How to Handle an Appeal

Fourth Edition
by Herbert Monte Levy

Herbert Monte Levy has updated his treatise with the latest useful information on appellate practice and procedure. Highlights of this Release #15 include:

**Special Verdict Forms.** As illustrated by a recent Tenth Circuit holding, failure to request a special verdict form as to each factual theory contained in jury instructions can prevent a party against whom a general verdict has been returned from raising the issue on appeal, as the court cannot know which theory the jury may have relied upon. See § 1:5.5 for more about preserving appellate points when special verdict forms are considered.

**Extensions of Time to Appeal.** In the federal courts, extension of time to appeal may be granted in civil cases only by the district court upon a finding of excusable neglect or good cause. See § 3:2.5 for details, including examples of what various courts have held not to constitute excusable neglect, including a recent Third Circuit case in which the court held that counsel’s mistaken belief as to the calculation of time to file did not excuse failure to timely file the petition.

**Mandamus.** In the federal courts, the writ of mandamus is permitted, solely in aid of appellate jurisdiction and only in exceptional cases where there is clear abuse of discretion or usurpation of judicial power. Chapter 3’s coverage of appeals by right versus appeals by permission has been supplemented with several recent mandamus decisions from various circuit courts. See § 3:4.

**Exceptions to the “Final Judgment” Rule.** The courts of appeals are given jurisdiction of appeals from all final decisions of the district courts (except where a direct review may be had in the Supreme Court). In federal cases, the Supreme Court has recognized the appealability of a “collateral order” as an exception to the final judgment rule. In applying this doctrine, the Ninth Circuit recently held that a clause in an arbitration agreement that eliminates all federal court review of arbitration awards is not enforceable, and the Eleventh Circuit has held

(continued on reverse)
that the collateral order doctrine does not extend to orders lifting stays of civil actions because of pending criminal investigations. See § 3:5.1[D] for further discussion.

Discretionary Appeals in Bankruptcy Cases. In bankruptcy matters, the thirty-day time limit for an appeal to the court of appeals is a non-jurisdictional claim-processing limit under which an untimely appeal can proceed to the merits if the other party does not object. See § 4:3.4.

Required Materials for the Appellate Record. In a criminal case, an appellant’s failure to order required transcripts and lying about it constitutes deceit and is cause for sanctions against the defaulting attorney, as was illustrated in a recent Seventh Circuit case involving the appeal of defendant’s bank robbery conviction, where the defense attorney was fined and publicly rebuked for falsely certifying that he had included the required documents in the appellate record. See § 5:2.3[A].

Standards of Appellate Review. Chapter 6’s coverage has been updated with numerous recent cases addressing standards of review in different settings, including rational basis review where a regulatory scheme neither implicates a fundamental right nor creates a suspect classification; clear error review in immigration cases, as well as a conflict in the circuits regarding de novo review of determinations of the Board of Immigration Appeals; the standard of review involving an agency’s construction of a statute that the agency administers; the Federal Circuit’s review of district court decisions concerning patent claim construction; review of arbitrators’ decisions; review of jury verdicts; the correct standard of review in cases involving administration of an ERISA plan; and much more. See §§ 6:5.2[D][1]–6:5.2[D][7].

Sua Sponte Interjection. Updates to chapter 7 include several recent cases addressing the issue of courts acting sua sponte, among other things: to raise questions of jurisdiction, to correct plain error, or to remand to reassign a case to a different judge where a district court judge’s conduct was so extreme as to demonstrate inability to render fair judgment. See § 7:3.4[J].

Timely Filing of Briefs. Effective April 1, 2014, the Second Circuit has adopted a new procedure for dismissing an appeal or sanctioning counsel when the court sets a brief filing date and a brief is not timely filed. See § 11:8.3.

In addition, this release updates the Table of Authorities and the Index.

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FILING INSTRUCTIONS

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Release #15
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Remove Old Pages
Numbered:

❑ Title page to 1-17
❑ 3-1 to 7-60
❑ 11-1 to 11-29
❑ T-1 to I-31

Insert New Pages
Numbered:

❑ Title page to 1-17
❑ 3-1 to 7-61
❑ 11-1 to 11-29
❑ T-1 to I-31