FRAP AMENDMENTS AND TRAPS IN THE FRAPS

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Introduction

Handling an appeal under the FRAPs (and appellate-related FRCPs) can be an energizing and rewarding experience. At the same time, though, it can be harrowing and anxiety-provoking, especially for Texas practitioners who initially assume that their mastery of the TRAPs will be sufficient to guide them through the federal appellate process. Despite a trend away from rules (and rulings) that appear to have little purpose other than to ambush unsuspecting practitioners, many traps still remain and new ones seem to emerge every year. And while some of them seem obvious in hindsight, most were probably less evident at the time they occurred.

The purpose of this paper is to raise your level of consciousness about some frightening pitfalls (and instructive near misses and great escapes) that have arisen in the Fifth Circuit in the past 24 months. Entire chapters can be (and have been) written about many of the areas in which these problems recur -- post-verdict preservation of error, waiver of appellate issues, notices of appeal, and briefing form and content. Ultimately, the best way to avoid these procedural pitfalls -- and the sleepless nights they provoke -- is to anticipate them to the extent possible before they rear their ugly heads. That, of course, requires a thorough understanding of the rules and their application, and probably a healthy measure of paranoia and luck as well.

Waiver -- If In Doubt, Shout It Out.

Trial and appellate practitioners alike constantly must be wary of waiver. Waiver is the intentional relinquishment of a known legal right, or acting inconsistently with a known legal right. The following recent Fifth Circuit cases illustrate procedural traps that can lead to waiver of a potential appellate argument.

1. Present your argument to the trial court.

Failure to specifically and timely assert an argument before the trial court will usually give rise to a waiver of that argument on appeal. See, e.g., Perez v. Region 20 Education Service Center, 307 F.3d 318, 331-32 (holding that plaintiff had waived its “waiver by removal” argument by waiting to assert it for the first time on appeal).

Trial strategy sometimes may require delay in asserting an argument before the trial court, but don’t wait too long. In Rogers v. Samedan Oil Corp., 308 F.3d 477, 482-83 (5th Cir. 2002), the Court held that a third-party defendant had waived its argument that the third-party plaintiff was not the real party in interest because the third-party defendant had waited until the eve of trial to assert the argument for the first time. Id. A dispute regarding the real party in interest should have been evident to the defendant early in the proceeding, the
Court held, and the defendant should have raised this objection early so that the proper party could be joined. Delay in asserting the argument constitutes waiver. *Id.*

To properly preserve an argument for appeal, the argument also must be presented to the trial court with some degree of precision and specificity. The “raising party must present the issues so that it places the opposing party and the court on notice that a new issue is being raised.” *Louque v. Allstate Ins. Co.*, 314 F.3d 776, 779 n.1 (5th Cir. 2002). In *Louque*, the Court held that Allstate had waived its argument that attorney’s fees should be included when calculating the amount in controversy for purposes of diversity jurisdiction because Allstate had not specifically cited the trial court to the statute authorizing attorney’s fees.

Similarly, in *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001), the Court held that the City had waived its statute of limitations defense by failing to assert the defense in its motion for summary judgment. *Id.* at 678. The Court noted that the City, in its answer, had stated that it “may” be able to prove a statute of limitations defense, but the City had not cited the particular statute giving rise to its limitations defense and had not asserted the defense unequivocally. Under these circumstances, the Court held that the City had waived its limitations defense. *Id.* at 678-79.

Merely citing cases that contain a useful argument, without specifically asserting the argument to the trial court, is also insufficient to preserve the issue for appeal. In *In re The Babcock and Wilcox Company*, 250 F.3d 955 (5th Cir. 2001), the appellant attempted to assert a fraudulent conveyance argument on appeal even though it had not specifically asserted that argument before the trial court. *Id.* at 961-62. Appellant asserted that its argument had not been waived because it had mentioned the argument in passing and had quoted two cases that suggested the argument in its briefing before the bankruptcy court. The Fifth Circuit disagreed, holding that the quotations were not accompanied by any discussion regarding how the fraudulent conveyance theory supposedly applied to the facts of that case. *Id.* In short, an argument must be pressed -- not merely intimated -- to be preserved for appeal.

The appealing party also must make sure the record demonstrates that it actually has presented its argument to the trial court. In *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001), a local rule required that briefs be submitted directly to the trial judge and not filed. On appeal, the defendant argued that the plaintiff’s statutory argument had been waived because it had not been raised before the trial court. In response, the plaintiff sought to rely upon his trial court brief as proof that the
argument had been raised. Because of the local rule, however, the brief had not been made part of the clerk’s record, and neither party had supplemented the record to include the brief. Thus, the Court of Appeals could not rely upon the brief as evidence that the issue had been raised. *Id.* at 444-45.

Fortunately for the plaintiff, however, the trial court’s order reflected that the argument in fact had been raised. Had the order not referred to the plaintiff’s argument, the only other recourse would have been to invoke FRAP 10(e)(2), which permits the record to be supplemented to include omitted materials upon the parties’ stipulation, by the district court before or after the record has been forwarded, or by the court of appeals. Rule 10(e)(2) is a handy (but frequently overlooked) mechanism that can come to a practitioner’s rescue when an omission in the record is discovered in the midst of appellate briefing.

The benefits of supplementing the record are illustrated by *Redden v. Robinson Property Group Limited Partnership*, 239 F.3d 756 (5th Cir. 2001). In *Redden*, the trial court held an evidentiary hearing on the plaintiff’s motion for an “adverse inference” jury instruction, and denied the motion after the hearing. On appeal, the Fifth Circuit noted that the record excerpts contained no reference to the evidentiary hearing, and thus the Court had “little guidance” as to the district court’s reasoning. Although the Court went on to discuss the merits of the appellant’s point of error, the appellant’s argument would have been strengthened if he had ensured that the transcript was complete under FRAP 10(b)(2) or had moved to supplement the record under FRAP 10(e)(2).

2. **When necessary, raise the appellate issues in motions for judgment as a matter of law.**

Some issues must be presented or renewed in a post-trial motion for judgment as a matter of law to be preserved for appeal. FRCP 50. If an appellate point must be preserved in this fashion, moving for judgment as a matter of law at the close of the plaintiff’s case is not alone sufficient. Instead, the motion must be renewed at the close of all the evidence. *See Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 572 (5th Cir. 2002) (failure to renew motion for judgment as a matter of law at the conclusion of the evidence precluded party from presenting a challenge to the sufficiency of the evidence on appeal).

Although the best practice is to move for judgment after the close of the evidence and before the case is submitted to the jury, a motion made during the jury’s deliberations but before a verdict is returned may be sufficient to preserve the issues raised therein -- provided that the trial court rules on the motion. *See*
Serna v. City of San Antonio, 244 F.3d 479, 481-82 (5th Cir. 2001). It is unclear, however, whether the issues would be waived if the trial court were to treat such a motion as untimely. See id. (“[H]ad the district court rejected the motion as untimely then we would be faced with a very different situation”).

Furthermore, a post-trial motion for judgment as a matter of law is permissible only to renew a motion made on the same issues before the case was submitted to the jury. See Logan v. Burgers Ozark Country Cured Hams, Inc., 263 F.3d 447, 456-57 (5th Cir. 2001). The Fifth Circuit, however, has interpreted this rule liberally. In Logan, for example, the defendant attempted to raise a challenge to fraud damages awarded to the plaintiff. The plaintiff argued that the defendant had not presented the damages issue to the trial court in its post-trial motion for judgment as a matter of law. The Fifth Circuit disagreed, holding that the issue had been preserved because the defendant had moved for judgment as a matter of law on “all questions of liability,” and damages are an inherent part of liability. Id.

When a party fails to raise a sufficiency challenge in its motion for judgment as a matter of law, the appellate standard of review is more deferential to the judgment. Thus, when a sufficiency challenge is timely and properly made, the standard of review requires the Court of Appeals to consider “whether the evidence, considered in the light most favorable to the verdict, has such quality and weight that reasonable and fair-minded persons could reach the same conclusion.” McKenzie v. Lee, 259 F.3d 372, 373 (5th Cir. 2001). In contrast, when a sufficiency challenge is not raised in a motion for judgment, the Court of Appeals reviews the judgment only for plain error, and considers only “whether the plaintiff has presented any evidence in support of his claim.” Id. The difference between an ordinary sufficiency of the evidence standard and plain error review is often outcome-determinative.

3. Be wary of other conduct that may amount to waiver.

Other conduct in the trial court may be deemed inconsistent with the assertion of a particular position on appeal, and thus will constitute waiver. For example, there may be unexpected consequences from accepting a suggestion of remittitur. These consequences were made painfully clear in Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc., 257 F.3d 449 (5th Cir. 2001). There, the jury assessed $2 million in compensatory damages and $8 million in punitive damages against the defendant. The trial court remitted compensatory damages to $923,473, and overturned the punitive damages award. The plaintiff accepted the remittitur but appealed the trial court’s elimination of
punitive damages. The Fifth Circuit held that the plaintiff had waived its right to challenge the trial court’s order setting aside the award of punitive damages by accepting a remittitur of the jury’s compensatory damages. Although acceptance of a remittitur on one claim does not bar an appeal with respect to a separate and distinct claim, the Court reasoned that a claim for punitives is not separate and distinct from a claim for compensatory damages. *Id.* at 460.

4. Raising new arguments on appeal is usually -- but not always -- futile.

In the Fifth Circuit, an intervening appellate decision that clarifies the law typically will not excuse the failure to assert an argument before the trial court. In *Martinez v. Texas Dept. of Criminal Justice*, 300 F.3d 567 (5th Cir. 2002), the plaintiff had not argued before the trial court that the state had waived sovereign immunity by removing the case to federal court. During the pendency of the appeal, the U.S. Supreme Court held in another case that removal by the state does waive Eleventh Amendment sovereign immunity. The Fifth Circuit held in *Martinez*, however, that the plaintiff could not raise this argument for the first time on appeal because the law “was not so settled prior to [the intervening decision] that raising her waiver-by-removal claim in district court would have been pointless or futile.” *Id.* at 574-75. The ramifications of *Martinez* will be explored further by Dana Livingston Cobb in her discussion of the “Supervening Decision Doctrine.”

Notice of Appeal -- Don’t Let The Beginning Become The End.
A timely filed notice of appeal ("NOA") is a prerequisite to the appellate court's jurisdiction over the case. See Wilkens v. Johnson, 238 F.3d 328, 330 (5th Cir. 2001). Typically, the NOA must be filed with the district clerk within 30 days after entry of the judgment or order being appealed. FRAP 4(a)(1)(A). The filing of certain post-trial motions, however, extends the appellate period so that the time to file a NOA begins to run from the date of the order disposing of the last such motion. FRAP 4(a)(4). The filing of a timely NOA perfects the appeal and divests the trial court of jurisdiction over most issues. See In re Transtexas Gas Corp., 303 F.3d 571, 578-80 (5th Cir. 2002).

5. Make sure the NOA is timely filed.

In calculating the time for filing an NOA, the day the order or judgment was entered is excluded. FRAP 26(a)(1). The additional three days after service by mail provided by FRAP 26(c) is not available because the time for filing an NOA begins upon entry of the judgment or order and not "after the paper is served on that party" as required by Rule 26(c). See Ludgood v. Apex Marine Corp. Ship Management, 311 F.3d 364, 367 (5th Cir. 2000). Furthermore, an NOA is effective on the date it is actually filed, and the filing date is the date it is actually received by the district clerk, not the day it is mailed. Id.

Ludgood illustrates how these rather arcane rules can combine to end an appeal before it even begins. In that case, the district court issued an order captioned "Final Summary Judgment" on October 17, 2001 dismissing all of the plaintiff's claims, and the judgment was entered on the docket sheet that same day. The NOA thus was due 30 days later, or November 16, 2001. The plaintiff mailed his NOA to the district clerk on November 15, and the clerk received it on November 20 -- four days after the due date.

In an effort to avoid dismissal of his appeal, plaintiff tried to invoke FRAP 26(c)'s three-day grace period for mailing (not bothering to explain how an additional three days would extend the date from November 16 to November 20). The Fifth Circuit rejected this argument and dismissed the appeal, holding that: (1) the three-day grace period for mailing in FRAP 26(c) does not extend the 30 day deadline for filing an NOA; (2) NOAs are effective on the day they are actually filed; and (3) they are filed on the same day they are received by the clerk, not as of the day they are mailed. Id. at 367-68. The lesson, of course, is to use an overnight service when filing a notice of appeal from out-of-town.

A party who fails to timely file an NOA may attempt to take advantage of two "lifelines": (1) the "extension lifeline" of Rule 4(a)(5) and (2) the
“reopening lifetime” of Rule 4(a)(6). See Wilkens, 238 F.3d at 330. (The Ludgood plaintiff did not invoke either approach, perhaps because the Court dismissed his appeal sua sponte).

A party seeking to use the extension lifeline must move for an extension with the trial court within 30 days after the expiration of the original appellate period, and must show “excusable neglect or good cause.” FRAP 4(a)(5).

A party seeking to use the reopening lifeline must move for an extension within the earlier of: (1) 180 days after entry of the order or judgment to be appealed, or (2) 7 days after the party receives actual notice of the judgment or order. The party also must show that it was entitled to receive notice of the order or judgment but did not receive such notice within 21 days of entry, and that no party would be prejudiced if the extension is granted. FRAP 4(a)(6). For purposes of this rule, any written notice of the order of judgment is sufficient to trigger the running of the applicable timeline. See Wilkens, 238 F.3d at 331-32 (holding, over dissent by Judge Dennis, that the 7 day filing window of Rule 4(a)(6) is opened when a party receives a fax notice of the entry of a judgment or order; declining to use FRAP 2, which allows for suspension of Rules “so that justice may be done,” to extend the time for filing an NOA).

6. But don’t file too early.

An NOA filed during the pendency of a post-trial motion specified in FRAP 4(a)(4) is premature, and is not effective to perfect the appeal. The strict application of Rule 4(a)(4) recently was illustrated in Simmons v. Reliance Standard Life Ins. Co. of Texas, 310 F.3d 865 (5th Cir. 2002). There, the district court had granted summary judgment in favor of the plaintiff, and the defendant timely filed a motion for reconsideration of the order granting summary judgment. While the motion was still pending, the defendant filed an NOA, the district court transmitted the case to the Fifth Circuit without ruling on the motion for reconsideration, and the defendant filed a brief in the Fifth Circuit raising arguments that were essentially identical to those in its motion for reconsideration. Relying on Rule 4(a)(4), the Fifth Circuit dismissed the appeal as premature because the district court had not “disposed of” the motion for reconsideration at the time of the NOA. The Court described the case as

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1 FRAP 4(a)(5) was amended effective December 1, 2002 to add “good cause” as a basis for justifying a late-filed NOA. “Good cause” is a different standard than “excusable neglect,” and thus may make it easier to obtain permission to file a late NOA. Ironically, the Committee note to the 1979 rule change stated an intention to do just that, but the text of the rule was changed after the Committee wrote its note. As a result, until the December 2002 amendment, the case law had excluded the use of the “good cause” standard to excuse late-filed NOAs.
“illustra[ting] the need for strict adherence to the requirements of Rule 4(a)(4)” -- namely, to give the lower court an opportunity to review the arguments in the motion for rehearing “and perhaps amend its ruling.” Id. at 869. The Court then sent a strong signal to the district court that it should do just that because of perceived procedural errors in granting summary judgment.

7. Know what you are appealing from.

Appeals are typically taken from a final judgment, but *Geosouthern Energy Corp. v. Chesapeake Operating, Inc.*, 241 F.3d 388 (5th Cir. 2001) illustrates that it sometimes can be difficult to determine if a judgment is final. *Geosouthern* involved a dispute over an oil prospecting joint development agreement. Appeal was taken from the district court’s “Amended Final Judgment,” which granted declaratory relief specifying the percentage interests to which Chesapeake was entitled, but declined to calculate or award monetary damages. The order recited: “THIS IS A FINAL JUDGMENT.”

thereby starting the clock for a timely notice of appeal. In a set of facts that only a law school professor could invent, the summary judgment in *Ludgood* was embodied in a document that read in its entirety:

**FINAL SUMMARY JUDGMENT**

In accordance with the Court’s Memorandum and Order of this date, the Court

**ORDERS** that Defendant APEX Marine Corp. is granted summary judgment on all claims brought against it by Plaintiff Earl Ludgood in the above-referenced action. The Court further
ORDERS that Plaintiff pay all costs of court.

This is a FINAL JUDGMENT

SIGNED at Houston, Texas, this 17th day of October, 2001.

/s Melinda Harmon, United States District Judge

Despite the reference to a “Memorandum and Order of this date,” the trial court’s actual Memorandum Opinion and Order was dated and entered on October 23, 2001. If this was the document that triggered the appellate timetable, then the plaintiff’s NOA filed November 20, 2002 would have been timely.

Unfortunately for the plaintiff, the Fifth Circuit rejected this argument (which it had raised sua sponte). Ludgood, 311 F.3d at 368-69. The Court held that the October 17 ruling met all the criteria of an appellate judgment under FRCP 58 because it was set forth on a separate document, it was entered on the district court civil docket sheet, and most importantly, it “conclusively determined the rights of the parties and left nothing further to be resolved.” Id. at 368. Any ambiguity arising from the October 23 memorandum opinion was eliminated by the plaintiff’s own NOA, which purported to appeal “the Judgment of this Court entered on October 17, 2001” and did not even mention the memorandum opinion of October 23. Id. at 369.

Both FRCP 58 and FRAP 4(a)(7) were amended effective December 1, 2002, to clarify various issues regarding the separate document requirement. FRAP 4(a)(7) was amended to provide that orders on certain motions (motions for judgment as a matter of law, motions to amend or make additional findings of fact, motions for new trial or to alter or amend judgment, or for relief from judgment) need not be set out in a separate document. FRAP 4(a)(7) is similarly amended to reflect that if FRCP 58 does not require the order to be contained in a separate document then neither do the FRAPs. The amendments also address the problem that arose under the former rules when a separate document was required but the district court did not prepare one. In this situation, amended FRAP 4(a)(7) provides that the judgment or order is deemed filed as a separate document 150 days after the judgment or order was entered on the civil docket. The time for filing an NOA runs from that date. Finally, amended FRAP 4(a)(7) gives the appellant an absolute right to appeal without waiting for the court to issue a judgment on a separate document. Under the new rule, an appellant who waives the separate document requirement may file an NOA anytime
within 150 days after entry of the judgment on the civil docket.

Special issues arise when a party appeals from a Rule 60(b) motion for reconsideration. A party may file a Rule 60(b) motion with the trial court at any time within one year after entry of judgment, even if an appeal is pending. See Taylor v. Johnson, 257 F.3d 470, 474-75 (5th Cir. 2001). Denial of the motion for reconsideration is appealable separately from the underlying judgment. Id. To perfect such an appeal, however, a separate NOA is required. Id. Nevertheless, the Fifth Circuit has construed this requirement liberally, allowing a brief to serve as the “functional equivalent” of a notice of appeal if it is filed within the time for filing an NOA and gives appropriate notice as required by FRAP 3.

Briefs and Record Excerpts -- Don’t Let the Brief Give You Grief.

8. File it on time.

The appellant’s brief is due 40 days after the record is filed. FRAP 31(a)(1). The appellee’s brief is due 30 days after the appellant’s brief is served, and the appellant’s reply brief is due within 14 days of service of the appellee’s brief. Id. The Court may, by local rule or by order in a particular case, shorten the time for filing briefs. FRAP 31(a)(2). An intervenor or amicus curiae must file a brief within 7 days after the principal brief is filed by the party that the intervenor or amicus is supporting. 5TH CIR. R. 31.2.

The Fifth Circuit’s local rules adopt a tough stance toward the granting of extensions to file briefs. “The court expects briefs to be filed timely and without extensions in the vast majority of cases. No extensions are automatic, even where the request is unopposed. Any requests for extensions should be made sparingly.” 5TH CIR. R. 31.4.1.

Local Rule 31.4.2 specifies the grounds for an extension and strongly suggests that “engagement of counsel in other litigation” will not alone warrant an extension of time to file a Fifth Circuit brief. Local Rule 31.4.3 describes the two “levels of extensions” that are available, and makes clear that it is much harder to obtain a level 2 extension (more than 30 days from the due date) than a level 1 extension (1-30 days from the due date). Finally, Local Rule 31.4.4 warns that the Court “greatly disfavors all extensions of time for filing reply
briefs “because the parties are assumed to have had ample opportunity to present their arguments in their initial briefs.”

9. **Form is not to be ignored.**

Everything an appellate practitioner needs to know about the form of briefs is contained in FRAP 32 and the accompanying local rules. Read the rules, study them, and if you are especially paranoid, memorize them. Make yourself a checklist. Do whatever it takes to get your briefs right. If you don’t, you will likely see your briefs again—after they are bounced by the Court. Just ask the Justices of the Texas Supreme Court. In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 270 F.3d 180 (5th Cir. 2001), a case in which the Justices had been sued over the Texas IOLT A program, the Justices’ petition for rehearing en banc was dismissed by the Fifth Circuit because it did not comply with the FRAP rules of form. Specifically, the petition lacked the statement of facts required by 5TH CIR. R. 35.2.6.²

The Fifth Circuit is especially rigorous in monitoring the lengths of briefs. Tales abound of the Court rejecting briefs with excessive footnotes, impermissibly wide margins, incorrect fonts, or other features that are perceived to be a means of circumventing the length limitations. Many of these “tricks of the trade” were eliminated when the Court adopted by Local Rule a “type volume limitation”--i.e., a word count limit--that applied to all briefs and required a “certificate of compliance” by the attorney preparing the brief. Although the type volume limitation is now followed in all circuits as a result of the recent amendments to FRAP 32, the Fifth Circuit remains especially vigilant in enforcing it and in discouraging requests for extra-length briefs.

Under 5TH CIR. R. 32.4 (added effective December 1, 2002), a motion for an extra-length brief must be filed at least seven days before the date the brief is due. The motion also must attach a copy of the proposed brief (thus requiring the practitioner to file with the Court and serve on the opponent a draft that may be rather unpolished and preliminary). These strict requirements telegraph what the Court thinks of extra-length briefs: it does not like them. An attorney who wishes to file an extra-length brief also should realize that, if the motion is submitted only seven days before the brief is due, it is quite possible that the Court may not rule on the motion before the end of the seven days. The more prudent approach would be to file the motion 14 days before the brief is due (even though that approach also may exacerbate the other problem of attaching a copy of the proposed brief).

² See the discussion of this case in *Fifth Circuit Civil News* at p. 14 (January 2002).
10. **Substance is as important as form.**

FRAP 28, and the accompanying local rules, provide a blueprint for assembling a federal appellate brief. FRAP 28 sets forth a laundry list of the brief’s required contents, and each item on the list will typically constitute a separate section of the brief.

The Fifth Circuit recently reiterated that FRAP 28 requires counsel to “provide cogent argument, supported by citation to relevant authorities, statutes, and the record, for all points raised on appeal.” *Bettersworth v. Federal Deposit Insurance Corp.*, 248 F.3d 386, 394 (5th Cir. 2001). In that case, the Court determined that the appellant had made only “general assertions” regarding his position that his statutory claim had been improperly dismissed, that he did not describe the portions of the record supporting his argument, and that he “simply states that the cause of action is supported by his affidavit.” *Id.* Because the argument was not adequately briefed, the Court refused to consider it. “Without such argument, the Court is in no position to provide any meaningful review.” *Id.*

Before briefing an argument at all, make sure it has merit. If you advance an argument that the Court considers to be less than meritorious, the resulting opinion might prove to be embarrassing. A recent case illustrates the Fifth Circuit’s intolerance for such arguments. In *Federal Insurance Co. v. CompUSA, Inc.*, 319 F.3d 746 (5th Cir. 2003), the Court observed that “[o]n the spectrum of disingenuous theories of defense, we view those advanced by CompUSA and Halpin lying somewhere between wholly specious and downright frivolous.” *Id.* at 750. The Court lauded the “clear and comprehensive” opinion of the district court (which it appended to its own opinion), and “in the interest of judicial economy” dismissed the defendants’ arguments without further discussion. *Id.*

Another recent case, *Casas v. American Airlines, Inc.*, 304 F.3d 517 (5th Cir. 2002), demonstrates the Court’s strict construction of the requirements of FRAP 28. FRAP 28(c) states, in part, that “An appellee who has cross-appealed may file a brief in reply to the appellant’s response to the issues presented by cross-appeal.” In *Casas*, the Court held that FRAP 28(c) “does not allow the cross-appellant to use his reply and response brief to discuss issues outside the scope of the cross-appeal.” *Id.* at 526. The Court determined that most of the cross-appellant’s reply brief dealt with issues that were pertinent only to the appeal (rather than the cross-appeal), and therefore struck the portions of the brief that did not address cross-appeal issues. *Id.* (Note that the Court typically defers ruling on motions to strike until the case is argued and an opinion is being prepared).
Perhaps the most dramatic example of the Fifth Circuit’s attention to the substance of a brief and the citations it contains is *Dube v. Eagle Global Logistics*, 314 F.3d 193 (5th Cir. 2002). There, the trial court had approved a $9 million settlement agreement between the EEOC and Eagle. The agreement contained an opt-out provision for any claimant who was unsatisfied with the settlement. Attorneys for the individual plaintiffs filed a motion requesting the trial court to stay its own approval of the settlement in order to hold a hearing on the settlement’s fairness. When the trial court refused, the plaintiffs appealed to the Fifth Circuit.

After the briefs were filed but before oral arguments, the Fifth Circuit panel took the highly unusual (if not unprecedented) step of sending a memo to its chief clerk highlighting improper briefing by the plaintiffs’ attorneys. At the panel’s direction, the clerk forwarded the memo to counsel. The memo chastised plaintiffs’ attorneys for, among other conduct: (1) omitting a significant portion of a hearing transcript to create the false impression that the trial judge had denied plaintiffs’ motion without reading the pleadings, (2) failing to attach a complete copy of a hearing transcript so that the court could independently verify some of the plaintiffs’ claims regarding actions taken by the trial court, (3) characterizing their clients as “class representatives” even though the motion for class certification was twice denied, and (4) inaccurately characterizing the plaintiffs as “whistleblowers.”

On another issue, the Court characterized as “patently specious” plaintiffs’ argument that the trial judge had not made clear whether the consent decree was intended to operate as an order because he crossed out the words “so ordered, adjudged, and decreed” on the signature page and wrote instead, “signed.” The Court observed: “Of course, this argument can make sense only if one ignores the consistent use of “signed” as a complimentary close in all of Judge Hughes’s court orders. . . . Having litigated in Judge Hughes’s courtroom for more than a year by the time they filed their pleadings in opposition to Eagle’s Motion to Dismiss, Plaintiffs-Appellants had to know this.”

If all this were not enough, the memo further stated:

> Plaintiff-appellants have filed several briefs with this court that contain

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3 Articles in the *Texas Lawyer* are the source for many of the facts contained in this description of *Dube*, including the extensive quotation from the Fifth Circuit’s memo. See “Provost*Umphrey Pulls Appeal After Harsh 5th Circuit Memo,” *Texas Lawyer*, September 30, 2002 p. 8; “More or Less,” *Texas Lawyer*, December 23, 2003, p. 3. See also *Fifth Circuit News* at pp. 3-4 (January 2003).
a substantial number of falsehoods, determinative omissions, out-of-context quotations, and specious arguments, collectively calculated to mislead the court.

Their outright misrepresentation of a district court’s statements and orders, of course, is the most egregious of their faults. To manipulate and redact selected statements intentionally so as to present a false picture -- particularly when those statements are made by a federal judge -- reveals a blatant disregard for the ethical norms of the legal profession, to say nothing of the obligation of full disclosure, forthrightness, and candor owed by an officer of the court.

To commit this ethical breach in a brief filed in a federal appellate court simply compounds the significance of the act.

In contrast, the presentation quality of plaintiffs-appellants’ brief is quite high; the grammar is virtually perfect, the arguments are logical and well-structured, and the formatting of the briefs is professional. This underscores the conclusion that the substantive faults identified in this memorandum are not the result of incompetence or lack of diligence.

This also further suggests the potential propriety of sanctions, whether an outright dismissal of the appeal with prejudice, a report filed with the professional ethics committee of the relevant state bars, a show-cause order preparatory to disciplinary action, or all the above.

The panel’s memo concluded that unless replacement briefs “free of improprieties and misrepresentations” were filed within 7 days, the appeal would be dismissed. It also gave the plaintiffs’ attorneys the option of voluntarily dismissing the appeal rather than filing compliant briefs.

Plaintiffs’ attorneys responded by electing to dismiss the appeal. According to the Fifth Circuit’s subsequent opinion, they also exhibited a “degree of contrition” in so doing. *Dube*, 314 F.3d at 194 (5th Cir. 2002).
As a result, the Fifth Circuit found that monetary sanctions in an amount equal to Eagle’s costs and attorney’s fees were sufficient, and awarded sanctions in the amount of $71,117.75. *Id.* Plaintiffs themselves were let off the hook, however, because “appellants generally are not held accountable for the offending tactics employed by their attorneys.”

Ironically (and apparently unbeknownst to the Court), the parties already had reached an agreement on the amount of sanctions -- an undisclosed amount greater than that awarded by the Court. Eagle thus moved to have the Court’s opinion vacated and a new order entered awarding the agreed-upon amount of sanctions.

Only time will tell if *Dube* is an anomalous case, or whether it signals a new direction in which the Fifth Circuit is more aggressively reading the entirety of the record even before oral argument takes place. In either event, *Dube* serves as a reminder that misstating the record, misquoting authority, or lacking candor toward the Court can lead to harsh consequences for the offending attorney.

11. The record excerpts are an integral part of the briefing process.

One significant feature of the Fifth Circuit’s local rules is that it dispenses with the requirement that the appellant file an appendix. Instead, the Local Rules require the appellant (and permit the appellee) to file “record excerpts,” which typically will be much smaller than an appendix and less onerous to prepare. Local Rule 30 states that appeals from the district courts and the Tax Court are decided upon the original record, and that the record excerpts are used primarily to assist the judges in making the screening decision on the need for oral argument and to assist the judges in preparing for oral argument.

Local Rule 30 sets forth the requirements governing the form and content of the record excerpts. In general, there are “mandatory contents” and “optional contents.” The latter is limited to 40 pages unless the Court authorizes more. This limitation can present a challenge if certain key exhibits exceed 40 pages or if (as has been known to happen) a Fifth Circuit clerk determines that items thought to be “mandatory” are actually “optional.” When in doubt, file an early motion requesting more pages of optional contents (bearing in mind, of course, that the primary purpose of the record excerpts is to assist the judges in
determining the need for and preparing for oral argument).

Post-Briefing Issues -- Just When You Thought It Was Over.

12. Supplemental authority is allowed -- within limits.

If a party discovers “pertinent and significant authorities” after the party has filed a brief (or after oral argument but before decision), FRAP 28(j) allows that party to inform the Court of such authorities by way of a letter to the circuit court clerk. The prior version of the rule required parties to describe supplemental authority “without argument.” Effective December 1, 2002, however, the “without argument” language was deleted from the rule, thus allowing parties to include argument in a letter brief. If a new case is not reported, copies of the decision should be appended. 5TH CIR. R. 28.5

The current version of FRAP 28(j) requires the party submitting a letter brief to state the reasons for the supplemental citations and imposes a 350 word limit on the body text of the letter. An opposing party may respond to the letter brief, and the response “must be made promptly and must be similarly limited.” FRAP 28(j).

13. The mandate is not just a piece of paper.

The mandate is the appellate court’s instruction to the trial court regarding how to proceed on remand. “Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs.” FRAP 41(a).

FRAP 41(b) was amended, effective December 1, 2002, to require that the mandate issue within 7 calendar days of the time for filing a petition for rehearing or 7 calendar days after entry of an order denying a timely petition for panel rehearing, whichever is later. The amendment added the words “calendar days” so that time under this section would not be computed according to newly amended FRAP 26(a)(2), which requires that Saturdays, Sundays, and legal holidays be excluded when computing time for periods of less than 11 days. If the time period for issuing a mandate were computed according to FRAP 26(a)(2), the period would never be less than 9 calendar days, and could be extended to as much as 13 days. The amendment to FRAP 41(b) ensures that the mandate will issue in a timely manner.

On remand, the district court is required to implement both the “letter and spirit” of the appellate court’s mandate. See Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002). Tollett
demonstrates the judicial inefficiencies that can result when the district court does not strictly comply with the appellate court’s mandate. In that case, the plaintiff was awarded discovery sanctions after her unsuccessful trial on the merits but before her appeal. The sanctions were imposed not only against the defendant, the City of Kemah, but also against two of its employees.

On appeal, plaintiff admitted that the sanctions were not supported by proof of reasonable fees and costs. The Fifth Circuit’s mandate directed the district court only to determine the appropriate amount of sanctions. Instead, the district court conducted a hearing to reassess who should be sanctioned, to determine the appropriate type of sanction, and to decide the amount of monetary sanctions against the City and its attorney, but not against the two employees.

The sanctions award was again appealed to the Fifth Circuit, which held that the district court exceeded the scope of the mandate when it: (1) redetermined whether and against whom sanctions should be imposed, (2) imposed sanctions and attorney’s fees pursuant to its inherent power rather than pursuant to Rule 37, and (3) imposed sanctions against the City’s attorney, who had not been sanctioned prior to the first appeal. *Id.* at 365. The Fifth Circuit admonished the trial judge for wasting judicial resources: “This appeal underscores why the mandate rule exists and, even more so, why it must be followed. Had it been, the cost, waste, damage, and other harm occasioned by the remand proceedings and this necessary second appeal would have been avoided. Absent exceptions not here present, the mandate must be followed -- *in letter and in spirit.*” *Id.* at 369-70 (emphasis in original). Rather than remanding the case to the district court for yet another determination of reasonable sanctions, the Fifth Circuit took the unusual step of imposing sanctions itself. *Id.* at 367-69.
14. Settling while the appeal is pending can be trying.

*Smith v. Texaco, Inc.*, 281 F.3d 477 (5th Cir. 2002), illustrates that procedural hurdles can sometimes make it difficult to finalize the settlement of a case that is pending on appeal. After the panel had rendered its decision and while a motion for rehearing en banc was pending, the parties in *Smith* settled the lawsuit. After reaching the settlement, the parties filed an agreed motion to dismiss in the district court, and that court issued an order on November 19, 2001 stating that the parties had settled all the claims, that the district court had approved the settlement, and that the case had been dismissed with prejudice. The motion to dismiss stated that the settlement was to become final as of December 19, 2001. On January 3, 2002, the parties filed an agreed motion to dismiss in the Fifth Circuit. At that time, the Court’s mandate was being held by one or more judges.

Typically, the clerk may issue an order of dismissal when the parties file an unopposed motion to dismiss. *See* 5TH CIR. R. 42.1. Under the unique facts of *Smith*, however, the Court concluded that Local Rule 42.1 does not authorize the clerk to enter an order of dismissal when the mandate is being held because that rule instructs the clerk to issue a copy of the order of dismissal “as the mandate.” *Smith*, 281 F.3d at 478. The Court, however, ultimately did not need to address whether the panel may enter an order of dismissal when the mandate is being held because, contemporaneously with the opinion, the judge or judges holding the mandate agreed to release the hold. *Id.*

Practitioners also should be cognizant of whether a settlement is structured in such a way that the federal courts retain ancillary jurisdiction to enforce the settlement should it be breached. Because the breach of a settlement agreement creates what is essentially a state-law contract claim, the federal courts will not automatically have jurisdiction over a suit to enforce the settlement agreement, even if the lawsuit being settled was properly before the federal courts. *See Hospitality House*, 298 F.3d at 430.

The federal courts will have ancillary jurisdiction over a suit to enforce the settlement agreement, however, “only if the parties’ obligation to comply with the terms of the settlement agreement has been made a part of the order of dismissal.” *Id.* (internal quotations omitted). This can be accomplished in either of two ways: (1) by a separate provision in the order of dismissal, such as a provision retaining jurisdiction over the settlement agreement, or (2) by incorporating the terms of the settlement agreement in the order. *Id.* If the district court intends to make the settlement agreement part of the dismissal order, it must make that
intention clear, and merely attaching a copy of the settlement agreement will not suffice. *Id.* at 430-31. The court must do more than merely recognize or approve the settlement -- it must manifest a clear intention to make the settlement part of the order. *Id.*

On the facts of *Hospitality House*, the Fifth Circuit held that the district court’s order of dismissal did not express a clear intention to incorporate the settlement agreement. The order itself did not specifically refer to the settlement agreement at all. Instead, the order had merely referenced the motion to dismiss. The Fifth Circuit held that this was not sufficient to create ancillary jurisdiction with respect to a suit to enforce the settlement agreement. *Id.* at 433-34.

15. **Petitions for rehearing can affect the time for petitioning for certiorari.**

Supreme Court Rule 13.3 makes clear that a petition for writ of certiorari is due 90 days from the date the Court of Appeals has denied a timely filed petition for rehearing. It is less clear, however, what happens if party has filed both a petition for rehearing and a petition for rehearing en banc, and the Court of Appeals has denied them on different dates. If the petition for rehearing en banc is denied later than the denial of the petition for rehearing, does the 90 day period for filing a certiorari petition run from the earlier date or the later date?

This conundrum actually arose in the case of *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001), *reh’d denied*, 287 F.3d 392 (5th Cir. 2002), *reh’g en banc denied*, 288 F.3d 702 (5th Cir. 2002). Initially, the Office of the Supreme Court Clerk advised petitioner that the 90-day period would not begin to run until entry of the order denying rehearing en banc. But just days before the certiorari petition was due under this computation, the Office of the Clerk expressed uncertainty whether its previous conclusion was accurate, and advised counsel for petitioner to file a protective motion for extension of time.

Petitioner filed such a motion, which is appended to this paper. Fortunately, Justice Scalia (who is assigned to the Fifth Circuit) granted the motion, thus “extending” the due date to what the petitioner had anticipated all along. It remains unclear, however, whether the other justices would take the same approach in cases originating from other circuits.

**Conclusion**

Federal appellate traps can arise at any stage and can ensnare even the most seasoned appellate practitioners. Yet, most traps seem to occur in just a few substantive areas -- bankruptcy and employment law are two of the most
notorious. Perhaps this illustrates the
danger of “dabbling” in areas of law that
require a high degree of knowledge,
experience, and precision. The
“dabbler” might be better served the next
time by engaging co-counsel who
regularly practices in this specialized
area. In the meantime, his misfortune
may help others avoid the same trap
before it’s too late.