

RECENT DEVELOPMENTS IN APPELLATE ADVOCACY

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This article discusses recent developments in federal and state appellate procedure as well as legislation affecting appellate advocacy. There have been no changes to the U.S. Supreme Court Rules, but there have been some modifications to the Federal Rules of Appellate Procedure. Decisions from the U.S. Supreme Court, various federal circuit and district courts, and several state appellate courts are discussed in detail. In addition, this article reviews the eventual advent of electronic filing.

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I. ELECTRONIC FILING IN THE FEDERAL CIRCUIT
COURTS OF APPEALS

For the past few years, the federal judiciary has been implementing its Case Management/Electronic Case Files ("CM/ECF") system in a number of district and bankruptcy courts across the country. The CM/ECF system replaces the courts' aging electronic docketing and case management systems with a more modern one and also allows courts to accept filings over the Internet and to keep case file documents in electronic format.¹ These systems are already being used in fifty-three district courts, seventy-seven bankruptcy courts, the U.S. Court of International Trade, and the U.S. Court of Federal Claims.² Implementation of the system began for bankruptcy courts in early 2001 and for the district courts in May 2002. For appellate practitioners, implementation is scheduled to begin late this year.³

Rule 25(a)(2)(D) of the Federal Rules of Appellate Procedure authorizes federal circuit courts of appeals to promulgate local rules providing for electronic filing of papers.⁴ Several circuits have already adopted or are in the process of adopting such local rules.⁵ On the other hand, many courts of appeals have not yet contemplated a provision permitting electronic filing, apparently waiting for the CM/ECF implementation process actually to begin.⁶ A number of state appellate court systems have already implemented electronic filing.⁷

Electronic filing is coming to the federal circuit courts of appeals, and all federal appellate practitioners will have to use it as our respective circuit courts of appeals implement its practices and procedures.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF APPELLATE PROCEDURE

In May 2003 and April 2004, the Advisory Committee on Appellate Rules met to discuss and approve certain amendments to the Federal Rules of

1. See *Case Management/Electronic Case Files (CM/ECF) October 2004* at 1, at http://www.uscourts.gov/cmecf/cmecf_about.html (last visited Oct. 12, 2004). See generally *Federal Courts Turn a New Page: Case Management/Electronic Case Files Systems Bring Greater Efficiency/Access*, 35 THIRD BRANCH 11 (Nov. 2003), at <http://www.uscourts.gov/ttb/nov03ttb/page/index.html> (last visited Oct. 12, 2004).

2. See *CM/ECF*, *supra* note 1, at 1.

3. *Id.* at 1-2.

4. FED. R. APP. P. 25(a)(2)(D). The service of electronic "documents" is addressed in FED. R. APP. P. 25(c), (d).

5. See, e.g., proposed amendment to 3D CIR. L. APP. R. 31.0 (electronic copies of briefs), available at <http://www.ca3.uscourts.gov/> (last visited Oct. 12, 2004); 5TH CIR. R. 25.2 (filing), 31.3 (electronic copies of briefs); 8TH CIR. R. 25A (filing), 28A(d) (digital version of brief); 9TH CIR. R. 25-3.3, Form 13 (electronic service).

6. See, e.g., 1ST CIR. L. R. 25; 4TH CIR. L. R. 25(b); 6TH CIR. R. 25; FED. CIR. R. 25(a).

7. See generally ARIZ. SUP. CT. R. 124; N.C. R. APP. P. 26(a)(2), (c); TEX. R. APP. P. 9.2(c); N.J. Sup. Ct. Order, dated Apr. 4, 2000, available at <http://www.judiciary.state.nj.us/notices/n000420b.htm> (last visited Oct. 12, 2004).

Appellate Procedure, which, if ultimately approved, will become effective December 1, 2005. The proposed amendments must gain approval from the Judicial Conference of the United States (which received the proposed amendments in September 2003), the U.S. Supreme Court, and the U.S. Congress.

A. *Rule 4(a)(6)*

Rule 4(a)(6) of the Federal Rules of Appellate Procedure “provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them.”⁸ The proposal clarifies the conditions under which a party may move to reopen the time to appeal.⁹ Under the proposed amendments, the time to appeal may be reopened only if the moving party did not receive notice of the entry of judgment or order within twenty-one days after its entry, as is required under Rules 77(d) and 5(d) of the Federal Rules of Civil Procedure.¹⁰ These proposed amendments “make it clear that the seven-day period to move to reopen the time to appeal is triggered only by written notice of the entry of judgment or order.”¹¹

B. *Rules 26(a)(4) and 45(a)(2)*

These rules address the officially designated legal holidays for purposes of determining when the courts of appeals are open and computing time under the appellate rules.¹² The 1998 revisions to the Federal Rules of Appellate Procedure had replaced the phrase “Washington’s Birthday” with “Presidents’ Day,” a change that has since been considered a mistake.¹³ Under federal law, the third Monday in February is officially designated “Washington’s Birthday,”¹⁴ and the Advisory Committee recommends that the federal rules should use a consistent designation.¹⁵

8. Memorandum from Judge Samuel A. Alito, Jr., to Judge David F. Levi 3 (May 14, 2004), *available at* <http://www.uscourts.gov/rules/Reports/AP5-2004.pdf> (last visited Nov. 3, 2004) [hereinafter Alito 2004 Memo.]; Memorandum from Judge Samuel A. Alito, Jr., to Judge Anthony J. Scirica 2 (May 22, 2003), *available at* <http://www.uscourts.gov/rules/app0803.pdf> (last visited Nov. 3, 2004) [hereinafter Alito 2003 Memo.].

9. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 2 (Sept. 2003), *available at* <http://www.uscourts.gov/rules/jc09-2003/reportjc.pdf> (last visited Nov. 3, 2004) [hereinafter JCC REPORT]; *see also* Alito 2003 Memo., *supra* note 8, at 6 (“only receipt or observation of written notice”).

10. JCC REPORT, *supra* note 9, at 2.

11. *Id.*; *see also* Alito 2004 Memo., *supra* note 8, at 5.

12. *Id.*

13. Alito 2004 Memo., *supra* note 8, at 12; Alito 2003 Memo., *supra* note 8, at 6.

14. *See* 5 U.S.C. § 6103(a) (2000).

15. *See* Alito 2004 Memo., *supra* note 8, at 13; Alito 2003 Memo., *supra* note 8, at 6 (noting that statute “reflect[s] the desire of Congress specially to honor the first President of the United States”).

C. Rule 27(d)(1)(E)

This rule addresses the typeface requirements for motions filed in the federal circuit courts of appeals. The Advisory Committee has proposed the addition of new section (E) to Rule 27(d)(1) of the Federal Rules of Appellate Procedure to make it clear that motion papers should comply with the typeface and type-style requirements set forth in Rule 32(a)(5) and (a)(6) for appellate briefs, appendices, and other papers.¹⁶ This amendment is intended “to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.”¹⁷

D. Rule 28.1 (Rules 28(c), (b); 32(a)(7)(C); 34(d))

Since their inception, the Federal Rules of Appellate Procedure have said very little about the briefing process in cases involving cross-appeals. “This omission has been a continuing source of irritation for judges and attorneys”¹⁸ More often than not, the various individual circuit courts of appeals adopted local rules to address this glaring omission in the rules.¹⁹ The Advisory Committee has suggested adopting a new Rule 28.1 that “would collect in one place all the provisions dealing with briefing of cross-appeals now dispersed throughout the rules and would also fill in the present gaps in the rules regarding cross-appeals.”²⁰ Effectively, part of Rule 28(c) of the Federal Rules of Appellate Procedure would be deleted, Rule 28(h) would be deleted completely, and references to Rule 28.1 would be added to Rules 32(a)(7)(C)(i), (ii) and 34(d). Practically speaking, the provisions included in the proposed rule are patterned after the requirements imposed by Rules 28, 31, and 32 of the Federal Rules of Appellate Procedure on briefs in cases without cross-appeals.²¹

E. Rule 32.1

In one of the most controversial proposed changes to the Federal Rules of Appellate Procedure in many years, the Advisory Committee recommended adopting new Rule 32.1.²² This rule “would require courts to permit the citation of opinions, orders, or other judicial dispositions that have been

16. Alito 2003 Memo., *supra* note 8, at 10; *see also* JCC REPORT, *supra* note 9, at 2; Alito 2004 Memo., *supra* note 8, at 16–18.

17. Alito 2003 Memo., *supra* note 8, at 12.

18. *Id.* at 12–13; *see also* Alito 2004 Memo., *supra* note 8, at 21, 29.

19. Alito 2004 Memo., *supra* note 8, at 21; Alito 2003 Memo., *supra* note 8, at 13.

20. JCC REPORT, *supra* note 9, at 3; *see also* Alito 2004 Memo., *supra* note 8, at 29–32.

21. JCC REPORT, *supra* note 9, at 3; *see also* Alito 2004 Memo., *supra* note 8, at 32–34.

22. *See generally* Howard J. Bashman, *The Law That Dare Not Speak Its Name* (Apr. 12, 2004), at http://www.hjbashman.blogspot.com/2004_04_01_hjbashman_archive.html (last visited Oct. 12, 2004); Alito 2004 Memo., *supra* note 8, at 1–2, 52–127 (setting forth summary of comments and arguments; listing individuals and entities submitting comments).

designated as ‘not for publication,’ ‘nonprecedential,’ or the like.’²³ Notwithstanding objections to such a rule, the widespread use of Westlaw, LEXIS, and other online legal research services and publicly accessible databases (whether for pay or free), as well as the advent of the West Group’s Federal Appendix, a federal circuit court of appeals’s opinion is seldom, if ever, actually “unpublished.” Currently, the local rules of the circuit courts of appeals treat the citation of “unpublished” or “nonprecedential” opinions for their persuasive value in dramatically different ways, thereby creating confusion and hardship for practitioners.²⁴

The Advisory Committee opined that no-citation rules simply are not justifiable today, if they ever were:

[T]hey tend to undermine public confidence in the judicial system by leading some litigants—who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past—to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court’s attention information that might help their client’s cause.²⁵

The proposed new rule would require the party citing the “unpublished” decision to provide a copy to the court and to the other parties, unless the case is available on an electronic database.²⁶

F. Rule 35(a)

Current Rule 35 of the Federal Rules of Appellate Procedure addresses a circuit court of appeals’s en banc determination of cases. A proposed amendment would resolve conflict between the circuits over the application of 28 U.S.C. § 46(c) regarding the makeup of the vote needed for a hearing or a rehearing en banc.²⁷ The proposed amendment would adopt the so-called “case majority approach” to voting in which “disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc.”²⁸ Practically speaking, this would permit a smaller “majority” to approve an en banc hearing.

23. JCC REPORT, *supra* note 9, at 3.

24. Alito 2003 Memo., *supra* note 8, at 27.

25. Alito 2004 Memo., *supra* note 8, at 49.

26. *Id.* at 50. It is probably a better practice to provide a copy of the “unpublished” opinion even if it is on an accessible electronic database.

27. JCC REPORT, *supra* note 9, at 3. The cited statute states that an en banc hearing “is ordered by a majority of the circuit judges of the circuit who are in regular active service.” 28 U.S.C. § 46 (2000); *see also* Alito 2004 Memo., *supra* note 8, at 128.

28. Alito 2004 Memo., *supra* note 8, at 131–32; Alito 2003 Memo., *supra* note 8, at 39–40.

III. PENDING FEDERAL LEGISLATION AFFECTING APPEALS

A. *Openness in Justice Act (H.R. 700)*²⁹

If this legislation ultimately becomes law, it will create a new Rule 49 of the Federal Rules of Appellate Procedure. The proposed Rule 49(a) “would require the courts to issue a written opinion in . . . (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds \$100,000, and (3) any appeal involving the use of the court’s inherent powers.”³⁰ Proposed Rule 49(b) would permit any party to request a written opinion in a direct appeal.³¹

B. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 (H.R. 975)*³²

This legislation seeks to amend 28 U.S.C. § 158 to allow for appeals of certain bankruptcy matters to go directly to the circuit courts of appeals.³³

C. *Class Action Fairness Act of 2003 (H.R. 1115)*³⁴

This legislation amends 28 U.S.C. § 1292(a) “to allow appellate review of orders granting or denying class certification under . . . Rule 23” of the Federal Rules of Civil Procedure.³⁵ It also would provide that discovery be stayed pending the outcome of the appeal.³⁶

IV. FEDERAL APPELLATE DECISIONS

In *Hibbs v. Winn*,³⁷ the U.S. Supreme Court addressed the issue of whether the Tax Injunction Act³⁸ prevented a taxpayer suit against the State of Arizona Department of Revenue regarding “income tax credits for payments to organizations that award education scholarships and tuition grants to children attending private schools.”³⁹ The district court held that the action was barred, but the U.S. Court of Appeals for the Ninth Circuit reversed and the U.S. Supreme Court agreed.

Although the merits of the case are interesting and controversial, for appellate practitioners the pertinent part of the case deals with the timing

29. H.R. 700, 108th Cong. (2003).

30. See generally *Pending Legislation Affecting Rules (108th Congress)* at 15, at <http://www.uscourts.gov/rules/newrules9.html> (last visited Oct. 12, 2004).

31. *Id.*

32. H.R. 975, 108th Cong., § 1233 (2003).

33. *Pending Legislation Affecting Rules*, *supra* note 30, at 17.

34. H.R. 1115, 108th Cong. (2003).

35. *Pending Legislation Affecting Rules*, *supra* note 30, at 18.

36. *Id.*

37. 124 S. Ct. 2276 (2004).

38. 28 U.S.C. § 1341 (2000).

39. *Hibbs*, 124 S. Ct. at 2281.

of the petition for writ of certiorari. The taxpayers argued that Arizona's petition was late because it was filed more than ninety days after the date the court of appeals first entered judgment, and because neither party had moved for a rehearing.⁴⁰

Although the parties had not moved for a rehearing, the Ninth Circuit, on its own, had recalled its mandate and had ordered the parties to brief the question of whether the case should be reheard by the court en banc.⁴¹ The Court held that the Ninth Circuit's sua sponte order suspended the finality of the judgment under 28 U.S.C. § 2101(c):

A timely rehearing petition, a court's appropriate decision to entertain an untimely rehearing petition, and a court's direction, on its own initiative, that the parties address whether rehearing should be ordered share this key characteristic: All three raise the question whether the court will modify the judgment and alter the parties' rights.⁴²

The Court noted that it needed to construe its own Rule 13 in the context of "the congressional objective underpinning § 2101(c): An appellate court's final adjudication, Congress indicated, marks the time from which the period allowed for a certiorari petition begins to run."⁴³

In *Bennett v. City of Holyoke*,⁴⁴ the U.S. Court of Appeals for the First Circuit held that it had jurisdiction over an appeal even though the appellant filed the notice of appeal one day late. Bennett, a retired twenty-one-year veteran of the Holyoke Police Department, sued the city, the police department, and several of his former superiors for, inter alia, violation of 42 U.S.C. § 1983. After trial, Bennett obtained a judgment of over \$131,000. The city appealed on April 8, 2003, one day after the April 7 deadline.⁴⁵

On appeal, the First Circuit noted that even though the notice of appeal was one day late, the district court had extended the time in which to appeal under Rule 58 of the Federal Rules of Civil Procedure in conjunction with Rule 4(a)(7)(A)(i) of the Federal Rules of Appellate Procedure. The district court took the blame for the timing confusion after it issued a judgment on March 6, which made the thirty-day appeal period end on April 7, but

40. *Id.* at 2283 (citing 28 U.S.C. § 2101(c) (2000) (The Court states that this section "instructs that a petition for certiorari must be filed 'within ninety days after the entry of . . . judgment.'"). The Court also discussed its own Rule 13(3), which provides that the "time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate," but if a petition for rehearing is filed, the time for a petition for certiorari "runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment." *Id.* (quoting SUP. CT. R. 13(3)).

41. *Id.*

42. *Id.* at 2283–84.

43. *Id.* at 2284.

44. 362 F.3d 1 (1st Cir. 2004).

45. *Id.* at 3–4.

then issued an amended judgment on March 18. The amended judgment did not change the March 6 version in any way and, therefore, the original judgment was still the effective document from which the appeal was taken.⁴⁶

Bennett argued that the city's untimely appeal rendered the First Circuit without jurisdiction to hear the appeal, but the court of appeals concluded that the district court had not abused its discretion by extending the appeal period by one day. The court of appeals noted that the "entry of an essentially duplicative order obfuscated matters, rendering the delay (as the district court put it) 'understandable'; and there [was] no indication of either bad faith [by the city] or undue prejudice [to Bennett]."⁴⁷ The First Circuit ultimately affirmed the judgment in Bennett's favor.

In *Garcia-Velazquez v. Frito Lay Snacks Caribbean*,⁴⁸ the U.S. Court of Appeals for the First Circuit concluded that the appellants' notice of appeal was untimely and the court of appeals was without jurisdiction to hear the matter. In 1997, the appellants sued Frito Lay relating to employment disputes. On December 28, 2001, the district court granted Frito Lay summary judgment on the federal claims and declined to exercise supplemental jurisdiction over the state law claims. On January 16, 2002, the appellants moved to alter or amend the judgment, which the district court denied by order dated June 26, 2002. The appellants appealed the next day.⁴⁹

The First Circuit dismissed the case for lack of jurisdiction because appellants filed their notice of appeal almost six months after the December 28, 2001, order. The court of appeals concluded that the appellants filed their post-trial motion one day late (on January 15 instead of January 14, 2002) and, therefore, did not toll the running of the time period in which to file the notice of appeal. Appellants' error was that they considered New Year's Eve as a legal holiday in computing the time under Rule 6(a) of the Federal Rules of Civil Procedure. Even though the district court's Clerk of Court's Office was closed on New Year's Eve, the closing was not official as it came by order of the Chief District Judge and not by direction of the U.S. Congress, the president, the state legislature, or the governor. Because New Year's Eve was not a specified legal holiday under Rule 6(a), it had to be counted in the ten-day period for filing a post-trial motion under Rules 6(a) and 59(a) of the Federal Rules of Civil Procedure.⁵⁰

46. *Id.* at 4.

47. *Id.* at 5.

48. 358 F.3d 6 (1st Cir. 2004).

49. *Id.* at 8.

50. *Id.* at 9 (citing *In re Cascade Oil Co.*, 848 F.2d 1062, 1064 (10th Cir. 1988); *Kirby v. Gen. Elec. Co.*, No. 5:98CV70-V, 2000 WL 33917974, at *2 (W.D.N.C. Feb. 9, 2000), *aff'd*, Nos. 00-1298, 01-1018, 01-1019, 01-1239, 01-1334, 2001 WL 1187957 (4th Cir. Oct. 9, 2001) (Christmas Eve and New Year's Eve are not legal holidays under Fed. R. Civ. P. 6(a) even if district court is closed those days)).

The U.S. Court of Appeals for the Fifth Circuit, in *United States v. Reyna*,⁵¹ addressed the standard of review for a district court's failure to afford a criminal defendant the right of allocution. Prior to this case, the Fifth Circuit had automatically reversed a conviction when allocution was denied.⁵² In this case, the panel of the court of appeals followed this precedent by vacating the conviction and remanding the case.⁵³ On reconsideration en banc, the Fifth Circuit altered its prior stance and concluded that a denial of the right of allocution under Rule 32 of the Federal Rules of Criminal Procedure should be reviewed under the plain error standard of review under Rule 52(b) of the Federal Rules of Criminal Procedure.⁵⁴

In *Pincay v. Andrews*,⁵⁵ the U.S. Court of Appeals for the Ninth Circuit reversed a district court's order extending the time in which a party was required to notice an appeal. On July 3, 2002, after several prior appeals, the district court entered judgment for Pincay against Andrews for certain financial injuries. A paralegal in Andrews's counsel's office timely provided counsel with a copy of the judgment; however, counsel apparently relied on the paralegal's interpretation of Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure and thought that he had sixty days to file a notice of appeal. Andrews's counsel filed an extension motion under Rule 4(a)(5)(A)(ii) on August 25 and a notice of appeal on August 27.⁵⁶ The district court granted the extension by order dated August 30, asserting that Andrews had shown "excusable neglect."⁵⁷ Pincay appealed.

The Ninth Circuit disagreed with the district court's assessment regarding excusable neglect, stating: "What counsel did was to *delegate a professional task to a nonprofessional to perform*. Knowledge of the law is a lawyer's stock in trade. Bureaucratization of the law such that the lawyer can turn over to nonlawyers the lawyer's knowledge of the law is *not acceptable* for our profession."⁵⁸ The court continued:

The lawyer's only excuse is that he relied on this non-lawyer clerk. But this focus is wrong. The focus must be on the lawyer When the lawyer delegates, he retains responsibility for knowing the law.

The lawyer was unaware of the law. Not knowing the law governing one's practice is different from mere neglect, and it cannot be classed as excusable neglect. No axiom is more familiar than, "Ignorance of the law is no excuse."

51. 358 F.3d 344 (5th Cir. 2004) (en banc).

52. *Id.* at 348 (citing *United States v. Dabeit*, 231 F.3d 979, 981 (5th Cir. 2000); *United States v. Myers*, 150 F.3d 459, 464–65 (5th Cir. 1998)).

53. *See id.* at 347.

54. *Id.* at 350 (abrogating *Dabeit*, 231 F.3d at 979; *Myers*, 150 F.3d at 459).

55. 351 F.3d 947 (9th Cir. 2003).

56. *Id.* at 948–49.

57. *Id.* at 949.

58. *Id.* at 949–50 (emphasis added).

This ordinary rule is not a per se rule, but it ordinarily applies to those whose profession is the law.

Nowhere in the proceedings . . . does the lawyer state that he had read the federal rules governing appeals. Nowhere does he state that he misremembered them. All that the lawyer states is that he relied on his clerk. A lawyer's obligation to know relevant law cannot be delegated in this way to a nonlawyer.⁵⁹

The court of appeals reversed the district court's decision and, in turn, dismissed the appeal.

V. STATE COURT APPELLATE DECISIONS

The Alabama Supreme Court, in *Ex parte State of Alabama (In re Marshall v. State)*,⁶⁰ addressed a criminal defendant's request for the court to amend the rules of criminal procedure to allow an out-of-time appeal of a trial court's denial of his petition for post-conviction relief. In 1997, Marshall was convicted of murder and sentenced to life in prison. The trial court dismissed his first petition for post-conviction relief (filed in 1998), but Marshall allegedly never received notice of the dismissal. He appealed, but his challenge was dismissed as untimely. Marshall filed a second petition for post-conviction relief in June 2001, which the trial court again dismissed. He appealed that decision, and the Court of Criminal Appeals held that he was entitled to an out-of-time appeal, because there was no dispute from either the state or the circuit court as to his allegation that he had not received notice of the dismissal of the first petition.⁶¹

The state filed a petition for writ of certiorari asking the Alabama Supreme Court to settle an alleged conflict in precedent between the Court of Criminal Appeals and the Alabama Supreme Court.⁶² After reviewing the matter, the state supreme court reversed the Court of Criminal Appeals's grant of Marshall's second petition on the basis that it was the incorrect remedy to address his asserted lack of notice.⁶³ The court specifically noted, "the *remedy* for a breach of [a trial court's] duty to notify, and to ensure due process, was the issuance of a *writ of mandamus* from this court to the circuit court."⁶⁴ Moreover, the court recognized that to afford Marshall relief as fashioned by the Court of Criminal Appeals would effectively create a new remedy in addition to the already accepted remedy of seeking a writ of mandamus. Unfortunately, since a writ of mandamus

59. *Id.* at 951.

60. 884 So. 2d 900 (Ala. 2003).

61. *Id.* at 901.

62. *Id.* at 901-02.

63. *Id.* at 903-04.

64. *Id.* at 904-05 (citing *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992); *Ex parte Johnson*, 806 So. 2d 1195, 1197 (Ala. 2001)).

can only operate when there is no other remedy available, the two remedies were inherently in conflict and the court was unable to “recognize such an ‘additional’ remedy”⁶⁵

In *Commission on Human Rights & Opportunities v. Board of Education of the Town of Cheshire*,⁶⁶ the Connecticut Supreme Court addressed the appealability of a trial court’s remand order of a case to an administrative entity. Chillon Ballard filed a complaint with the Commission against the school board and the high school principal alleging, inter alia, that racial discrimination had forced him to leave Cheshire High School when he was a senior. The defendants moved to dismiss the complaint on jurisdictional grounds and, after the administrative referee agreed, the Commission appealed to the trial court. On appeal, the trial court reversed, finding that the Commission had jurisdiction over Ballard’s allegations, and remanded the matter for further proceedings. The defendants, in turn, appealed the remand order.⁶⁷

The court recognized the existence of a conflict between its own precedents⁶⁸ and Connecticut statutory law.⁶⁹ After reviewing its precedents, the court determined that it had misinterpreted the legislature’s purpose and intent concerning Connecticut General Statute § 4–183(j).⁷⁰ Moreover, in an unusually candid admission,⁷¹ the court stated that there simply was no basis in the statute’s language or its legislative history to have justified the court’s prior interpretation of the statute. The court overruled both conflicting precedents and concluded that any remand order from a trial court back to the administrative entity was a final judgment for appellate purposes.⁷²

In *Price v. State*,⁷³ Florida’s Fifth District Court of Appeal sanctioned a criminal defendant’s attorney for failing to comply with the applicable appellate rules. Vinette Morris-Hudson’s client was convicted of a crime and

65. *Id.* (citing *Ex parte Weaver*, 781 So. 2d 944, 949 (Ala. 2000) and abrogating *Brooks v. State*, No. 1020344, 2004 WL 68542 (Ala. Jan. 16, 2004)).

66. 855 A.2d 212 (Conn. 2004).

67. *Id.* at 217–18.

68. See generally *Morel v. Comm’n of Pub. Health*, 811 A.2d 1256 (Conn. 2002); *Lisee v. Comm’n on Human Rights & Opportunities*, 782 A.2d 670 (Conn. 2001).

69. See CONN. GEN. STAT. § 4–183(j) (“For purposes of this section, a remand [from a trial court to an administrative entity] is a final judgment.”).

70. *Bd. of Educ.*, 855 A.2d at 220–21. The court previously concluded that the legislature, in adopting CONN. GEN. STAT. § 4–183(j), had intended to codify the decision in *Schieffelin & Co. v. Dep’t of Liquor Control*, 521 A.2d 566, 570 (Conn. 1987), which had established a two-tier review of the appealability of a trial court’s remand order. See generally *Lisee*, 782 A.2d at 675 (dictum).

71. “[T]his is one of those exceptional cases where, having become aware of the clear error of our ways, it is wiser to correct our errors now, rather than wait for the legislature to do so.” *Bd. of Educ.*, 855 A.2d at 220.

72. *Id.* at 220 & n.11.

73. 873 So. 2d 1246 (Fla. Dist. Ct. App. 2004).

although she timely filed a notice of appeal on his behalf, Ms. Morris-Hudson was late consistently thereafter. Ms. Morris-Hudson was supposed to file the record on appeal by May 30, 2003, but did not do so until about July 31; she was required to file the initial brief by September 11, but failed to do so and was personally sanctioned \$250 for failing to comply with the court's orders and the appellate rules.⁷⁴ Ms. Morris-Hudson initially failed to pay the sanction, finally doing so some eleven days late and only upon the threat of being sanctioned further.⁷⁵

The court of appeals held that Ms. Morris-Hudson's rule breaking had crossed the line and that action was required:

The rules of appellate procedure include time schedules designed to insure an orderly and efficient appellate process. While we are aware that such rules are not meant to be rigid or unyielding where valid reasons or exceptional circumstances support extension requests, when abuse of the rules and this court's occurs, sanctions must follow.⁷⁶

The court sanctioned Ms. Morris-Hudson an additional \$1,000 and reported her actions to the Florida Bar.⁷⁷

In *Augusta-Richmond County Commission v. Lee*,⁷⁸ the Georgia Supreme Court took the opportunity to address mandamus actions. Chonk Suk Lee unsuccessfully applied for a permit to sell beer and wine in her convenience store. After the commission denied her request, Lee sought a writ of mandamus from the Superior Court. On appeal, the Superior Court reversed and directed the commission to grant Lee the requested permit. The commission, in turn, appealed to the Georgia Supreme Court. The court initially dismissed the commission's direct appeal because of the underlying subject matter, holding that it should have been filed as a discretionary appeal.⁷⁹ Nevertheless, the court granted the commission's motion for reconsideration on the grounds that it had accepted direct appeals involving the commission and the same ordinance in three nearly identical cases. However, the court warned that the commission should look to the requirements of the discretionary appeals statute to govern future appeals of this nature.⁸⁰

74. *Id.* at 1247. The court of appeals had issued a number of orders directing Ms. Morris-Hudson to comply with the appellate rules. Unfortunately, she either merely sought an extension or did not respond at all.

75. *Id.*

76. *Id.* at 1246.

77. *Id.* at 1248. See also *Holland v. Heavner*, 595 S.E.2d 224, 226-28 (N.C. Ct. App. 2004) (dismissing appeal due to numerous violations of the appellate rules by appellate counsel).

78. 592 S.E.2d 71 (Ga. 2004).

79. *Id.*

80. *Id.* at 72 (citing GA. CODE ANN. § 5-6-15 (West 2004) (governing discretionary appeals)).

The Indiana Court of Appeals, in *Thacker v. Wentzel*,⁸¹ awarded the appellees appellate attorney fees for the pro se appellant's blatant failure to comply with the Indiana Appellate Rules. The court of appeals noted that Thacker's brief did not comply with the rules in many ways: his table of authorities was not in alphabetical order, his appendix did not have page numbers, his statement of the case did not adequately describe the course of the proceedings that were relevant to the issues on review, and his brief did not provide page references to the appendix.⁸² The court found: "Thacker's non-compliance with our appellate rules of procedure is substantial, permeates his entire brief, and precludes our review of his allegation of error on appeal."⁸³ Thacker's disregard for procedure was so extensive in this case that the court remanded the matter back to the trial court to calculate the appropriate award of fees.⁸⁴

In *Isis Development, LLC v. Town of Wells*,⁸⁵ the Maine Supreme Judicial Court addressed the standard of review regarding local volunteer boards' interpretations of local zoning ordinances. In 2002, Isis applied to the town for a permit to construct a three-story, brick, self-storage facility within the town's General Business District. The town's Code Enforcement Officer denied the permit and the Board of Zoning Appeals approved the denial. Isis appealed to the Superior Court, which reversed the denial, and the town then appealed to the Supreme Judicial Court.⁸⁶

On appeal, the Supreme Judicial Court concluded that the interpretation of a zoning ordinance presents a question of law that the court should review under a de novo standard. While acknowledging that it had adopted a deferential review standard for an administrative agency's interpretation of an ordinance or statute that it regularly administered, the court found that a local volunteer board's interpretation of a statute, ordinance, or both was not in the same category and must be reviewed under a de novo standard.⁸⁷ Therefore, under this new standard of review, all cases that "have mistakenly merged the de novo and deferential reviews" must be abrogated.⁸⁸

In *Fabre v. Walton*,⁸⁹ the Massachusetts Supreme Judicial Court addressed the determination of appellate attorney fees. After a single justice

81. 797 N.E.2d 342 (Ind. Ct. App. 2004).

82. *Id.* at 347.

83. *Id.*

84. *Id.* at 347–48. *See generally In re Estate of Eyajan*, No. 2002-A-0043, 2004 WL 1043698 (Ohio Ct. App. May 7, 2004) (appeals dismissed after pro se appellant failed on three attempts to submit an appellate brief that complied with the appellate rules).

85. 836 A.2d 1285 (Me. 2003).

86. *Id.* at 1286.

87. *Id.* at 1287 & n.4.

88. *Id.* at 1287 (citing *Griffin v. Town of Dedham*, 799 A.2d 1239, 1242 (Me. 2002); *Wright v. Town of Kennebunkport*, 715 A.2d 162, 164 (Me. 1998)).

89. 802 N.E.2d 1030 (Mass. 2004).

awarded Amelia Walton \$56,510 in appellate attorney fees and costs, the debtor, Sean Fabre, appealed to the full court.⁹⁰ While acknowledging the long-time use of the “single justice” attorney fee award procedure, the court noted that this procedure often results in more appeals from the single justice’s decision to the full court, either as to the amount of the award or as to the basic question of whether an award is appropriate in the first place.⁹¹ The court took the opportunity to announce a new system for the award of appellate attorney fees and costs whereby the entire panel that heard the appeal should consider (a) the prevailing party’s appellate attorney fees and costs application, (b) the losing party’s opposition, and (c) any reconsideration motion.⁹²

In *Kintz v. Amerlink, Ltd.*,⁹³ the North Carolina Court of Appeals imposed monetary sanctions against both counsel for the appellant and counsel for the appellees relating to preparation of the record on appeal. The court noted that Rule 9(a)(1)(a) of the state’s appellate rules requires a record on appeal to contain an index of its contents.⁹⁴ The record in this case did contain a page captioned “Index,” but it failed to include any page numbers. The court held that an index without page numbers simply does not qualify as an index. Because the record on appeal had been settled by agreement of all counsel, the court of appeals concluded that each counsel involved bore the duty to see that the record on appeal submitted conformed with the rules. The court of appeals assessed unspecified costs against the two appellate attorneys who had signed the agreement settling the record on appeal.⁹⁵

The Ohio Supreme Court, in *Leon v. Boardman Township*,⁹⁶ addressed a police officer’s alleged wrongful termination for purportedly violating his employer’s residency requirements. The officer arbitrated his discharge, and the Ohio Patrolmen’s Benevolent Association represented his interests during the proceeding. When Leon was not satisfied by the results of the arbitration, he requested the trial court to vacate the award, but the court dismissed his request on the grounds that he lacked standing because he was not a party to the arbitration. The Ohio Court of Appeals affirmed, noting that the police officer’s collective bargaining agreement did not permit Leon to “have control over the arbitration proceedings”⁹⁷

90. *Id.* at 1031.

91. *Id.* at 1032 (citing *Stowe v. Bologna*, 629 N.E.2d 304 (Mass. 1994); *Edgar v. Edgar*, 549 N.E.2d 1128 (Mass. 1990)).

92. *Id.*

93. 595 S.E.2d 239 (N.C. Ct. App. 2004) (Table) (Unpublished Disposition at 2004 WL 835734).

94. *Id.* at *4 (citing N.C. R. App. P. 9(a)(1)(A)).

95. *Id.*

96. 800 N.E.2d 12 (Ohio 2003).

97. *Id.* at 13.

On discretionary appeal, the Ohio Supreme Court concluded that

when an employee's discharge or grievance is arbitrated between an employer and a union under the terms of a collective bargaining agreement, the aggrieved employee does not have standing to petition a court to vacate the award . . . unless the collective bargaining agreement expressly gives the employee an independent right to submit disputes to arbitration.⁹⁸

Since Leon's collective bargaining agreement did not contain such permissive language, the Supreme Court affirmed the dismissal of his case.

In *Commonwealth of Pennsylvania v. Melendez-Rodriguez*,⁹⁹ the Pennsylvania Superior Court addressed certain evidentiary issues of a man convicted of, among other things, murder. The defendant claimed that the trial court erred by admitting into evidence large, color photographs of the victim's wounds, which prejudiced the defendant's case.¹⁰⁰ Unfortunately, the defendant's legal counsel failed to object contemporaneously to the photographs' admission at trial and did not raise the issue until after his appeal was filed.¹⁰¹ Nevertheless, the defendant argued that because the trial court overlooked his counsel's failure to object in its post-trial order, the appellate court must do likewise.¹⁰²

The Pennsylvania Superior Court, sitting en banc, looked to interpretations of Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure and concluded that in order for the alleged erroneous admission of evidence to be challenged on appeal, the appellant must "make a timely and specific objection to the admission of evidence at trial and subsequently preserve the issue for appellate review by including it in a [Rule] 1925(b) statement . . ." ¹⁰³

The Utah Supreme Court, in *RHN Corp. v. Veibell*,¹⁰⁴ adopted a new standard for review of a trial court's findings of fact in an equity case. Even though the Veibell and Ericksen families had owned adjacent properties since the early 1900s, their present descendants were locked in two bound-

98. *Id.* at 16 (abrogating *Barksdale v. Ohio Dep't of Admin. Servs.*, 604 N.E.2d 798 (Ohio Ct. App. 1992) (holding that an employee under a collective bargaining agreement did have standing to challenge an award as he or she was a real party in interest and as his or her rights were affected by the decision)).

99. 856 A.2d 1278 (Pa. Super. Ct. 2004) (en banc).

100. *Id.* at 1280. As noted by many a law professor and jurist, generally speaking any evidence from one party will prejudice the case of the party against whom the evidence is offered. That is, of course, the very nature of the adversary legal process.

101. *Id.* at 1287.

102. *Id.* (citing *Commonwealth v. Miller*, 765 A.2d 1151, 1155 (Pa. Super. Ct. 2001) (finding that when a "trial court chooses to overlook the error and addresses the issue, an appellate court is bound to do likewise").

103. *Id.* at 1289 (abrogating and disavowing *Miller*, 765 A.2d at 1151; *Commonwealth v. Perez*, 664 A.2d 582 (Pa. Super. Ct. 1995)).

104. 96 P.3d 935 (Utah 2004).

ary claims based upon acquiescence and deed reformation.¹⁰⁵ The dispute eventually wound its way to trial and the trial court rendered its decision, which both parties appealed. The Supreme Court took the opportunity to address the proper standard of review. The court noted that it was “settled that in cases at law, an appellate court will review a trial court’s findings of fact under a clearly erroneous standard[, but in] equity cases, appellate courts have often applied a clear preponderance standard.”¹⁰⁶ Nevertheless, the court recognized that the modern trend in equity cases was to use the clearly erroneous standard in reviewing findings of fact.¹⁰⁷ Based upon this trend and in the interests of simplicity, the court held that the standard of review should be the same for both cases in equity and at law.¹⁰⁸

VI. CONCLUSION

As noted in last year’s article, there have not been any great changes in appellate law in the last few years. However, there are a number of important changes on the horizon, including the advent of electronic filing, a number of proposed new or amended appellate rules, and some interesting legislation that will affect our niche practice. As in the past, appellate practitioners across this country continue to ply their trade in various courts and seek to implement the extensive 2002 amendments to the Federal Rules of Appellate Procedure. It is hoped that the coming electronic filing process will make our jobs somewhat easier.

105. *Id.* at 938.

106. *Id.* at 944 (citing *Spears v. Warr*, 44 P.3d 742 (Utah 2002); *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *Horton v. Horton*, 695 P.2d 102, 105 (Utah 1984); *Jensen v. Brown*, 639 P.2d 150, 151–52 (Utah 1981); *Del Porto v. Nicolo*, 495 P.2d 811, 812 (Utah 1972)).

107. *Id.* (citing *MacKay v. Hardy*, 896 P.2d 626, 629 (Utah 1995); *Bellon v. Malnar*, 808 P.2d 1089, 1092 (Utah 1991); *Bountiful v. Riley*, 784 P.2d 1174, 1175 (Utah 1989)).

108. *Id.*