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Recent Developments in Federal Appellate Practice and Procedure

Karen M. Grundy

RECENT DEVELOPMENTS IN FEDERAL APPELLATE PRACTICE AND PROCEDURE

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This article summarizes significant developments in federal appellate practice and procedure in three areas: (1) amendments to the Federal Rules of Appellate Procedure, (2) case law from the United States Supreme Court and the circuit courts of appeals, and (3) articles worth reading.

I. AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

A. *Rule 25*

Amended Rule 25(a)[1] prohibits the clerk of the court of appeals from refusing pleadings that are not in proper form or do not comply with either the Federal Rules of Appellate Procedure or local rules.[2] This rule conforms with similar provisions in Rule 5(c) of the Federal Rules of Civil Procedure and Rule 5005 of the Federal Rules of Bankruptcy Procedure.[3] According to the Advisory Committee, local rules that authorized the clerk of the court of appeals to refuse nonconforming pleadings delegated a role unsuitable for the office of the clerk and subjected litigants to the hazard of time bars.[4]

1. Fed. R. App. P. 25(a) (1994).

2. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices. *Id.*

3. Fed. R. App. P. 25(a) advisory committee's note.

4. *Id.*

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B. *Rule 26.1*

Rule 26.1[5] now requires a party to file three copies of the corporate disclosure statement whenever the statement is filed before the principal brief.[6]

C. *Rule 28*

Amended Rule 28(a)[7] adds a requirement that briefs of both the appellant and the appellee contain a summary of the argument.[8] This requirement conforms to local rules of several circuits.[9] The amendment to Rule 28(g)[10] adds the proof of service to the list of items in a brief that do not count for purposes of the page limitation.[11] This amendment recognizes that the mandatory certificate of service may contain several pages in a case involving multiple parties and counsel.[12]

D. *Rule 33*

Rule 33[13] essentially has been rewritten.[14] This new rule permits the court to require the parties to attend an appeal conference in appropriate cases. The language of the amended rule is broad enough to allow a court to find that an executive or an employee other than the general counsel of a corporation or government agency may, with authority on the matter at issue, be "a party."[15] The provision allowing

5. Fed. R. App. P. 26.1.

6. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. *Id.*

7. Fed. R. App. P. 28 (1994).

8. (a) Appellant's Brief. The brief of the appellant must contain . . .

(5) A summary of argument. The summary should contain a succinct, clear and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings. . . .

(b) Appellee's Brief. The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6). . . .

Id.

9. *See* D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

10. Fed. R. App. P. 28(g) (1994).

11. (g) Length of briefs. Except by permission of the court, or as specified by local rule of the Court of Appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, table of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

Id.

12. Fed. R. App. P. 28(g) advisory committee's note.

13. Fed. R. App. P. 33 (1994).

14. The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

15. Fed. R. App. P. 33 advisory committee's note.

persons other than judges to preside over the appeal conference conforms to similar provisions in the local rules of several circuits.[16]

E. *Rule 38*

Rule 38[17] on damages for delay and frivolous appeals now requires that, before a court of appeals can impose sanctions, the person or entity to be sanctioned must have notice and an opportunity to respond.[18] This amendment reflects the principles articulated by the United States Supreme Court in *Roadway Express, Inc. v. Piper*,[19] that notice and opportunity to respond must precede the imposition of sanctions. The Advisory Committee Notes to Rule 38 clarify that a separate motion requesting sanctions gives notice, but a request for sanctions in a party's brief is not sufficient notice.[20] In the view of the Advisory Committee, requests for sanctions in briefs have become so common that a court realistically cannot expect a careful response to such requests without any indication that the court actually contemplates entertaining a request for sanctions.[21] If no party files a separate motion for sanctions, the court must give notice before it can impose sanctions.[22]

F. *Rule 40*[23]

Rule 40(a) lengthens the time for any party to file a petition for rehearing in civil cases involving the United States or its agencies or officers, from fourteen days to forty-five days.[24] This amendment adopts the current practice in the District of Columbia and the Tenth Circuit[25] and is analogous to the provision in Rule 4(a)[26] that extends the time for filing a notice of appeal in cases involving the United States.[27]

G. *Rule 41*[28]

Rules 41(a) and (b) concerning issuance and stay of mandate have been amended. Rule 41(a), as amended, links the time for issuing mandate to expiration of time

16. *See, e.g.*, 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33-1; and 10th Cir. R. 33.

17. Fed. R. App. P. 38 (1994).

18. If a Court of Appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. *Id.*

19. 447 U.S. 752, 767, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980).

20. Fed. R. App. P. 38 advisory committee's note.

21. *Id.*

22. *Id.*

23. Fed. R. App. P. 40 (1994).

24. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. *Id.*

25. D.C. Cir. R. 15(a) and 10th Cir. R. 40.3.

26. Fed. R. App. P. 4(a).

27. *See* Fed. R. App. P. 40 advisory committee's note.

28. Fed. R. App. P. 41 (1994).

to file a petition for rehearing, not to entry of judgment.[29] The amendments to Rule 40(a) require the use of the expiration of time to file a petition for rehearing as the triggering date.[30]

Rule 41(b) requires a party who files a motion requesting a stay of mandate to provide the court with evidence of notice to the other parties.[31] It also states the motion must show that a petition for certiorari would present a substantial question and that good cause exists for such a stay.[32]

H. *Rule 48*

Rule 48[33] now authorizes a court of appeals to appoint a special master to make recommendations on ancillary matters.[34] The Advisory Committee Notes emphasize that special masters should be appointed only in those limited instances when factual issues, such as fees for representation on appeal, arise for the first time in the court of appeals.[35]

II. CASES FROM THE UNITED STATES SUPREME COURT AND THE CIRCUIT COURTS OF APPEALS

A. *Jurisdiction*

1. Collateral Order Doctrine

The United States Supreme Court clarified the bounds of the collateral order doctrine in *Digital Equip. Corp. v. Desktop Direct, Inc.*[36] It held that a district court's

29. The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. . . . *Id.*

30. *See also* Fed. R. App. P. 41 advisory committee's note:

> Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring mandate to issue 21 days after the entry of judgment would cause mandate to issue while the government is still considering requesting rehearing.

Id.

31. A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. Fed. R. App. P. 41 (b).

32. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. *Id.*

33. Fed. R. App. P. 48 (1994). The text of former Fed. R. App. P. 48 concerning the title was moved to Fed. R. App. P. 1(c).

34. A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties. *Id.*

35. Fed. R. App. P. 48 advisory committee's note.

36. ____ U.S. ____, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

refusal to enforce a settlement agreement (resulting in a trial on the merits) is not immediately appealable. A unanimous Court found that Digital's "right" not to stand trial failed to meet the third prong of the *Cohen*[37] test—that the decision on an "important" question must be "effectively unreviewable on appeal from a final judgment." The Court concluded that rights under private settlement agreements can be vindicated from a final judgment. Noting that virtually every pretrial decision could be characterized as a "right not to stand trial," the Court implied that broad expansion of the collateral order doctrine to include enforcement of settlement agreements could lead to evisceration of the final judgment rule by the clever drafting of private parties.

Thus, the mere characterization of an interest as a right that could be lost irretrievably will not suffice to meet the third prong of the *Cohen* test; instead, the inquiry must focus on the importance of the interest lost through application of the final judgment rule. Significantly, the Court distinguished privately conferred rights from those embodied in constitutional or statutory provisions, noting that Digital had available to it a remedy as a suit for breach of contract. It suggested that, in appropriate cases, a discretionary appeal could be used in serious issues of contractual interpretation.

An order granting the plaintiff's motion for leave to amend the complaint to add a defendant, thus destroying diversity, is an interlocutory order not subject to appeal in the federal courts. In *Powers v. Southland Corp.*,[38] the plaintiff in a slip-and-fall case sued the Southland Corporation for personal injury sustained in the defendant's convenience store. Southland removed the case to federal court, and the plaintiff moved the district court for leave to amend the complaint to add the franchisee as a party defendant. The district court granted the motion (though the statute of limitations governing the action had expired before the motion to amend) and remanded the case to state court because the addition of the franchisee destroyed diversity jurisdiction. On appeal to the Third Circuit, the court found that the portion of the district court's order allowing the relation back amendment was not final within the meaning of 28 U.S.C. § 1291 and that the decision could be reviewed effectively by the state court. In so holding, the court rejected the argument that review of the district court's order was barred by 28 U.S.C. § 1447(d),[39] concluding that the decision to allow the addition of the franchisee as a defendant had ramifications beyond determination of the court's subject matter jurisdiction and was, therefore, severable from the remand order for purposes of appellate review.

The court then found, however, that the order at issue was unreviewable because

37. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949).

38. 4 F.3d 223 (3d Cir. 1993).

39. 28 U.S.C. § 1447(d) (1988) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

it was not a final order and was not appealable under the collateral order exception to the final judgment rule as enunciated in *Cohen v. Beneficial Indus. Loan Corp.*[40] The court explained that the appropriate inquiry for the purposes of the third *Cohen* factor (that the order be effectively unreviewable on appeal from a final judgment) should focus on whether the decision being appealed would be conclusive in the state court under principles of res judicata. Acknowledging that the state appellate courts might be inclined to defer to the federal court's determination of the application of the Federal Rules of Civil Procedure, the court nevertheless opined that the state court was neither precluded from reviewing the district court's decision to allow the relation back amendment nor bound by the federal court's conclusion.

Finally, the court distinguished the case before it from *City of Waco v. United States Fidelity & Guaranty Co.*,[41] in which the United States Supreme Court permitted review of an order dismissing a cross-claim. The circuit court reasoned that no portion of the action was unreviewable because no party or cause of action was dismissed by the district court.[42]

An order denying a motion to approve and enter a consent decree in settlement of a CERCLA action is not subject to immediate appeal, according to the Tenth Circuit in *Utah State Dept. of Health v. Kennecott Corp.*[43] In *Kennecott*, the district court refused to approve and enter a consent decree submitted by the parties that would have settled Utah's claim for natural resources damages under the Comprehensive Environmental Response Compensation and Liability Act[44] (CERCLA). The court dismissed the appeal for lack of jurisdiction. Because the order was not based on the merits, the court concluded it was not appealable as a final order. The court then found that the order refusing to approve and enter the consent decree did not meet the *Cohen* requirements[45] for appeal under the collateral order doctrine. Noting a split in the circuits on whether an appeal is proper under the collateral order doctrine for denials of consent decrees,[46] the Tenth Circuit found that "the better reasoned rule finds a denial of a settlement does not conclusively decide the parties' ability to settle."[47] In this regard, denial of a settlement offer commonly is open to revision by the trial court before a final

40. 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949).

41. 293 U.S. 140, 55 S. Ct. 6, 79 L. Ed. 244 (1934).

42. *But see* Carr v. American Red Cross, 17 F.3d 671 (3rd Cir. 1994) (federal appeals court has jurisdiction to review district court order that is separable from a subsequent remand order and satisfies the finality requirements).

43. 14 F.3d 1489 (10th Cir. 1994).

44. 42 U.S.C. §§ 9601-9675 (1988).

45. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949).

46. Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) (refusal to enter consent decree not appealable); Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) (orders refusing to enter consent decrees appealable), *cited in Kennecott*, 14 F.3d at 1493.

47. *Kennecott*, 14 F.3d at 1493.

judgment on the merits, and the parties, who were not foreclosed from proposing future consent decrees by the trial court's order, were free to continue with renewed settlement efforts.[48] In deciding whether the trial court's denial of the consent decree conclusively decides the parties' ability to settle their claims, the court phrased the test as "whether the trial court is less likely to revise its prior denial as new settlement proposals are offered, not whether the parties feel discouraged and less likely to continue with settlement negotiations."[49] Because the trial court's order contained no limitations on its ability to reconsider future settlement proposals, the order did not conclusively determine the ability of the parties to settle. The court also found that a broadly worded rule allowing review of denied settlements under *Cohen* would burden appellate courts with the threat of successive appeals and would interfere "intolerably" with the discretion of trial courts.[50]

2. Appeals from Injunctive Orders

In *Santana Products, Inc. v. Compression Polymers, Inc.*[51] the Third Circuit held that an interlocutory order directing the Commissioner of Patents and Trademarks to cancel the defendant's federal trademark registration failed to qualify as an injunction for purpose of immediate appeal. The plaintiff in *Santana*, a manufacturer of restroom partitions, sued a competitor alleging unfair competition and trademark infringement, and sought cancellation of Compression Polymers' federal trademark registration. The district court ordered the Commissioner of Patents and Trademarks to cancel Compression Polymers' registration, prompting the appeal. The Third Circuit dismissed the appeal for lack of jurisdiction, finding that Compression Polymers failed to satisfy the requirements of 28 U.S.C. § 1292(a)(1),[52] allowing interlocutory appeal of injunctions. The court said that an injunctive order under 28 U.S.C. § 1292(a)(1) must be: (1) directed to a party, (2) enforceable by contempt, and (3) designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion.[53] In applying the three-part test, the court found the order at issue failed to satisfy the first two requirements. Specifically, the order was directed to the Commissioner of Patents and Trademarks, a nonparty. Moreover, the order would not be enforceable by contempt against Compression Polymers because the order did not restrain it from doing anything. Compression Polymers also could continue to use the disputed trademark during litigation because the right to use the mark arises from prior use, and not from federal registration.

48. *Id.*
49. *Id.*
50. *Id.* at 1495.
51. 8 F.3d 152 (3rd Cir. 1993).
52. 28 U.S.C. § 1292 (1988) provides: "(a) [T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States. . . ."
53. 8 F.3d at 154.

3. Appeals from Orders Certified for Immediate Appeal from Judgment on Multiple Claims or Involving Multiple Parties

In *Day v. NLO, Inc.*,[54] a class action suit alleging radiation leaks from a nuclear power plant, the Sixth Circuit declined to grant interlocutory review to the district court's statute of limitations ruling, certified for interlocutory appeal under Rule 54(b).[55] The court dismissed the appeal as "inappropriate for decision at this time," and said that a decision on the applicable statute of limitations turns on the nature of the cause of action, which was still evolving. The court also found that the plaintiffs' claims were so closely related to those still pending that the results of the litigation below (i.e., settlement or appeal) could substantially affect the appeal. No decision at the interlocutory stage could resolve completely the litigation with respect to the plaintiffs because some claims remained in the district court. Finally, the court held that the district court must consider the following factors in making a Rule 54(b) certification: (1) the closeness of the relationship among the causes of action; (2) the possibility that the need for review might be mooted by future developments in the district court; (3) the possibility that the reviewing court might be required to consider the same issue a second time; (4) delay; (5) expense; and (6) the relative frivolity of the claims.

4. Standing

In *Gottlieb v. Wiles*[56] the Tenth Circuit carefully analyzed whether and under what circumstances an unnamed plaintiff in a class action suit under Rule 23[57] has standing to appeal the approval of a settlement when the named plaintiffs do not wish to pursue an appeal. The Tenth Circuit, deciding a question of first impression in that circuit, joined the Fifth,[58] Eighth,[59] and Eleventh[60] Circuits in holding that standing depends on a grant of intervention. In *Gottlieb*, unnamed plaintiffs in a class action securities fraud case challenged the district court's approval of a settlement, and one of the named plaintiffs and one of the defendants moved to dismiss the appeal. The court ruled that formal intervention is a prerequisite to an unnamed class member's standing to appeal (absent any violation of the Rule 23 procedures intended to protect the rights of the unnamed class members).

The court expressly adopted the reasoning of the Eleventh Circuit in *Guthrie v. Evans*.[61] It cited three reasons for requiring formal intervention to appeal: (1) permitting unnamed class members to pursue an appeal contrary to the wishes of the named class members effectively substitutes the unnamed members for the

54. 3 F.3d 153 (6th Cir. 1993).
55. Fed. R. Civ. P. 54(b).
56. 11 F.3d 1004 (10th Cir. 1993).
57. Fed. R. Civ. P. 23.
58. Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988).
59. Croyden Assoc. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992).
60. Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987).
61. 815 F.2d at 628-29.

certified class members; (2) Rule 23[62] provides that, in the event the unnamed class members disagree with action taken by class representatives, they can intervene as of right pursuant to Rule 24(a)(2);[63] and (3) allowing individuals to appeal without formal intervention conflicts with the goals of Rule 23.[64] The court noted the distinction between classes certified under Rule 23(b)(1) and (2), which do not enjoy the added protections offered by the notice and opt-out provisions of 23(b)(3), but decided that the policy underlying Federal Rule of Civil Procedure 23 required that the same rule be applied to all class action suits. Finally, the court concluded that, while unnamed class action plaintiffs who had not formally intervened had no standing to appeal the court's approval of a settlement, the unnamed members would have standing to appeal the approval of the settlement based on due process if notice of the proposed settlement was constitutionally deficient.

5. Mootness

The United States Supreme Court's refusal to decide *Ticor Title Insurance Co. v. Brown*[65] presents curious questions about issues that may be termed "hypothetical." In *Ticor*, representatives of Arizona and Wisconsin classes of title insurance consumers brought an action alleging that the title insurers conspired to fix rates for title search services. The district court granted the title insurers' motion for summary judgment, reasoning that a settlement entered into between the title insurers and the consumers, over some class members' objection, precluded the subsequent suit. The Ninth Circuit disagreed, holding that it would violate the consumers' due process rights to enforce the prior judgment when the class members were not afforded the opportunity to opt-out of the prior class action settlement. The United States Supreme Court accepted certiorari to decide whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23,[66] on grounds that absent class members have a constitutional due process right to opt-out of a class action that asserts monetary claims for them. After oral argument, the Court decided, per curiam, certiorari in the matter should not have been granted. Justices O'Connor, Kennedy, and Rehnquist dissented. According to the opinion, resolution of the issue would require the Court to resolve a "hypothetical question," because the class could have been certified under Rule 23(b)(3), which allows for opt-out, instead of under Rules 23(b)(1) and (2), which do not. The lower court was required to give res judicata effect to the decision in the earlier litigation to certify the class under Rules 23(b)(1) and (2). The Court nevertheless implied that the class might not have been properly certified and that it could have been certified under Rule 23(b)(3). In dismissing the writ of certiorari as "improvidently granted," the Court found that a decision on the merits of the

62. Fed. R. Civ. P. 23.
63. Fed. R. Civ. P. 24(a)(2).
64. Fed. R. Civ. P. 23.
65. ____ U.S. ____, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994).
66. Fed. R. Civ. P. 23.

constitutional question would have no practical application because the parties had already reached a settlement.

When the parties to an appeal settle the case after a panel of the court of appeals renders its opinion, but before mandate is issued, no case or controversy remains, and the court must dismiss the appeal, vacate the district court's judgment, and remand the case to district court with directions to dismiss the entire case, according to the Eleventh Circuit in *Key Enterprises of Delaware, Inc. v. Venice Hospital*.[67] In *Key* after a verdict for plaintiff in an antitrust action, the district court granted the defendants' motion for judgment notwithstanding the verdict, and the plaintiff appealed. A panel of the Eleventh Circuit reversed the district court's order, with directions to enter judgment in accordance with the jury's verdict. The defendants then filed a Petition for Rehearing and Suggestion for Rehearing, and the Eleventh Circuit stayed mandate pursuant to Rule 41(a).[68] While the petition for rehearing was pending (and while mandate was stayed), the plaintiff and one defendant reached a settlement in which the plaintiff agreed to execute a satisfaction of judgment with respect to all defendants. The Eleventh Circuit subsequently took the case en banc. The court ruled that the settlement was a full payment and satisfaction of the plaintiff claims, and that the order granting rehearing en banc therefore had been "improvidently granted" because no case or controversy remained. Reasoning that the case became moot when the settlement was reached, the court found that the case became moot after the panel published its decision, but before the mandate was issued. Significantly, the court observed that "[b]ecause the precedential force of appellate decisions extends beyond any one controversy, we will not permit parties to a specific suit, or their counsel, through an agreement or otherwise, to control our statement of the law."[69] It noted that, after the settlement, any opinion would be "purely advisory."[70] The court was required to dismiss the appeal, vacate the district court's judgment, and remand to the district court with instructions to dismiss the case to preserve the rights of all parties.[71]

The Ninth Circuit held that a court can review a dispute about the standard of review in requests for a preliminary injunction under section 10(j) of the National Labor Relations Act[72] under the "capable of repetition yet evading review" exception to the mootness doctrine, according to *Miller v. California Pacific Medical Center*.[73] In *Miller* the Regional Director of the NLRB sought a preliminary injunction pending disposition of the unfair labor practices charge against the defendant employer. The district court granted the injunction and the employer appealed.

67. 9 F.3d 893 (11th Cir. 1993).
68. Fed. R. App. P. 41(a).
69. 9 F.3d at 899.
70. *Id.* at 900.
71. *Id.*; *but see* U.S. Bancorp Mortgage Co. v. Bonner Mail Partnership, ____ U.S. ____, 115 S. Ct. 386, 130 L. Ed. 2d (Nov. 8, 1994) (mootness by reason of settlement does not justify vacatur of federal civil judgment under review).
72. 29 U.S.C. § 160(j) (1988).
73. 19 F.3d 449 (9th Cir. 1994).

The Ninth Circuit found that, while a section 10(j) injunction lasts only while the charges are pending, it was nevertheless faced with an important legal issue that will continue to come up, and continue to evade review. The court found that the "capable of repetition yet evading review" exception to the mootness doctrine applied to resolution of the question before it, because the Board would most probably issue a final order on the merits of the unfair labor practices charge before the appellate courts could fully consider the case. Furthermore, the court reasonably expected that the dispute would recur since the Board will continue to litigate section 10(j) injunctions in district courts throughout the Ninth Circuit. The court concluded that the Board's final order did not render the appeal moot, and noted that the Board and employers must know what criteria will apply when the Board requests interim relief under section 10(j).

6. Reviewability

In *Dalton v. Specter*[74] the United States Supreme Court reiterated its adherence to the principles of *Franklin v. Massachusetts,*[75] finding that actions of the President and administration officials were not subject to judicial review under the Administrative Procedures Act (APA). In *Dalton* the respondents filed an APA action seeking to enjoin the Secretaries of the Navy and Defense from carrying out the President's decision, pursuant to the Defense Base Closure and Realignment Act of 1990,[76] to close the Philadelphia Naval Shipyard. The Supreme Court reversed the Third Circuit's ruling that judicial review was permissible, holding that the actions of the Secretaries of Navy and Defense and the Defense Base Closure and Realignment Commission (an independent body whose members are appointed by the President with the advice and consent of the Senate) in recommending closure of the Philadelphia Naval Shipyard could not be reviewed under the APA because they are not "final agency actions." The Court reiterated the test for "finality" for purposes of review under the APA as whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect those parties. The Court found the actions of the President could not be reviewed under the APA because the President is not an "agency" under the Act. Finally, the Court rejected the argument that judicial review was available because the President exceeded his authority under the Base Closure Act. The Court found this claim to be statutory in nature, and held that, when a statute commits the decision making to the discretion of the President, how the President chooses to exercise that discretion is not subject to judicial review.

B. *Notice of Appeal*

1. Timing

A notice of appeal does not divest the district court of jurisdiction when the appellant files a notice of appeal from an unappealable post-trial order, ruled the

74. Dalton v. Specter, ____ U.S. ____, 114 S. Ct. 1719, 129 L. Ed. 2d 497 (1994).
75. ____ U.S. ____, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992).
76. Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687 (Supp. I 1993).

Ninth Circuit in *Estate of Connors v. O'Connor*.[77] In *Estate of Connors* successful plaintiffs to a § 1983[78] action sought an award of attorney fees and costs. The district court referred the motion to a magistrate, who awarded attorney fees and costs of $340,323.94 to the plaintiffs. The defendants filed a notice of appeal, purporting to appeal the magistrate's order, which was believed to be final. The district court later agreed to review de novo the magistrate's order and reduced the award to $315,433.94. The plaintiffs appealed from this order, contending that the district judge lacked jurisdiction to reduce the fee award because the filing of the notice of appeal from the magistrate's order divested the district court of jurisdiction. The Ninth Circuit disagreed, reasoning that since the magistrate had no authority to issue a final appealable order,[79] jurisdiction had never been transferred from the district court to the Court of Appeals by the attempt to appeal from an unappealable order.

The Ninth Circuit concluded that a premature notice of appeal from an oral pronouncement (that the court was entering summary judgment in favor of the Chapter 7 trustee in an adversary proceeding) did not preserve an appeal, according to *In re Jack Railey Construction, Inc. v. Homestead Development Co., Inc.*[80] The court orally granted summary judgment to the trustee, but had not yet entered judgment when the would-be appellant filed a notice of appeal. The appellant failed to renew its notice of appeal after the judgment was filed. The Ninth Circuit rejected the appellant's argument that its premature appeal could be saved under Rule 4(a)(2).[81] That rule allows a notice of appeal from a nonfinal decision to operate as a notice of appeal from a final judgment only when the district court announces a decision that would be appealable if immediately followed by the entry of judgment.[82] In this case, the premature notice was not valid because the district court had not yet completed its adjudication and the matter of prejudgment interest was not decided until long after the notice of appeal had been filed. In dismissing the appeal, the court offered this sage advice:

> Where there is some doubt about the application of an exception to the general rule, the prudent course of action is merely to file a fresh appeal after the entry of final judgment. The Appellants failed to do so and instead gambled [and lost] on the premise that this case did not fit within Rule 4(a)(2)'s narrow exception.[83]

77. 6 F.3d 656 (9th Cir. 1993).

78. 42 U.S.C. § 1983 (1981).

79. 28 U.S.C. § 636(b)(1) (1993) restricts the authority of the magistrate judge to decisions involving nondispositive pretrial matters, absent the consent of the parties.

80. 17 F.3d 291 (9th Cir. 1994).

81. Fed. R. App. P. 4(a)(2). The rule provides: "[A] notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." *See also* American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 813 (5th Cir. 1993).

82. A premature notice of appeal is valid when all that remains is the clerk's ministerial task of entering a Fed. R. Civ. P. 58 judgment.

83. 17 F.3d at 294.

In *Pruett v. Choctaw County*[84] the Eleventh Circuit held that the defendant's motion to reconsider denial of its summary judgment motion did not toll the time for appealing the order denying summary judgment. The plaintiffs, former county employees, sued seeking money damages under section 1983[85] from the county, the county commission, and three county commissioners, individually and in their official capacities. The district court denied the commissioners' motion for summary judgment, which sought dismissal on the grounds of legislative and qualified immunity. Following denial of their motion to reconsider, the commissioners filed a notice of appeal. The Eleventh Circuit dismissed the appeal on jurisdictional grounds, noting that the commissioners could have appealed the order denying summary judgment, but failed to do so. The court rejected the argument that the motion to reconsider tolled the time to appeal the order denying summary judgment because Rule 4(a)(4)[86] does not apply to nonfinal judgments and because an untimely motion will not toll the running of the time for notice of appeal.[87] The court concluded that denial of the motion to reconsider was not functionally equivalent to an order refusing to grant summary judgment, when nothing indicated that the district court engaged in a review of the record or reexamined its ruling. The court therefore dismissed the appeal for lack of an appealable order.

Similarly, in *American Federation of Grain Millers, Local 24 v. Cargill Inc.*[88] the Seventh Circuit held that a motion to correct clerical errors in the judgment does not restart or toll the time for filing a notice of appeal. The district court issued an order dismissing the plaintiff's complaint on grounds of preemption. On the next day, the clerk of the court issued an order dismissing the case for lack of subject matter jurisdiction, entered judgment for defendants, and awarded defendants their costs. More than thirty days later, the plaintiff filed a motion to strike the judgment. On January 22, 1993, the district court issued an order granting the plaintiff's motion, dismissing the case without prejudice, and ordering each side to bear its own costs. From the January 22 order, the plaintiff filed a notice of appeal. The Seventh Circuit dismissed the appeal, and found that its appellate jurisdiction was limited to review of the order under appeal[89] and did not extend to the substantive issues in the previous order, unless the filing period was tolled or restarted because of alterations in the judgment. The court held that plaintiff's own characterization of the district court's January 22 order (referencing a clerical error due to misunder-

84. 9 F.3d 96 (11th Cir. 1993).

85. 42 U.S.C. § 1983 (1981).

86. Fed. R. App. P. 4(a)(4). The rule limits the post-trial motions which toll the appeal time to: (1) a motion for judgment notwithstanding the verdict, (2) a motion under Fed. R. Civ. P. 52(b) to amend or make additional findings of fact, (3) a motion under Fed. R. Civ. P. 59 to alter or amend the judgment, or (4) a motion for new trial.

87. 9 F.3d at 97.

88. 15 F.3d 726 (7th Cir. 1994).

89. According to the court, "When appealing from an order altering a previous judgment under Rule 60, an appellant cannot attack the original order, but is limited to assigning as errors any problems in the Rule 60 decision itself." 15 F.3d at 727.

standing of the court's order) suggested that the court acted pursuant to Rule 60(a),[90] which authorizes a court to correct clerical errors in judgments and orders. The court found that Rule 60(a) applied because the district court's January 22 order merely carried out the result intended when the original order was entered, instead of correcting a legal or factual error. Motions under Rule 60(a) do not restart or toll the time to appeal. Moreover, even if the court's January 22 order was made pursuant to Rule 60(b),[91] which permits a party to seek relief from the judgment on the grounds of mistake, inadvertence, excusable neglect, newly discovered evidence or fraud, a motion made under this rule likewise does not toll the time to appeal from, or affect the finality of, the original judgment unless the change materially alters the original judgment. The district court's January 22 order clarified its intention to dismiss the case for lack of subject matter jurisdiction and did not adversely affect the plaintiff's interests. Because the district court's order dismissing the case for subject matter jurisdiction was not materially altered by the subsequent January 22 order, the plaintiff could not appeal from the original ruling after the thirty days had elapsed.

2. Cross Appeals

In *Shearson Lehman Bros., Inc. v. M & L Investments*[92] the Tenth Circuit decided the date used to determine the timeliness of a defendant's cross-appeal was the date the clerk received the notice of appeal, rather than the later date when the clerk entered the notice on the docket sheet. In *Shearson*, the defendant filed a timely notice of appeal on November 21, 1991. Shearson filed its notice of cross appeal on December 9, 1991, within fourteen days of M & L's notice of appeal, but the district court clerk did not enter Shearson's notice on the docket sheet until December 13, 1991. Observing that it was unclear from the district court docket sheet whether Shearson's notice of appeal was timely filed, the court found the cross appeal to have been timely commenced, concluding that the relevant date for purposes of jurisdiction is the date the clerk received the notice of appeal.

In *Texport Oil Co. v. M/V Amolyntos*[93] the Second Circuit held that the defendant's cross appeal would be considered, although not timely filed, where the direct appeal and the cross appeal were closely related (involving damages between the same parties in the same action), the notice of cross appeal was filed only one day late,

90. Fed. R. Civ. P. 60(a). The rule provides: "Clerical mistakes in judgments, orders, or other parties of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." *Id.*

91. Fed. R. Civ. P. 60(b). That rule provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . .; (4) the judgment is void; (5) the judgment has been satisfied . . .; or (6) any other reason justifying relief from the operation of the judgment. . . ." *Id.*

92. 10 F.3d 1510 (10th Cir. 1993).

93. 11 F.3d 361 (2d Cir. 1993).

and the cross appellees were neither surprised nor prejudiced by the late filing. The court held the cross appellant's late filing (one business day beyond the limit contained in Rule 4(a)(3)[94]) was not a jurisdictional bar to review. It found that the requirement that a cross appeal be filed within fourteen days of the filing of a notice of appeal is a rule of practice and not one of jurisdiction; thus, in appropriate circumstances, the rule may be disregarded.

3. "Excusable Neglect"

In *Weinstock v. Clerk, Gottlieb, Steen & Hamilton*[95] the Second Circuit concluded an individual's lack of awareness of the Rules of Appellate Procedure was not "excusable neglect" warranting an extension of the time for filing a notice of appeal. Similarly, in *Gochis v. Allstate Insurance Co.*,[96] the First Circuit held that "counsel's inadvertence" and "plausible misconstruction" of the rules were not the type of unique or extraordinary circumstances required to permit an extension of time to file an appeal. The court held that the trial court abused its discretion when it granted the appellants an extension of time to file an appeal because of counsel's ignorance of the law, and dismissed the appeal.

C. *Standard of Review*

The United States Supreme Court found in *Elder v. Holloway*[97] that appellate review of qualified immunity dispositions must be conducted in light of all relevant precedent and not simply those cited to or discovered by the district court. Writing for a unanimous Court, Justice Ginsburg found that, when an appellate court reviews a judgment of the district court affording public officials qualified immunity from a damage suit for alleged violations of a federal right, it cannot disregard relevant legal authority, even if that authority was not presented to or considered by the court of the first instance. Allowing appeals courts to ignore relevant precedent would neither help deter unlawful conduct by government officials nor aid in shielding these officials from vexatious lawsuits. Such a rule would operate merely to release defendants because of poor legal research or briefing. A court engaged in review of a qualified immunity judgment should, therefore, use its full knowledge of its own (and other) relevant legal precedents.

D. *Briefing Requirements*

The Ninth Circuit exemplified a trend among the appellate courts toward strict compliance with the rules regarding page limitations on briefs in *Kano v. National Consumer Co-op Bank*.[98] The court imposed a $1,500 sanction on the appellant's attorney when the opening brief as submitted was the equivalent of sixty-five pages

94. Fed. R. App. P. 4(a)(2).
95. 16 F.3d 501 (2d Cir. 1994).
96. 16 F.3d 12 (1st Cir. 1994).
97. ____ U.S. ____, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994).
98. 22 F.3d 899, 900 (9th Cir. 1994).

of text, exceeding the fifty-page limit. The court found the opening brief violated Rule 32(a);[99] the text was spaced one-and-one-half lines apart, and the typeface in the footnotes was much smaller than permitted by the rule, containing eight lines per inch instead of six.

E. *Attorney Fees and Sanctions*

1. Attorney Fees

If a litigant fails to request appeal-related attorney fees from the appellate court before mandate, the district court has no authority to award attorney fees for the successful defense of an appeal, even though the parties agreed by contract that the prevailing party would be entitled to attorney fees, held the Tenth Circuit in *Hoyt v. Robson Comps., Inc.*[100] The appellee who successfully defended a judgment on appeal filed a motion for appeal-related attorney fees in the district court following mandate. Observing that a prevailing party is not automatically entitled to appeal related attorney fees, especially where the authority for such fees is rooted in a private agreement, the court found that it could exercise its discretion properly on whether to award fees only if a litigant had first made application to the appellate court. The appellant's failure to request fees, and the ensuing mandate that did not mention fees, therefore proved fatal to the quest for fees under the parties' private contract.

2. Sanctions

In *McKnight v. General Motors Corp.*[101] the United States Supreme Court clarified the standard for sanctions for a frivolous appeal. The appellant appealed dismissal of his employment discrimination case; the Seventh Circuit Court of Appeals dismissed the appeal and imposed a $500 sanction on appellant's attorney, concluding the appeal was frivolous in light of controlling circuit precedent that refuses to apply section 101 of the Civil Rights Act[102] retroactively. The Supreme Court vacated the sanctions order. Even though the circuit court decisions did not conflict on the retroactivity question, the issue had divided the district courts[103] and its answer was not so clear as to make the petitioner's position frivolous.[104] Moreover, since the United States Supreme Court had not yet ruled on the retroactivity issue at the time of the sanctions order, filing an appeal was the only way the appellant could preserve the issue pending a favorable ruling.

In *Nagle v. Alspaugh*[105] the Third Circuit addressed the purpose behind the

99. Fed. R. App. P. 32(a).

100. 11 F.3d 983 (10th Cir. 1993).

101. ____ U.S. ____, 114 S. Ct. 1826, 128 L. Ed. 2d 665 (1994).

102. 42 U.S.C. § 1981 (1994).

103. ____ U.S. at ____, 114 S. Ct. at 1826.

104. The retroactivity question was settled by the Supreme Court in Landgraf v. USI Film Prods., ____ U.S. ____, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), and Rivers v. Roadway Express, Inc., ____ U.S. ____, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994).

105. 8 F.3d 141 (3d Cir. 1993).

appellate rule permitting sanctions for a frivolous appeal, imposing sanctions *sua sponte* upon the appellant. Shareholders of a debtor corporation filed derivative claims for negligence and legal malpractice against the debtor, the debtor's bankruptcy trustee, and the trustee's attorneys. The district court granted summary judgment in favor of the defendants on four independent grounds. On appeal, the appellants contested only two of the four grounds, dooming the appeal to failure. The Third Circuit imposed sanctions *sua sponte* against the appellant's attorney personally, pursuant to Rule 38.[106]

Holding that sanctions were appropriate, the court found the purposes of Rule 38 are: (1) to compensate appellees who are forced to defend judgments awarded to them in the trial court from appeals that are wholly without merit; (2) to preserve the appellate court calendar for cases worthy of consideration; and (3) to discourage litigants from unnecessarily wasting their opponents' time and resources.[107] The court noted that the inquiry for purposes of Rule 38 is an objective one and that the presence of nonfrivolous arguments will not save an otherwise meritless appeal.[108]

In *Perry v. Pogemiller*[109] the Seventh Circuit held that sanctions under Rule 38 are appropriate if the appellant merely restates arguments that were properly rejected by the district court and that are unsupported by a reasoned, colorable argument for altering the district court's judgment.

F. *Mandate*

In *Boston and Main Corp. v. Town of Hampton*[110] the First Circuit rejected the argument that it could recall its mandate based on a decision of the state supreme court explicitly declaring parts of the court of appeals' reasoning to be erroneous. The railroad (B&M) brought an action for contribution and indemnity against the town for an automobile accident that occurred on a railroad bridge. The First Circuit affirmed judgment against B&M and denied B&M's petition for rehearing. Six months later, B&M filed a renewed petition for rehearing, a motion to enlarge time in which to file that renewed petition for rehearing, and a motion to recall mandate in the court of appeals. B&M's renewed petition for rehearing was prompted by a decision of the New Hampshire Supreme Court that explicitly rejected two parts of the court of appeals' analysis of substantive state law. The court's analysis of whether the state court opinion could properly be applied to affect its previous decision began by noting that while Rule 40[111] grants appellate courts authority to extend time to file a petition for rehearing, the rule can operate

106. Fed. R. App. P. 38. The rule provided: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages or single or double costs to the appellee." *Id.*

107. 8 F.3d at 145.

108. *Id.*

109. 16 F.3d 138 (7th Cir. 1993).

110. 7 F.3d 281 (1st Cir. 1993).

111. Fed. R. App. P. 40. This rule provides: "A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. . . ." *Id.*

only while the court retains jurisdiction. In the case before it, mandate had already been issued, divesting the court of any authority to extend the time to file a petition for rehearing. The First Circuit then turned to the issue of whether it could re-establish its jurisdiction by recalling its mandate. The court was troubled by the "procedural maze" that might be created if it were to assert its inherent authority to recall its mandate, citing as examples the effect on the district court's jurisdiction and the specter of extending indefinitely the authority of appellate courts to recall closed cases.[112] Even if the court had the authority to recall its mandate, prudential reasons prevented it from doing so, because "although the Supreme Court of New Hampshire has explicitly declared parts of our reasoning in this case erroneous, we would only compound our error by reopening a dispute in which our judgment was not demonstrably wrong."[113]

Despite this quixotic reasoning, the court also found that the appellant could not be now heard to complain, as it was aware of the pending state court case and failed to seek certification to the state court, failed to move for a stay of consideration of the appeal pending resolution of the state court case, and failed to seek a writ of certiorari to the United States Supreme Court.

III. ARTICLES WORTH READING

John C. Bodnar, Case Comment, *The Expansion of Appellate Jurisdiction Over Tax Court Decisions*, 72 Wash. L.Q. 531 (1994).

W. Wendall Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045 (1993).

Kay N. Hunt & Eric J. Magnuson, *Ethical Issues on Appeal*, 19 Wm. Mitchell L. Rev. 659 (1993).

Hon. Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 Fordham L. Rev. 829 (1993).

Hon. Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas—the Fairchild Lecture*, 1994 Wisc. L. Rev. 9 (1994).

Hon. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 Ohio St. L. J. 405 (1994).

Michael E. Solimine, *Removal, Remands and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993).

Michael A. Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805 (1993).

Robert M. Tyler, Jr., *Practices and Strategies for a Successful Appeal*, 16 Am. J. Trial Advoc. 617 (1993).

112. 7 F.3d at 282-83.

113. *Id.* at 283.