K. Nelson, Student Author, *The Limits of Section 1292(a)(1) Redefined?: Appealability of the Class Determination as an Order "Refusing an Injunction"*, 9 U. Tol. L. Rev. 488 (1978): a restrictive reading of § 1292(a)(1) to restrict proliferation of piecemeal review.

Cedric W. Porter, *Appeals from Interlocutory and Final Decrees in the United States Circuit Courts of Appeal*, 19 B.U. L. Rev. 377 (1939): an extensive article on interlocutory and final decrees; a good historical perspective.

Robin Rae Rausch, Student Author, *The Collateral Order Doctrine After Firestone Tire & Rubber Co. v. Risjord: The Appealability of Orders Denying Motions for Appointment of Counsel*, 62 B.U. L. Rev. 845 (1982): a good treatment of the topic.

Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89 (1975): deals with aspects of § 1292(b), etc.; concludes that the so-called pragmatic approach to appealability has suffered from fundamental confusion as to its basic purposes.

Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 Wash. L. Rev. 733 (2006): analyzes appealing a decision on a privilege claim against a discovery

order; discusses the problems with waiting for final judgment and the difficulty of obtaining an interlocutory appeal.

Jean F. Rydstrom, *Appealability of Order Allowing Action to Proceed As Class Action under Rule 23 of Federal Rules of Civil Procedure*, 32 A.L.R. Fed. 674 (1977); note that this annotation has been superseded by Barbara J. Van Arsdale, *Appealability of Determination Regarding Confirmation of Action as Class Action Under Federal Rule of Civil Procedure Rule 23 and its Enabling Legislation (28 U.S.C.A. § 1292(e))*, 22 ALR Fed. 2d 303 (2007).

Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531 (2000); discusses the history of appellate review of class action certification decisions before Fed. R. Civ. P. 23(f) and offers suggestions on how the courts of appeals should exercise their discretion to grant review under this rule.

Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237 (2007); proposes alternative new theories of appellate jurisdiction for interlocutory orders under the all writs statute.

Gary D. Spivey, *Appealability of Determination Adverse to Confirmation of Action As Class Action Under Rule 23 of Federal Rules of Civil Procedure*, 17 A.L.R. Fed. 933 (1973); note that this annotation has been superseded by Barbara J. Van Arsdale, *Appealability of Determination Regarding Confirmation of Action as Class Action Under Federal Rule of Civil Procedure Rule 23 and its Enabling Legislation (28 U.S.C.A. § 1292(e))*, 22 ALR Fed. 2d 303 (2007).

Gary D. Spivey, *Appealability of Federal Court Order Granting or Denying Consolidation, Severance or Separate Trials*, 30 A.L.R. Fed. 393 (1976).

Student Author, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975): an extensive examination of § 1292(b).

Student Author, *Section 1292(b): Eight Years of Undefined Discretion*, 54 Geo. L.J. 940 (1966): concludes that double discretion governs action on appeal; complains that no legal precedent was established as a guide.

David B. Sweet, *Appealability, Under Collateral Order Doctrine, of Order Denying Qualified Immunity in 42 U.S.C.A. § 1983 or Bivens Action for Damages Where Claim for Equitable Relief is Also Pending—Post-Harlow Cases*, 105 A.L.R. Fed. 851 (1991).

Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83 (1994): discusses the history of 28 U.S.C. § 1447(d), which bars appellate review of orders remanding a case to state court, and the judge-made exceptions to this rule; proposes a rule allowing discretionary review of remand orders.

#### *E. Review by Writ*

*Relief in the nature of habeas corpus; “all writs necessary and appropriate”; appellate sanctions.*

Griffin B. Bell, *The Federal Appellate Courts and the All Writs Act*, 23 Sw. L.J. 858 (1969): a good overview, written by a then-circuit judge, who later served as Attorney General.

Bennet Feigenbaum, *Interlocutory Appellate Review Via Extraordinary Writ*, 36 Wash. L. Rev. 1 (1961): an extensive analysis of interlocutory appellate review with specific applications.

Glenn S. Goldstein, Student Author, *Federal Courts—Use of Mandamus to Compel Adjudication of a Claim Within*

*Exclusive Federal Jurisdiction*, 24 Vill. L. Rev. 815 (1978): a brief comment on mandamus holding of Supreme Court.

Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 Nw. U. L. Rev. 1413 (2002): an Assistant U.S. Attorney analyzes courts' use of common-law writs to allow collateral review of federal criminal convictions; concludes that they are only properly used in the case of the writ of coram nobis for those no longer in custody.

Charles Robert Janes, Student Author, *Mandamus As a Means of Federal Interlocutory Review*, 38 Ohio St. L.J. 301 (1977): a general outline of mandamus.

Wesley Kobylak, *Sanctions, in Federal Circuit Courts of Appeals, for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R. Fed. 521 (1981).

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### *G. Appeals in Administrative Matters*

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