A Word from the Publications Chair
Dear CAL Members,
I am pleased to distribute the final 2008 edition of *Appellate Issues*. I hope that you enjoy this edition of *Appellate Issues*. The Publications Committee previously announced that CAL is writing its first book. The book is an “insiders” guide of practical tips and procedure in the appellate courts of every state, Circuit and the Supreme Court. The Committee is still seeking authors for individual chapters on the following: United States Supreme Court, Third, Fourth, Sixth, Eighth and Ninth Circuits, Alaska, Arkansas, Delaware, Georgia, Idaho, Illinois, Iowa, Maine, Maryland, Mississippi, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming. If you are interested in being considered for a chapter, or you have a recommendation on an author, please send your request or recommendation to me at lmedford@elrodtrial.com and the book’s editor, Dana Livingston at dlivingston@adjtlaw.com.

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INSIDE THIS ISSUE

*Exxon Shipping Co. v. Baker*: The U.S. Supreme Court Adopts Federal Common Law Limits On Punitive Damages
by J. Brett Busby

Notes From the Inside
by McKay Cunningham

Pro Bono Appeals for New Lawyers
by Jason Jarvis

Book Review
by Norman A. Olch

Direct Bankruptcy Appeals: Three Years Later
by Ben L. Mesches

ABA Council of Appellate Lawyers - CAL Annual Meeting Minutes
2008 ABA Annual Meeting in New York
Exxon Shipping Co. v. Baker: The U.S. Supreme Court Adopts Federal Common Law Limits On Punitive Damages

by J. Brett Busby

In June 2008, after a five-year hiatus, the U.S. Supreme Court returned to the subject of excessive punitive damage awards in Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008). The Court developed a “guidepost” analysis in 1996 to define the substantive constitutional limitations that the Due Process Clause places on the size of punitive awards. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). It applied that analysis in Gore and again in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), to strike down punitive awards as unconstitutionally excessive.

The Court’s next major punitive damages decision, however, did not reach the question whether the award was excessive. See Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007). Instead, the Court vacated and remanded because the lower courts had failed to recognize that a jury may not constitutionally punish a defendant for harm to persons who were not parties to the litigation. The last edition of Appellate Issues included two interesting articles discussing the implications of Philip Morris and the course of the litigation on remand. As discussed at the end of this article, the Supreme Court recently granted certiorari in Philip Morris again and it will hear argument in late 2008 or early 2009.

Exxon Shipping gave the Court an opportunity to address the size of punitive damage awards again—this time from the perspective of the common law. Putting aside the narrower constitutional role of defining the “outer limit [of punitive awards] allowed by due process,” the Court held as a matter of federal maritime common law that an award of punitive damages that is greater than the compensatory damages will be excessive in the ordinary case. 128 S. Ct. at 2626, 2633. This holding may be persuasive to courts reviewing punitive damages for excessiveness under state common law, and it is likely to influence the constitutional excessiveness analysis.

The history of Exxon Shipping

Exxon Shipping was a set of consolidated civil cases in which classes of commercial fisherman, Native Alaskans, and landowners sought to recover damages caused by the 1989 grounding of the Exxon Valdez supertanker and the resulting oil spill.2 The issues that ultimately reached the Supreme Court concerned when punitive damages may be imposed on a company for conduct by its employee, whether punitive damages are available when Congress has

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2 This summary of the facts and lower court proceedings is taken from the Supreme Court’s opinion. See Exxon Shipping, 128 S. Ct. at 2613-14.
specified relevant civil and criminal penalties by statute, and what limits maritime law places on the size of punitive damage awards.

In the first phase of the trial in Alaska federal court, the jury heard evidence about the tanker captain’s alcoholism, Exxon officials’ knowledge of his condition, and the captain’s drinking on the night of the spill. The jury was instructed that a corporation is responsible for reckless acts by managerial employees acting in the scope of their employment, and it found both Exxon and the captain reckless and thus potentially liable for punitive damages.

In a later phase of the trial concerning the amount of punitive damages, the parties offered testimony about the acts and omissions of Exxon management regarding the spill. The jury was instructed to consider the reprehensibility of defendants’ conduct, their financial condition, the magnitude of the harm, and any mitigating facts, and it awarded $5 billion in punitive damages against Exxon and $5,000 against the captain. The district court denied Exxon leave to file a late motion for judgment arguing that the common-law rule of maritime punitive damages had been preempted by the water pollution penalties in the Clean Water Act (“CWA”).

On appeal, the Ninth Circuit upheld the jury instruction on recklessness. It recognized that Exxon’s CWA argument was late but decided not to treat it as waived because preemption had been an issue throughout the litigation and the question was of massive significance. It rejected that argument on the merits, however. Finally, the Ninth Circuit remitted the award against Exxon to $2.5 billion on constitutional excessiveness grounds.

**The Supreme Court’s decision**

The Supreme Court granted certiorari. As to recklessness, the Court divided four to four (with Justice Alito recused) regarding whether federal maritime law makes shipowners responsible for the reckless acts of shipmasters. Thus, the Ninth Circuit’s holding that they are responsible remained in place. With respect to the CWA, the Court declined to hold that the Ninth Circuit had abused its discretion in considering Exxon’s preemption argument, and it agreed that the argument failed given the CWA’s broad saving clause reserving other damage obligations.

The Court next took up Exxon’s argument that, as a matter of federal maritime common law, the size of the punitive award exceeded the bounds justified by the goals of punitive damages. The Court began by considering the history of punitive damages, their twin goals of punishing and deterring reckless (or worse) conduct, and various factors that affect the amount of punishment. For example, the court noted that “[a]ction taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure.” 128 S. Ct. at 2622. In addition, “heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect . . . when the value of injury and the corresponding compensatory award are small . . . [and] in order to induce private litigation to supplement official enforcement that might fall short if unaided.” *Id.*

The Court then reviewed modern state regulation of punitive damages, their limited availability in other countries, and recent studies analyzing punitive awards. Based on these studies, it concluded that “discretion to award punitive damages has not mass-produced runaway
awards,” noting that “by most accounts the median ratio of punitive to compensatory awards has remained at less than 1:1. Nor do the data substantiate a marked increase in the percentage of cases with punitive awards over the past several decades.”  Id. at 2624.

Instead, the Court found that “[t]he real problem . . . is the stark unpredictability of punitive awards.”  Id. at 2625.  Statistical studies revealed “a median ratio of punitive to compensatory awards of 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81”—in other words, “the spread is great” and “outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories.”  Id.  The Court concluded that this problem made it desirable to regulate the common law remedy of punitive damages:

[T]he unpredictability of high punitive awards . . . is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries . . . . Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes’s “bad man” can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man’s counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage. 3

The Court then considered three potential approaches to judicial review of punitive awards that go beyond traditional “shock the conscience” or “passion and prejudice” tests. First, some state courts review the awards using multi-factor verbal tests, parts of which echo BMW’s constitutional guideposts. Yet these judicial review criteria, like the instructions typically given to juries, offer only general guidance for reaching an appropriate penalty. The Court expressed skepticism that such verbal tests could produce systemic consistency given their failure to do so in the analogous context of federal criminal sentencing, where judicial discretion was eventually abandoned in favor of a system of detailed quantitative guidelines.  Id. at 2627-29.

Second, the Court considered some states’ practice of setting a hard dollar cap on punitive damages. It rejected that approach as well, noting the difficulty of settling on a particular figure as appropriate across the board and courts’ inability to index that figure for inflation.  Id. at 2629. The Court found more promising a third alternative adopted by many states: “pegging punitive to compensatory damages using a ratio or maximum multiple.”  Id.

As to the appropriate multiple, the Court rejected a 3:1 ratio as too high for cases involving more than negligent but less than malicious behavior.  Id. at 2631-32. It also rejected 2:1, noting that federal treble-damage statutes yield a 2:1 ratio but observing that they govern areas far afield from maritime concerns and that their purpose is often to supplement official enforcement by inducing private litigation, which was unnecessary here.  Id. at 2632.

Ultimately, the Court held that 1:1 is a “fair upper limit” in maritime cases “with no exceptional earmarks of blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of

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3 128 S. Ct. at 2627 (citations omitted).
detection that have opened the door to higher awards.” *Id.* at 2633. The Court found support for this conclusion in the studies showing a median ratio of less than 1:1, which “reflect[s] what juries and judges have considered reasonable across many hundreds of punitive awards.” *Id.* at 2632. It also noted that the CWA provision doubling the maximum fine for knowing violations of pollution restrictions confirmed that a punitive award greater than 1:1 would be excessive. *Id.* at 2634.

Finally, the Court observed that “our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low.” *Id.* In particular, it pointed to *State Farm*’s statement that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* (quoting *State Farm*, 538 U.S. at 425). In a footnote, the Court explained that this reference to “‘substantial’ takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit.” *Id.* at 2634 n.28. It concluded that class actions address this concern and thus the class recovery—not individual awards—were the touchstone for determining substantiality. *Id.* Here, the class recovery of more than $500 million was substantial, so “the constitutional outer limit may well be 1:1.” *Id.*

Applying this ratio, the Court took as given the district court’s calculation that the relevant compensatory damages were $507.5 million, and it vacated and remanded for the Ninth Circuit to remit the punitive damages to that amount. *Id.* In its judgment, the Court said that the Ninth Circuit should also address the parties’ dispute about whether the plaintiffs were entitled to interest on the reduced punitive award and, if so, from what date.

**Implications of Exxon Shipping**

Aside from its obvious impact in the maritime arena, the *Exxon Shipping* decision is likely to affect the law of punitive damages in at least two ways. First, it provides a persuasive roadmap for any court to follow in deciding whether and how to conduct more searching common law excessiveness review of punitive awards. Much of the Supreme Court’s reasoning appears applicable to any case in which punitive damages are recoverable under state or federal statutes or decisional law.

When the amount of punitive damages has been limited by statute, however, *Exxon Shipping* may not support more restrictive common law limits. In response to Justice Stevens’ argument in dissent that those limits should be left to Congress, the Court noted that maritime law is “a common law landscape largely of our own making.” 128 S. Ct. at 2630 n.21. Thus, “we may not slough off our responsibility for common law remedies because Congress has not made a first move,” though of course “Congress retains superior authority” to revise “a judicially derived standard.” *Id.* When statutory limits are already in place, this justification for judicial regulation of punitive damages loses some force.

Second, *Exxon Shipping* is likely to influence constitutional excessiveness review of punitive awards. For example, one theme of the decision is that our “commonly held notion of law,” which “rests on a sense of fairness,” requires a penalty scheme that threatens wrongdoers “with a fair probability of suffering in like degree when they wreak like damage.” 128 S. Ct. at 2627. Advocates can use this theme to encourage courts applying *BMW*’s reprehensibility and
ratio guideposts to compare the size of the award at issue to punitive awards upheld or reduced in other cases involving similar conduct.

In addition, the Court’s analysis of the appropriate ratio is likely to be imported into the constitutional context because it employs many of the same variables that courts consider in applying the constitutional excessiveness guideposts. Thus, 1:1 may become the default constitutional maximum in cases of reckless conduct “with no earmarks of exceptional blameworthiness”—such as “intentional or malicious conduct” or “dangerous activity carried on for the purpose of increasing a tortfeasor’s financial gain”—unless “modest economic harm or odds of detection . . . open[] the door to higher awards.” Moreover, the Court made clear that the criterion of “substantial” versus “modest” economic damages simply “takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit.” Exxon Shipping, 128 S. Ct. at 2634 n.28. When other mechanisms—such as class actions—are available to encourage suit, modest awards of economic damages to individual plaintiffs are unlikely to support a punitive award exceeding the 1:1 ratio. Id.

Finally, while Exxon Shipping did not expressly address “the constitutional significance of the unpredictability of high punitive awards,” 128 S. Ct. at 2627, its reasoning suggests that unpredictability also raises constitutional concerns. Exxon Shipping decided that unpredictability should not be tolerated because it is in tension with the goals of knowing the stakes when choosing a particular course of action and imposing like punishment for like damage. Id. In other cases, the Court has indicated that fair notice and similar treatment of similarly situated persons are important factors in due process analysis.5 Thus, Exxon Shipping’s reasoning regarding unpredictability could easily be used to support an increased focus on the ratio guidepost in conducting constitutional excessiveness review. As the Court observed, “eliminating unpredictable outlying punitive awards . . . will probably have to take the form . . . of quantified limits” rather than “verbal formulations.” Id. at 2628-29.

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4 Exxon Shipping, 128 S. Ct. at 2631, 2633; cf. State Farm, 538 U.S. at 419 (considering whether conduct was malicious or threatened physical danger in applying reprehensibility guidepost); id. at 425 (considering whether injury is hard to detect or caused small economic damages in applying ratio guidepost).

5 Cf. United States v. Williams, 128 S. Ct. 1830, 1845 (2008) (“A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”); State Farm, 538 U.S. at 417 (due process requires “that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose”); Lyng v. Castillo, 477 U.S. 635, 636 & n.2 (1986) (applying “guarantee of equal treatment in the Due Process Clause”).
Coming up next: *Philip Morris* (again)

The Court’s next opportunity to address punitive damages will come when it revisits the *Philip Morris* case in the coming months. Because the Court has limited its grant of certiorari to procedural issues, however, the next *Philip Morris* decision is unlikely to shed additional light on constitutional excessiveness review of punitive awards.

On remand following the U.S. Supreme Court’s original decision in *Philip Morris*, the Oregon Supreme Court held that the trial court did not err in failing to give Philip Morris’s proposed jury instruction on harm to non-parties because it was not “clear and correct in all respects” as required by Oregon law. *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1261 (Or. 2008). For example, the court held that even if the instruction correctly articulated the due process standard regarding harm to non-parties, it erroneously suggested that the jury had discretion whether to consider Oregon’s statutory factors for determining punitive damages, and it misstated the statutory factor regarding profitability. *Id.* at 1262-63.

Philip Morris filed another certiorari petition (No. 07-1216), arguing that the Oregon Supreme Court did not follow the U.S. Supreme Court’s mandate, and that the preservation rule it invoked is neither firmly established nor regularly followed and thus cannot provide an independent and adequate state-law ground for the judgment. At minimum, Philip Morris argued, the U.S. Supreme Court should decide the second question presented by its prior certiorari petition but not reached in the original decision: whether the $79.5 million award of punitive damages (which is 97 times the compensatory damages) is unconstitutionally excessive. When the Court granted certiorari, however, it excluded this second question. Thus, the Court’s next *Philip Morris* decision probably will not have a significant impact on the law of punitive damages.
The first lesson in persuasive legal writing is “know your audience.” When drafting a legal brief to an appellate court, maybe you envision the judge methodically pouring over the niceties and nuances of your prose. But in many appellate courts a law clerk or other staff member takes the first crack at your brief. Below are a few notes from a former federal appellate law clerk and current appellate court staff attorney that might broaden your influence with the judge by communicating through her staff.

**Study memos and bench memos**

The great majority of appellate courts assign study memos or bench memos to law clerks and staff attorneys. Sometimes a law clerk’s review of your brief will only result in a preliminary summary of the dispute. But more often than not, courts require staff to compile a comprehensive analysis – including a recommendation. A law clerk’s memo may be the first words a judge reads about your case. As a result, you want the law clerk’s memo to parrot your writing as much as possible.

For example, if the study memo calls for a one-sentence presentation of each issue, you have a much better chance of a law clerk adopting your characterization of the issue if you frame it in one sentence – rather than as a deep issue. Similarly, study memos may require a separate section on error preservation or jurisdiction. The appellate advocate who includes a discrete subsection on error preservation is far more helpful to court staff than an advocate who argues preservation sporadically throughout the brief.

With regard to substantive law, a humble advocate will sacrifice a few pages educating the reader. Most staffers don’t have a working knowledge of off-shore maritime law or the scope of regulatory power over oil and gas leases. While your expertise makes you fluent, an esoteric brief serves only your ego. If, due to mastery of a topic, you write as though everyone else is on your level, you risk clear communication, and by extension you risk persuasion. That said, it is often impossible to avoid jargon and vital technicalities in a byzantine dispute. Conveying meaning with clarity in those cases is the art of appellate advocacy. At minimum, include a footnote or citation to a reputable secondary source, pointing a law clerk to a treatise or digest so he can get up to speed.

**Telling your story**

The statement of facts is arguably the most important part of your brief. The judges probably know the law, but they are complete strangers to the facts, making it

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particularly important to convey a comprehensive and persuasive narrative. One pitfall stems from the fact that you’ve been living with the case a long time. It’s easy to omit facts you’ve long since taken for granted. Have a lawyer who is unfamiliar with the case read your brief before you file it.

While your statement of the facts persuades through telling your story, keep an eye out for over-zealous advocacy. In particular, the statement of the case traditionally conveys procedural history. Insulting opposing counsel or injecting superlatives when the reader expects an objective recitation of the procedural background only undermines your credibility. Judges quickly recognize and disfavor ad hominem attacks and overbroad claims unsupported by the record; although less attuned, law clerks sense it too. Objective representation of law and fact is far more persuasive to both audiences.

Finally, think visually. Buttress your narrative by saying it twice, in two forms.

- In an alter ego case, or dispute including various parent, subsidiary, affiliate entities – include a diagram connecting the corporate cousins.
- In an easement dispute or condemnation appeal, include a map.
- In a probate contest, include a family tree.
- In a specific jurisdiction debate, include a chronology of defendant’s contacts.

You say more in a one-page diagram than four pages of rambling prose. I’ve seen judges try to persuade colleagues with crude diagrams of their own making. Better to have a judge lift up your diagram than anyone else’s.

The record, the research and the appendix

The Record

As a rule of thumb, include record cites often and with precision. Law clerks are routinely admonished to never stray outside the record. If you state a “fact” without a record reference, you risk losing that fact in the law clerk’s study memo or bench memo. Also, record references ought to be precise. Several clerks express frustration at references like the following: (CR 154, Exhibit B). When Exhibit B is 79 pages, a pinpoint cite to an exact bates page within the exhibit is highly valued.

Consider telling the court what is not in the record. The court expects counsel to support all factual claims with record references. It’s an added bonus to read “the trial court’s judgment is nowhere in the appellate record.” I’ve scoured voluminous records looking for documents that weren’t there. Sometimes, omitted documents are outcome determinative.
Finally, don’t forget how technology facilitates the task of tying your case to the record. Your judge may be sixty-four, but his law clerk is closer to twenty-four. Electronic briefs that provide computerized links to the record delight law clerks. When a brief says: “The joint agreement was signed by all parties. (CR at 403),” if a law clerk can instantly pull up the joint agreement on his computer by clicking “403,” he is thankful for the time saved and impressed with your techno-savvy. Warning: metadata (data about data) often attends electronic filings. Microsoft Office, for example, includes metadata beyond printable content, including the original author’s name, the creation date of the document, and the amount of time spent editing it. Unintentional disclosure of such information can be awkward or even raise confidentiality and malpractice concerns.

The Research

Run-of-the-mill research (i.e., case law and statutes) are strong suits for law clerks. Even if you imperfectly cite a case, the clerk can pull it up electronically. But sloppy citation is not suggested. If a law clerk knows anything on his first day on the job, it’s the Blue Book. You win instant credibility if you adhere to the Blue Book’s strictures -- the more arcane, the better. Mis-citing the Third Circuit, for example, by using “3rd Cir.” rather than “3d Cir.” miffs many ex-law review editors.

While you may think it irrelevant, courts often want to know how other states have ruled. If you have an issue of first impression, tell the court how the federal courts and the other states have decided the issue. Not infrequently, judges assign 50-state surveys to court staff. If your briefing already includes a survey, law clerks inevitably start with your cases rather than from scratch.

For statutory interpretation cases, courts often examine legislative history (even if they don’t say so in the opinion). Researching legislative history requires hours in a state capitol library listening to committee tapes or reviewing transcripts. By including that research in your brief, you ensure your brief will be at the top of the stack when the law clerk prepares his memo.

Finally, most law clerks research legal issues independent of the authorities listed in the briefing. Err on the side of including those authorities that might be viewed as adverse. Your credibility is at risk otherwise.

The Appendix

The appendix can be a clerk’s best friend. Depending on local appellate rules, err on the side of including key documents: the insurance policy in a coverage dispute; the will in a probate matter; the service papers in a default judgment challenge. Many times, appeals turn on a statute that has since been amended or repealed. Clerks fret about finding the precise statutory language as it existed prior to amendment. If relatively short, include it in the appendix. That said, do not over-clutter with case law. Most clerks have access and are adept at electronic case law research. Appending twenty-three cases that arguably affect your claims is not helpful.
Before you write one word in a brief to an appellate court, consider that your task might be more difficult than you think: instead of one target audience, you have two. An adroit appellate advocate speaks to both.
Pro Bono Appeals for New Lawyers

by Jason Jarvis

Introduction

Many students leave law school convinced they want to be appellate lawyers. Whether this is becoming known in the office as the guy “who likes writing briefs” or as the woman “who really loves oral argument,” the unifying problem new lawyers who want to practice appellate law need to solve is that familiar catch-22: you need experience to get experience. It is difficult, if not impossible, to convince a client to let you argue the appeal in a $20 million securities fraud case when you have never argued an appeal at all.

Thankfully, there is a nearly endless source of appeals that junior associates can brief and argue, and that many law firms encourage, by granting billable hour credit and offering support and supervision: pro bono appeals. The balance of this article discusses how to get and handle a pro bono appeal.

As an initial matter, aside from the practical appellate-practice benefits with which this article is chiefly concerned, all lawyers should recognize the value of pro bono service. Most law schools and law firms have recognized the importance of pro bono practice. We all should recognize that, while the law is a business, it is also more than that: It is the foundation of civilized society. Accordingly, the law should not exclusively serve the rich and well connected. You serve as a vital cog in the legal system when you represent an indigent person or non-profit organization by making the law accessible to everyone.

Getting Your First Case

The first hurdle for the aspiring appellate lawyer – how to get experience in appellate law – is a similar hurdle for pro bono appeals: How do you get your first case? Some aspiring appellate lawyers might be fortunate to already be a part of an established appellate group and are therefore already linked to various advocacy groups or circuit court pro bono programs. These groups may already have standing relationships and are asked periodically if an associate

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from that firm can accept a pro bono appellate assignment. On the other hand, some aspiring appellate lawyers may be sole practitioners with no similar structure in place.

For all aspiring appellate attorneys, however, two primary sources of cases exist. First, there are non-profit advocacy groups, which commonly refer non-appellate pro bono litigation matters. Second, there are the federal circuit courts themselves. As to the former, one approach that you can take is to talk to the contact person for the organization and tell them of your interest. This might be as simple as dropping in on a colleague who is the contact person for a particular organization, or it might require a little more leg-work, finding out who is the contact person for the organization and expressing your interest to him or her. In either case, if possible, you should start internally with a senior attorney who is related to the organization. Not only will this person be your best source of encouragement and possibly supervision, but he or she is also likely to support the group and flattered that you want to help it. Furthermore, an internal contact person for an organization will likely know how best to approach the organization about representing it on appeal. If you have no senior person, there is nothing wrong with contacting the organization directly, but consider the conflicts issues discussed below before doing so.

Recognize that most non-profit organizations, whether a victim’s rights law center or a political organization, will not frequently “hand off” appeals. Organizations usually find a firm or lawyer with whom they work, who then handles the case from beginning to end. It is rare that a case is handled by one firm, pro bono, and then handed off to a new lawyer to handle the appeal. But it does happen, and, depending on the organization and its appetite for litigation, it may not be exceptionally rare. Just be prepared to “sell” the organization on your skills and why it may want you handling an appeal. As with most sales, your first contact is usually unlikely to make the sale. Check in periodically with the organization, offering to help with other matters, but continuing to express your interest in helping the organization with an appeal. You can also offer to draft amicus briefs pro bono for the organization. While this will not result in oral argument, it is experience and will develop a solid relationship with the organization. Eventually, you will be offered a case.

You can also contact the circuit courts directly. Among the circuits there are a wide variety of approaches for how each deals with pro bono appellate matters. Generally, there is a clerk who handles pro se cases, where an individual has filed a notice of appeal and is not represented by counsel. A screening clerk or staff attorney looks at the appeal, sometimes at the notice stage and sometimes after initial briefing, and, if he or she sees complexity and perhaps merit in the appeal, the clerk will recommend to a judge or panel of judges that pro bono counsel be appointed. While not all circuits do it this way, generally speaking, most pro bono appellate matters follow a similar process.

After a case and client are identified as ones that will benefit from pro bono counsel, the circuits again differ in their approaches. Some circuits have a panel of attorneys that have previously expressed an interest in pro bono appointments and have applied to and been accepted to the panel. Other circuits may employ a more organic process, where the court should be contacted and interest expressed but no formal panel of attorneys is published and utilized. Still

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2 Some states may also appoint pro bono appellate lawyers, but the vagaries of 50 states are beyond the scope of this article and practicing therein will require licensure within the particular state.
other circuits employ a restricted list based on associations with certain law firms. It is best to start with the circuit in which you reside, both because some circuits encourage that and some firms will find it prudent for its associates to work on local pro bono matters. Call the clerk’s office and ask to speak with whoever handles pro bono appeals and ask how the process works in your circuit. But you need not limit yourself only to the circuit in which you reside, particularly if it employs one of the more stringent processes.

Assuming you have either developed a relationship with a charitable legal aid organization or with one or more circuits, you may be offered a case at some point in time. This may come directly to you alone or it may come to you as a member of a pro bono panel. I caution you not to jump at the first case you see without reading the description and making sure you are comfortable with it.

First, you should be sure you are comfortable not only with the potential arguments you will need to make but also with your client’s underlying situation. This does not mean that you agree with the conduct (if a convicted felon) or that you have to think your client is innocent, but you should be able to feel confident that you can represent the individual to the best of your legal ability. Pro bono representation does not mean – in any way – that you take your duties as a lawyer any less seriously than you do for a paying client. Your ethical obligations are the same if not heightened. In a sense, however, it involves a higher degree of personal sacrifice, and, for that reason, I recommend ensuring you are personally comfortable with the representation before accepting it.

Second, sometimes the issues involved may be simply beyond your ability to handle. For example, you may be offered a death penalty appeal. Death penalty appeals often require a much greater investment of time than other kinds of appeals, and, for obvious reasons, may be significantly more emotionally intense. In another vein, you may be offered a civil rights appeal under § 1983, but you don’t know the first thing about civil rights and have no interest in learning. Or, you may have plenty of interest in § 1983, but – and this is critical – your firm regularly represents employers defending against such lawsuits and you cannot represent an individual “on the other side.” So-called “positional conflicts” are discussed in greater detail, below.

On that note, it is critical that, when you have accepted a case for appointment, you are quickly very clear about what arguments you will need to advance for the client and that you make sure your firm’s conflicts department understands them. Some firms have very strict “issue” or “positional conflict” rules and will simply never take a position adverse to that of their clients. Ask your firm’s conflicts partner or administrator. You may “accept” a case from a source and find out you cannot represent the client; it is then incumbent on you to inform the client or court and explain why. This is usually not as great of a concern for appeals that have been referred to you through an organization with which the firm regularly associates.

Another aspect of accepting an appeal includes knowing that you have the time to brief and argue it. In simple cases with one issue, that may be as little as 100 hours of your time over the course of a year. In complex cases with several issues, especially issues that are new to you or for your first appeal, it can be well over 200 hours of time over the course of two or three years. There are a lot of different kinds of appeals you may be offered, including prisoner’s
litigation cases, habeas corpus petitions, civil rights cases, immigration appeals; more rare cases like housing or land use cases; bankruptcy appeals; or even free speech or free exercise clause cases under the United States Constitution. Each of these will take a different amount of time, but generally plan on a minimum of 100 but up to over 200 hours for complex cases (and especially for your first one).

That said, once a case is offered and you have determined that you are comfortable with it, at least from what you know of its description, immediately accept the appointment. Even so, someone may beat you to it, and you may not get the first case for which you agree to be appointed. You may not get the second. In fact, it may take a long time; both because there are not that many cases and because there are a lot of people who have been waiting for a case a lot longer than you. But you will get one, eventually.

The Appointment

If you receive your case through a circuit court appointment process, you will probably get an email, letter, or phone call, from the relevant clerk or assigning attorney, giving you details about the case, usually including the full docket, supporting documents, and sometimes the record on appeal or even briefs that have already been filed. In some circuits, pro bono appointment usually happens only after initial briefs are filed and you are presented with the opportunity to either replace your client’s brief or write a supplemental one. If you receive a case from an organization, you will probably be brought in before any briefs are filed and perhaps even before the notice of appeal. Check your deadlines immediately.

Either way, as soon as you get your case, read it over until you understand the broad issues, who the client is, what the client may need to argue, and then go talk to a partner in your firm about it (if applicable). Do not start writing the brief. Do not tell the court you formally accept. If at all possible, find a mentor-partner, senior attorney, pro bono coordinator, or someone similar, and tell them that you have been honored with the opportunity to represent someone pro bono in the circuit court and ask that he or she recommend someone to supervise you (or would the senior attorney be willing to do it him or herself)? Most senior lawyers are happy to do this. It does not need to take a lot of the supervising lawyer’s time, and if he or she has confidence in your abilities, the supervising lawyer will see it as a good opportunity for you to get appellate experience without the need for writing off your time on a billable matter.

Some supervising attorneys will want their name on the brief or the appointment order or both; some will want neither. Some supervising attorneys will want to micromanage the brief and argument and others not at all. There is a delicate balance, however, between being respectful of your supervising lawyer and recognizing that this is your best chance to get personal experience writing the brief and arguing an appeal. Be humble and prudent but stress to your supervising lawyer that you are appointed counsel for the appeal and that comes with an expectation (by the Court or organization) that you will have primary responsibility for it.

That said, appreciate your supervising lawyer. First, you will benefit from an experienced set of eyes and another mind, even if the supervisor is not experienced in that specific area or even in appellate law at all, and what you benefit from in the briefing and argument, your client will benefit that much more. Second, the law firm will benefit. Its
partners value the firm’s reputation and abhor the idea of letting a junior associate ruin that reputation before a circuit court due to inexperience or, worse, incompetence. A supervising lawyer will provide both the firm and you with a comfort level on this count, which, incidentally, should also provide a certain degree of “cover” in case something comes up with the case in the future if the firm needs to deal with a public relations or ethics issue related to your case. If you simply do not have a supervising lawyer within your firm (for example, if you are a sole practitioner), try to find a mentor – someone within your legal community that can at least serve as a sounding board and assist with briefing and argument preparation as discussed below.

**Conflicts of Interest**

After you have a supervising attorney or mentor, you need to make sure the representation will clear a “conflicts check.” For some this may be as simple as you personally checking a list of clients. For others there may be a committee and a thorough database for potential clients that an administrator of the firm will review for you. Most critical, however, for the majority of pro bono representations is the consideration of “positional conflicts” rather than adverse-client conflicts.

Business or positional conflicts are those where you or your firm regularly represent a certain kind of client or regularly take certain positions such that it would be ethically or pragmatically inappropriate to take a position on the other side. This can arise, for a few non-exhaustive examples, in the employment context (such as in the § 1983 discrimination case referred to earlier); in the banking or finance context (such as in a lender-liability case); or even in the broader context of certain procedural rules (such as where a pro bono client needs to argue that a contract of adhesion’s arbitration agreement is not binding, but your firm’s clients rely heavily on binding arbitration clauses).

Furthermore, some firms may not wish to represent certain political causes or organizations, either because they have a particular political bent in the firm’s leadership and your proposal bends the wrong way, or because the firm generally tries to avoid political entanglements so as not to offend some of its lawyers and clients. Be sensitive to this issue just as you are with business-related positional conflicts. In all events, there are as many potential positional conflicts as there are opinions on the law, and exhausting them here is not possible. Consider your proposed case carefully with your supervising lawyer to make sure you can take the appeal and represent the client fully and fairly within the context of your firm.

Once conflicts have “cleared” and you have established that there are no positional conflicts, you should tell the pro bono clerk or organization that you can accept the appointment. Clerks at the circuit courts generally will send you an order and letter affirming your appointment. Organizations usually will not. In both cases, however, you need to generate a retention letter.

**Retention Letters**

Retention letters are ubiquitous in legal practice, but some firms do not have standardized forms for pro bono cases; and, unless they regularly do this kind of practice, likely do not have one for a pro bono appeal. Still, you should start with your firm’s basic model. It likely says
something like: “Client agrees that law firm will represent it in such-and-such matter.” It will probably have language about costs, about terminating the representation, and perhaps about retainers, much of which is irrelevant to you. Use your judgment and your firm’s guidelines, and solicit the advice of your supervising attorney or mentor as well as your ethics/conflicts partner, or if your firm has one; but these are the seven things that should be in the pro bono appeal retention letter: (1) your name and the client’s name, (2) the matter name and description of the matter, (3) the court it is in and any other pertinent procedural background, and (4) that your representation is only as to this appeal and does not concern further appeals or past trial court litigation. It should also include the statement that (5) it is a pro bono representation, (6) either the client or you (subject to ethical restraints) can terminate it, and (7) that the client understands and agrees to these statements. Some clients, especially in pro bono immigration appeals, may not understand the statements for the simple reason that they do not speak or read English. If necessary, you should try to find someone to translate the retention letter as well as future correspondence between you and the client. If that is totally unfeasible, and your firm will not pay for a translator, you may need to consider refusing the appointment. A total lack of ability to communicate is obviously a significant impediment to an appropriately responsive representation.

Finally, make sure you receive a signed retention letter before you start doing too much work. There is nothing wrong with hitting the ground running, but some clients, for a variety of reasons, may simply refuse to sign. It is rare for that to happen, but it does happen. If it does, take your medicine and wait for the next case; trust me, you did not want to represent that client anyway. If not, however, and you receive the retention letter, check the briefing schedule set by the Court and get cranking.

Interacting with the Client

Along the way, starting when you first send your potential client a retention letter, you will be communicating with your client. This may be frighteningly difficult, for example, if you have an immigration appeal for a client that speaks no English and is facing deportation directly from state prison. On the other hand, it may be easy if, for example, you have an appeal of a land use decision for a local religious institution, and the institution’s board is populated by lawyers from your firm. Either way, communicate you must.

Statistics show that clients’ (pro bono or otherwise) number one complaint about lawyers is that they do not communicate adequately with them. Do not add to that statistic. When you begin writing the brief, write and tell your client. When you finish the brief, send a copy to your client. If you have a question and you do not understand something from the record on appeal, write or call the client and ask. When you have finished the briefing process, write and tell the client when to expect argument. As an aside, almost all clients will be shocked when you tell them “about nine months,” but that is indeed a common gestation period for appeals in the federal circuit courts. Of course your mileage may vary based on your circuit and, sometimes, the substance of the case.

When argument is set, tell the client. Some clients will refuse to attend argument when they easily could have. Other clients will demand that the court pay for their presence even when they were incarcerated in another jurisdiction. Most clients will be somewhere in between,
perhaps wanting to come but nervous about the idea. This is a good opportunity for you to meet the client, thank them for the opportunity to serve them, and assure them you are representing them to the utmost of your ability. Your client might be about to be deported – in fear of having themselves and their families uprooted and sent back to a dangerous and economically-depressed country. Assure the client that you will do your best, but do not guarantee a win. In fact, it is prudent to warn the client that appeals, like all litigation, are never a sure thing no matter how strongly you admire your arguments.

You will, sooner or later, get a challenging client. You will get a client that will refuse to believe that you did your best, or that appeals are hard to win, or that you should not have made that 24th ground on his habeas petition. There is not much more you can do than create a nice paper trail for you and your firm and try to defuse anxiety and frustration as best you can. Remember your law school’s Legal Ethics class: The client makes the ultimate dispositive decisions. You make the strategic decisions. You are the expert in the law, not the client, but the client needs to be informed because the final say on what is done is the client’s. You only decide how it is done. If you come to a complete impasse, you can request that the client go with someone else. In an extreme case, you can file a motion to withdraw as counsel. You should not do this unless absolutely necessary and where you have a very good reason. Even then, such a decision must be entered into with the full support and understanding of your supervising attorney and ethics partner, if applicable.

**Briefing and Argument**

A thorough discussion of how to write an effective appellate brief or make compelling oral argument is beyond the scope of this article. It goes without saying that you should involve your supervising lawyer in the brief and argument preparation to the extent he or she desires. That said, here are some preliminary things to keep in mind about writing the brief:

First, know the rules. Each circuit has different rules for briefing. Some have different rules for pro bono cases. Some even have different rules for different kinds of pro bono cases. In short, learn the rules for your particular case.

Second, when possible, replace a prior brief rather than supplementing it. The judges and their law clerks do not want to read duplicative material, and chances are the clerk or staff attorney suggested a pro bono appointment at least in part because the pro se brief was deficient in some way.

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Third, identify your critical arguments and stick to them. In many pro bono cases, habeas petitions in particular, there is a tendency to want to “throw the kitchen sink” at the courthouse walls in the hope something sticks. Resist that urge. Counsel your client to resist that urge. Three thoughtful well-supported arguments are more likely to win the day for your client than 16 alternative arguments, even if 3 of those as well are thoughtful and well-supported. Think like an advertising executive – do not bombard the Court with too much information such that you lose the message in the medium.

As to preparing for oral argument, just like with brief writing, other sources can be of far more assistance than the scope of this article permits. That said, here are three short points to consider:

First, again, know the rules. If at all possible, visit the court house, if not the very court room, before your argument, and watch some oral arguments if possible. If you are traveling to the argument this will be difficult, but at least arrive early for your argument and do not be afraid to ask questions of the clerks or court room deputies. In most courts you tell the judges at the outset if you want time for rebuttal (hint: you do), for example, but some may require that you also tell the court room deputy before the argument. Learn and follow these procedural rules.

Second, benefit from knowing who comprises your (presumably) three-judge panel. Some circuits will divulge the judges on your panel well in advance of the argument. Others will not tell you which judges are on your panel until just before the argument. Either way, do what you can to research your judges, their proclivities, and especially the opinions that they have generated on the subject matter of your appeal. You absolutely must know those cases – in obvious addition to the most relevant authority – because you can be sure that the judges do, and if their opinions are at all relevant, they will be in the judges’ minds if not on their lips.

Third, consider carefully all of the questions you will be asked, your responses to them, and how those responses harmonize with your “theme” or principal arguments. In fact, most appellate lawyers will have at least one “moot court” in which other lawyers ask questions while role-playing the judges on your panel. This invaluable time not only prepares the advocate for the rigors of oral argument, it can also reveal weaknesses in the case and how best to deflect or counter them. If you do not have available colleagues at least go over your argument with your supervising lawyer or a friend (preferably a lawyer, although there is nothing wrong with talking through your argument with a lay person – sometimes the best observations will come from someone with no background in the subject matter).

Conclusion

In summary, these are the steps I recommend for aspiring appellate practitioners, recognizing that if you want to be an appellate lawyer, you need to start practicing appellate law. First, the best way to practice appellate law is to get appointed as pro bono appellate counsel. The best way to get appointed as pro bono appellate counsel is through a non-profit organization or through a circuit court’s appointment process. Once you are appointed to a case that you are confident you can and want to handle, make sure you get a supervising lawyer or mentor, the approval of your conflicts/ethics department, and a signed retention letter from the client. After
you are appointed, make sure to stay in touch with your client. Finally, write a clear and focused brief and prepare thoroughly for your oral argument.

Good luck!
Book Review

by

Norman A. Olch


Reflecting on his years as an appellate lawyer, Justice Robert H. Jackson of the United States Supreme Court wrote:

“I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned--as I thought, logical, coherent, complete. Second was the one actually presented--interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.”

Every appellate attorney dreams of making the devastating oral argument or writing the perfect brief, and there is no shortage of books, articles, and continuing legal education programs which assure the attorney that it is possible.

The book under review is the latest addition to the how-to appellate literature. It is briskly written, informative and entertaining. Its stated purpose is to take the advice on rhetoric offered by the likes of Aristotle, Cicero, and Quintilian, and update it for the modern lawyer. The fact that it is co-authored by a sitting Justice of the United States Supreme Court guarantees the attention it has received.

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Making Your Case offers up much of the advice an appellate attorney has heard before: know the record thoroughly, answer a judge’s question when it is asked, dress for the courtroom and not for the local tavern. But even the experienced advocate can benefit from the reminders.

Among the book’s many recommendations and cautions I cite three. First, the twofold importance of the appellant’s reply brief: it can set the agenda for the oral argument, and, as the authors note, there are judges who read the reply brief first. While the book emphasizes the importance of using the reply brief to answer the appellee’s arguments while keeping the appellant’s claims in the forefront, I thought it omits one use that actually helps to shape the later oral argument: identifying those critical facts or matters of law that the appellee does not dispute or implicitly concedes.

Second, while the authors note the role and importance of rebuttal at oral argument, I think they might have drawn attention to Justice Jackson’s caution: “One who returns to his feet exposes himself to an accumulation of questions. Cases have been lost that, before counsel undertook a long rebuttal, appeared to be won.”

Third, it cannot be repeated too often that an attorney must be familiar with the rules of the court in which the case will be heard. For example, my state, New York, has four intermediate appellate courts. Each has its own rules of practice so that the procedure for requesting oral argument in one is not necessarily the same procedure for requesting it in another. More than one New York attorney has come to court primed for oral argument only to learn on the call of the calendar that his case is marked ”submitted” because he failed to follow that court’s rule for requesting oral argument. The lessons one takes from this book about oral argument are of no use if one, even inadvertently, waives oral argument.

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For me the book has one major disappointment. There is less in the book of Justice Scalia--less of the judicial point of view--than I had hoped, or one would assume from the fact that his name is on the cover. He does plainly disagree with his co-author on two stylistic matters: he rejects Garner’s recommendation that case citations should be in footnotes and not in the body of the brief (I agree with Justice Scalia), and he disagrees with Garner’s view that contractions can be used in a legal brief (here, too, I agree with Justice Scalia).

But absent is the judicial point of view. It is one thing to write, as the authors do, that the skepticism many lawyers have about the effect of oral argument on the outcome of a case “has proved false in every study of judicial behavior we know.” It is another matter entirely to hear from Justice Scalia his personal views on oral argument: has oral argument ever changed his mind or the outcome of a Supreme Court case; what in his experience distinguishes the outstanding appellate advocate from the mediocre one; how does an attorney argue before an ideologically divided court. All of these questions, and many more, Justice Scalia could have addressed without identifying particular Supreme Court cases or particular lawyers, and without breaching the confidentiality of the Court’s deliberations. With all the books, articles, and continuing legal education programs on appellate advocacy, I purchased this book with the expectation that Justice Scalia would share the personal insights gleaned from hearing hundreds of oral arguments in the nation’s highest court. Those insights are sorely missing.

But if one approaches the book with the understanding that those judicial insights are absent, it is a good investment: briskly written, concise yet thorough, a valuable and entertaining tool for the novice and the experienced advocate.
DIRECT BANKRUPTCY APPEALS: THREE YEARS LATER

Ben L. Mesches

The 2005 Bankruptcy Code Amendments

In 2005, as a part of the Bankruptcy Abuse and Consumer Protect Act of 2005 (“BACPA”), Congress amended section 158(d) (the jurisdictional statute for bankruptcy appeals brought in the court of appeals) to provide for a discretionary direct appeal from the bankruptcy court to the Circuit Court of Appeals. This new provision took effect 180 days after enactment (October 17, 2005) and applies only to bankruptcy cases filed after on or after October 17, 2005. BACPA, § 1501(a); In re McKinney, 457 F.3d 623, 624 (7th Cir. 2006) (dismissing attempted direct appeal under BACPA because the amendments do not apply “to bankruptcy proceedings filed before the effective date of the provision, which was October 17, 2005”); In re Blumeyer, No. 4:06CV1681 CDP, 2007 U.S. Dist. LEXIS 5037, at *4 (Bankr. E.D. Mo. Jan. 24, 2007) (same); In re Berman, 344 B.R. 612, 615 (B.A.P. 9th Cir. 2006) (same).

One of the principal reasons for this change was “widespread unhappiness with the paucity of settled bankruptcy-law precedent.” Weber v. United States Trustee, 484 F.3d 154, 158 (2d Cir. April 13, 2007). Congress also enacted the direct appeal provision because (i) of “the time and cost factors attendant to the present appellate system,” and (ii) “decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value.” H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005); see also Weber, 484 F.3d at 158-59 (stating direct-appeal provision designed to resolve legal – not fact-intensive – questions and that “Congress hoped that [this provision] would permit us to resolve controlling legal questions expeditiously and might foster the development of coherent bankruptcy-law precedent”).

Under 28 U.S.C. § 158(d)(2)(A), the Circuit Court has jurisdiction over appeals “described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel” or the parties jointly certify that (i) the judgment “involves a question of law as to which there is no controlling decision of the court of appeals of the circuit or of the United States Supreme Court, or involves a matter of public importance,” (ii) the judgment “involves a question of law requiring resolution of conflicting decisions,” or (iii) “an immediate appeal [would] . . . materially advance the progress of the case or proceeding in which the appeal is taken.” 28 U.S.C. 158(d)(2)(A)(i)-(iii). Only one of the three certification requirements must be met for the lower court to certify a direct appeal to the court of appeals.

The bankruptcy court, district court, or Bankruptcy Appellate Panel “shall” make the certification if (i) on its own or on a party’s motion the court determines that any of the above circumstances are satisfied, or (ii) the court receives a request by a majority of appellants and majority of appellees to make the certification. Thus, the lower courts have no discretion to decline to certify an appeal if one of the certification requirements is satisfied or a majority of

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appellants and a majority of appellees agree that certification is appropriate. A party seeking certification under this provision must file such a motion within 60 days of the judgment. 28 U.S.C. § 158(d)(2)(E). The notice of appeal, however, is due within 10 days – not 60 days. See FED. R. BANKR. P. 8002; See In re Virissimo, 332 B.R. 208, 208 n.1 (Bankr. D. Nev. 2005) (certification without perfection of appeal does not allow a party to obtain direct-appeal review by the circuit court); Interim Rule 8001(f), Committee Note (noting that a notice of appeal is required in direct appeals of bankruptcy court orders). An appeal under section 158(d) “does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective [court] . . . issues a stay of such proceeding pending the appeal.” 28 U.S.C. § 158(d)(2)(D).

Review at the Circuit Court is discretionary. 28 U.S.C. § 158(d)(2)(A). To obtain review direct appellate review, the appellant must file a petition for permission to appeal in the court of appeals under Federal Rule of Appellate Procedure 5. BACPA, § 1233(b)(3). That petition must – in addition to complying with Rule 5 – (i) “be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and (ii) have attached a copy of the certification.” Id., § 1233(b)(4). Section 158(d)(2) does not create any standards applicable to the appellate court’s decision to dispose of the petition for permission to appeal.

Procedural Rules

Until final rules are adopted, section 1233(b) of the Act establishes temporary procedural rules for direct appeals to the court of appeals, the majority of which address the application of Federal Rule of Appellate Procedure 5 to direct appeals. BACPA, Pub. L. No. 109-8, § 1233(b), 119 Stat. 23, 202-04 (uncodified temporary procedural rules). The Advisory Committee and Committee on Rules of Practice and Procedure issued Interim Rules to provide guidance on various aspects of BACPA, including some parts of the new direct appeal provision, pending adoption under the Rules Enabling Act. Interim Rules 8001(f) & 8003(d). The highlights of these interim rules are:

- Under Rule 8001(f)(1), certification by the bankruptcy court is not effective until a notice of appeal is filed. Because of the “short time limit to file the petition with circuit clerk [10 days], subdivision (f)(1) provides that entry of a certification on the docket does not occur until an effective appeal is taken under Rule 8003(a) or (b).” Committee Note.
- Rule 8001(f)(2) addresses where the certification is to be made: If the case is pending in the bankruptcy court, only the bankruptcy court can certify the case for direct appeal. Likewise, if the case is pending in the district court, only the district court can certify the case for direct appeal. This rule “adopts a bright-line test for identifying the court in which the matter is pending.” Committee Note.
- Rule 8001(f)(2) outlines the procedure for a joint certification by the appellants and appellees, urging parties to use the official form
- Rule 8001(f)(3) sets forth the requirements, in terms of form, contents, service, and filing, for a party’s certification request and any response to that request.
- Rule 8001(f)(4) addresses the court’s power to certify on its “own initiative.”
• Rule 8003(d) “solve[s] the jurisdictional problem that could otherwise ensue when a district court or bankruptcy appellate panel has not granted leave to appeal under 28 U.S.C. § 158(a)(3).” Committee Note. Under the rule, if the court of appeals authorizes a direct appeal, that authorization is “deemed to satisfy the requirement for leave to appeal.”

Decisions Under the New Direct Appeal Provision

Cases Certified for Direct Appeal

Nuvell Credit Co., LLC v. Dean (In re Dean), No. 07-14163, 2008 U.S. App. LEXIS 16625 (11th Cir. Aug. 7, 2008): The Eleventh Circuit agreed to accept a direct appeal on the issue of whether a claim that comes under the “hanging paragraph” of Section 1325(a)(9) of the Bankruptcy Code is an allowed secured claim, permitting payment in full, plus postpetition interest to the creditor.


Ad Hoc Group of Timber Noteholders v. Pacific Lumber Co. (In re Scotia Pacific Co. LLC), 508 F.3d 214 (5th Cir. 2007): The appellee asked the Fifth Circuit to revisit the motion panel’s decision to grant direct-appeal review because the case was pending in the bankruptcy court when the district court certified the case for direct appeal. The court agreed that the bankruptcy court – not the district court – should have certified the case for direct appeal because the appeal had not yet been docketed in the district court. Nevertheless, the Fifth Circuit conclude that this was not a jurisdictional defect and therefore “this procedural glitch” did not deprive the court of jurisdiction: “[T]his error is technical in nature, does not affect the substantial rights of the parties, and prompts us to exercise our discretion in favor of proceeding to the merits of this appeal.” 508 F.3d at 220.

In re Salazar, 339 B.R. 622 (Bank. S.D. Tex. 2006): The bankruptcy court was presented with a novel Chapter 13 question – whether “ineligible” debtors who did not first seek credit counseling (as the revised Bankruptcy Code requires) are entitled to the protection of the Bankruptcy Code’s automatic-stay provision – and on its own certified the case for direct appeal to the Fifth Circuit. The bankruptcy court focused on the importance of the questions presented and the lack of authority on that question in the Fifth Circuit in opting to certify a direct appeal under section 158(d)(2)(A)(i):

Pursuant to 28 U.S.C. § 158(d)(2), the Court certifies this decision for direct appeal to the United States Court of Appeals for the Fifth Circuit. Based on a review of case law in this and other jurisdictions, as well as a consideration of the importance of this matter for many consumer debtors and their creditors, the Court believes that direct appeal of the present order is appropriate under § 158(d)(2)(A)(i). . . .
Id. at 634. The bankruptcy court, however, cautioned the parties that “certification in no way alters a party's ordinary requirements in filing a notice of appeal” and also reminded the parties that a supplement, containing a short statement of the basis of the bankruptcy court’s certification may be appropriate. Id. The Fifth Circuit subsequently denied the petition for permission to appeal as moot because “Petitioners consented to an Agreed Order essentially settling the dispute.” In re Salazar, 193 Fed. Appx. 281, 283 (5th Cir. 2006).

In re Jones, 352 B.R. 813 (Bankr. S.D. Tex. 2006): The bankruptcy court, on its own initiative, certified for direct appeal to the Fifth Circuit its order dismissing debtors’ bankruptcy petition for failure to complete a credit counseling course within 180 before filing for bankruptcy, acknowledging that its decision “creates a split between bankruptcy judges in this district.” 352 B.R. at 814.

In re Elmendorf, 345 B.R. 486 (Bankr. S.D.N.Y. 2006): The bankruptcy court certified its order striking – but not dismissing – debtors’ Chapter 7 and 13 bankruptcy cases based on their failure to obtain credit counseling before seeking bankruptcy protection, as required by BACPA. Because the bankruptcy court’s decision was “at odds” with the results reached in other bankruptcy courts within the Second Circuit, the bankruptcy court “determined that it is appropriate to certify these questions to the Second Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A)(ii) and Interim Fed. R. Bankr. R. 8001(f)(4).” 345 B.R. at 505. The bankruptcy trustee, however, declined the invitation to appeal the bankruptcy court’s refusal to dismiss directly to the Second Circuit and instead sought review from the district court in the first instance. Adams v. Finlay, 06 Civ. 6039 (CLB), 2006 U.S. Dist. LEXIS 81591, at * 3 (S.D.N.Y. Nov. 3, 2006) (“The Bankruptcy Court certified three related questions directly to the Court of Appeals for the Second Circuit, but the Trustee did not pursue the certification, seeking instead appellate review in the first instance in the District Court.”) (appeal dismissed for lack of standing).

In re Virissimo, 332 B.R. 208 (Bankr. D. Nev. 2005): The bankruptcy court, again on its own, certified the following question to the Ninth Circuit: Do the 2005 revisions to the Bankruptcy Code, which limit the amount of the homestead available to those who have owned their homestead less than 1215 days, apply to Nevada debtors? 332 B.R. at 209:

This court fully recognizes and appreciates the work done by, and expertise of, the bankruptcy appellate panel and the district court in hearing and deciding appeals from the bankruptcy court. This court is also fully cognizant of the tremendous workload of the Ninth Circuit Court of Appeals. However, the issue presented in this case is one which will recur in Nevada as well as other districts in the Ninth Circuit and will impact the administration of bankruptcy estates until the issue is ultimately decided. As this involves the statutory construction of a hotly contested provision of BACPA and is a matter of first impression, there is no question that the Court of Appeals will ultimately be required to determine the question. Hence not merely one, but all three, of the criteria specified in § 158 exist and justify an immediate appeal in this case.

Id.
Although the use of section 158(d) has thus far been limited to certification of issues arising under the recent changes to the Bankruptcy Code (such as the credit counseling requirements), as time passes, parties will likely use this provision for direct appeals of long-standing, unresolved questions and other important bankruptcy issues.

**Decisions Declining to Certify for Direct Appeal**

*In re Davis*, 512 F.3d 856 (6th Cir. 2008): The Sixth Circuit declined to accept a certified appeal on whether – in the Chapter 13 context – a vehicle ownership expense is an allowable expense if the debtor has no loan or lease payment. The court noted that “material advancement” was not a factor and that the “extent of the conflict is unclear.” Therefore, the court declined to “exercise [its] discretion” to decide the appeal. The court also noted at least two procedural infirmities: (i) the failure to attach the bankruptcy court’s order to the petition as required under Federal Rule of Appellate Procedure 5; and (ii) the failure to file a notice of appeal to the district court or bankruptcy appellate panel as required by Interim Rule 8001(f)(1).

*Weber v. United States Tr.*, 484 F.3d 154 (2d Cir. 2007): Despite certification by the bankruptcy court, the Second Circuit declined to exercise its discretionary jurisdiction to decide whether an increase in the New York homestead exemption should apply retroactively because the Court did not “perceive a conflict of such a nature that creates uncertainty in the bankruptcy courts.” *Id.* at 161 (observing that “all three of the courts within this circuit to have considered the question have held that New York’s homestead exemption applies retroactively”). This decision contains an extensive discussion of the legislative history and purpose of the direct-appeal provision and provided the following guidance of when the Second Circuit would be most likely to accept a direct appeal:

We will be most likely to exercise our discretion to permit a direct appeal where there is uncertainty in the bankruptcy courts (either due to the absence of a controlling legal decision or because conflicting decisions have created confusion) or where we find it patently obvious that the bankruptcy court’s decision is either manifestly correct or incorrect, as in such cases we benefit less from the case’s prior consideration in the district and we are more likely to render a decision expeditiously, thereby advancing the progress of the case. On the other hand, we will be reluctant to accept cases for direct appeal when we think that percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision.

484 F.3d at 161.

*In re Berman*, No. 04-45436, 2007 Bankr. LEXIS 65 (Bankr. D. Mass. Jan. 5, 2007): The bankruptcy court denied a request to certify because “the Court does not find that any of the circumstances enumerated in clause (i), (ii), or (iii) exist here.”

*In re Fields*, Case No. 05-60595/JHW, 2006 Bankr. LEXIS 4090 (Bankr. D. N.J. Oct. 24,
The bankruptcy court declined to certify a question related to the violation of the automatic-stay provision because: “The question of law involved in this case is directly answered by the statutory provisions cited above. I am not aware of conflicting decisions regarding the termination of the automatic stay by operation of law following abandonment of property by the trustee. The material advancement of the progress of the case is not implicated.”

_In re Waczewski_, Case No. 6:06bk-00620-KSJ, 2006 Bankr. LEXIS 1234 (Bankr. M.D. Fla. May 5, 2006): Although noting that section 158(d)(2) did not apply, the court nevertheless addressed the availability of direct appeal and concluded that it would not certify its order for direct appeal, noting “a party seeking a direct appeal certainly must show something more than that a direct appeal would expedite the resolution of the appellate issues.”

_In re Marrama_, 345 B.R. 458 (Bankr. D. Mass. 2006): The bankruptcy court refused to certify its order dismissing a debtor’s Chapter 13 case because he had an already-pending Chapter 7 case in which he was denied a discharge. The bankruptcy court analyzed the 158(d)(2) factors as follows:

I granted the motion to dismiss because I determined that the Debtor could not meet the eligibility requirements. I did not address what constitutes a contingent debt because none of the debts which I used in my calculation were debts that the Debtor described as contingent. It appears that the Debtor's issue with the decision is that I could not look to the amounts of the outstanding nondischargeable debts set forth in his pending Chapter 7. While there is no controlling case law in this circuit, the case law above reflects that there is no significant dispute regarding the applicable standard for looking at pending cases. This is not an issue of significant proportion or one that is certain to arise repeatedly. Therefore, I cannot conclude that the Debtor has met the first criteria. As for the second, I am not convinced that the purpose behind certification is to enable a litigant to obtain a binding decision from a circuit court on every adverse ruling from this court. As for the third prong, I cannot determine that a ruling from the First Circuit, as opposed to an appeal to the BAP or the district court would materially advance this appeal. Accordingly, I will not certify the matter to the First Circuit.

345 B.R. at 474.

_Simon & Schuster, Inc. v. Adv. Mktg. Serv., Inc.,_ 360 B.R. 429 (Bankr. D. Del. Feb. 27, 2007): This decision in explores an issue that can arise when the underlying order is interlocutory in nature and the only way to effectively prosecute an appeal is to request certification under section 158(d)(2) and file a motion for leave to appeal under section 158(a)(3) and Rule 8003. That is precisely what Simon & Schuster did here in seeking review of an order denying its motion for a temporary restraining order. 360 B.R. at 431 (noting the simultaneous filing of a notice of appeal, motion for leave to appeal, and request for certification). The motion for leave to appeal was transmitted to the district court for disposition there. The request for certification remained pending in the bankruptcy court. Id. at * 9 (stating that under Interim Rule 8001(f)(2), a matter remains pending in the bankruptcy until the district court grants leave to appeal under section 158(a)(3)). The bankruptcy court ultimately deferred consideration of the
request for direct appeal certification so that the district court could decide whether (i) an interlocutory appeal should be permitted under section 158(a)(3), and (ii) direct appeal was available. *Id.* at 434-35.

The court reached this conclusion apparently based on its assessment that standards for both a 158(a)(3) motion and 158(d)(2) certification are “virtually identical.” *Id.* at 434 (emphasis in original); *id.* at 434 (requiring the bankruptcy court “to perform the same analysis generally reserved for the district court”). That is, there is no reason for the bankruptcy court to step on the district court’s toes and decide the certification question before the district court has that opportunity (after first granting leave to appeal). *Id.* at 434 (asserting that ruling otherwise “is contrary to the hierarchy of the court system”).
ABA Council of Appellate Lawyers
CAL Annual Meeting
2008 ABA Annual Meeting
Marriott Marquis
Duffy Conference Room, 7th Floor
New York, New York
August 8, 2008

MINUTES

The meeting was called to order at 12:15 p.m. by CAL Chair Sharon Freytag.

The minutes of the 2007 CAL Annual Meeting were approved.

Sharon began by noting the revival of the Appellate Practice Institute (API), which has been dormant since October 2002. The Executive Committee of the Appellate Judges Conference has now approved a 2009 API, which will take place May 28-30, 2009, in Chicago, partnering with Northwestern University Law School. Participants will have an opportunity to have their appellate writing and oral argument critiqued by sitting appellate judges from around the country.

Sharon also noted the ABA’s approval of the very first CAL book project. The publication will include advice and tips on appellate practice for all federal circuits, the 50 states, and the District of Columbia.

COMMITTEE REPORTS

Membership Committee. The committee submitted a written report. Mark Friedman noted that membership is currently between 375-400, and he encouraged everyone to solicit additional appellate attorneys as CAL members. CAL enrollment is only $35 if an attorney is already a member of the ABA.

Program Committee. Jerry Ganzfried reported that last year’s annual and mid-year ABA programs and the AJEI Summit in Washington D.C. were all great successes. One structural change was the appointment of a committee vice-chair, Matt Lembke, who was then appointed as CAL’s representative to the Judicial Division Program Committee.

Marketing Committee. The committee submitted a written report. Brad Pauley noted that the committee maintains national and regional e-mail databases to distribute information about CAL programs and announcements to a wider audience. We have experienced increased attendance at our programs and expect that trend to continue.

Publications Committee. Leane Medford discussed the CAL book project. The committee is finalizing a preliminary topic outline for authors and is looking for authors in states and circuits that have not already been assigned. Appellate Issues continues to be a standout online publication; please volunteer and encourage colleagues to write articles, book reviews, or other
submissions of interest to appellate attorneys. The committee is also working on ways to improve the visibility (and find-ability) of the CAL website.

**Rules Committee.** Steve Finell submitted a written report. He emphasized that the Judiciary’s Standing Committee on Federal Rules requested that CAL comment on a package of statutory amendments that accompany the time calculation amendments that have been proposed for the Federal Rules of Civil and Appellate Procedure. The committee recently submitted its comments and is already preparing for the next round of amendments to the Rules of Civil Procedure, which will likely be published for comment later this month. The committee is also discussing model rules for the preparation and filing of electronic briefs and records.

**Pro Bono Committee.** The committee submitted a written report.

**Long-Range Planning Committee.** The committee submitted a written report that was published in the most recent edition of *Appellate Issues*. Roger Townsend explained the committee’s function as coordinating and brainstorming to improve the organization. A very productive committee meeting was held in Los Angeles in February. One current initiative, being coordinated with numerous other ABA sections, is a program to encourage an increase in the number of minority judicial clerks. The committee also recommended the establishment of benchmarks and timelines for the various CAL committees.

**Nominating Committee.** The committee submitted a written report. Carrie Legus presented the recommended slate of officers and Executive Committee members. In making its recommendations, the committee considered diversity, including diversity of geography and type of practice. Carrie presented a brief biographical summary for each Executive Committee and officer candidate.

**ELECTION**

The Nominating Committee’s slate of officers and Executive Committee members was formally nominated. Nominations were solicited from the membership, but none was made. Ben Cooper moved to close nominations; Mark Friedman seconded the motion, and the motion passed unanimously. The slate was unanimously elected as follows:

- Chair-elect: John Bursch
- Secretary: Jerry Ganzfried
- Executive Committee: Dan Polsenberg
  Kathleen McGarry
  Sonia Escobio O’Connell
  Kirsten Castaneda
  A. Vincent Buzzard
  Michael B. King
Next, the Nominating Committee recommended that the following addition to CAL’s Bylaws be adopted by the membership:

5.5 Chairs of the standing committee, established pursuant to section 6.1, and of any ad hoc committees established pursuant to section 6.2, shall serve as members ex officio of the Executive Committee.

The amendment was unanimously adopted.

OLD BUSINESS

Sharon Freytag presented plaques in appreciation for the hard work performed this past year by Mark Friedman, Harold Rauzzi, Matt Lembke, Leane Medford, Brad Pauley, and Dan Polsenberg. Sharon then passed the CAL gavel to Ben Cooper, the new CAL Chair. Ben presented an outstanding service plaque (and a promise of more to come at the November Summit) to Sharon in gratitude for her long and distinguished service to CAL. Sharon embodies everything that is great about CAL: she is gracious and collaborative, and she brings out the best in everyone with whom she works. Under Sharon’s leadership, we have seen a revival of the API, a new book, a reinvigorated rules committee, and great optimism for further growth.

Sharon also presented a gift to Amanda Raible for her “absolutely enthusiastic support of CAL,” and for making our activities the success they have been.

Ben Cooper explained his vision for this year, which includes a significant build-out of the organization to create more subcommittee and special project leadership. This initiative will create more opportunities for CAL members to participate in leadership positions and further strengthen CAL as an institution that will thrive and long endure.

NEW BUSINESS

Tom Warner noted that his wife, Judge Martha Warner, will simultaneously hold two significant positions next year: chair of the Appellate Judges Conference, and chair of the Florida Appellate Judges. Judge Warner plans to combine next year’s Florida appellate judges conference with the ABA appellate judges summit in Orlando, which will present a significant cross-marketing opportunity for CAL.

The meeting adjourned.

John J. Bursch
Secretary