COURSE SYLLABUS
APPELLATE COURTS and PROCEDURE
PROFESSOR JOAN STEINMAN

Fall, 2008

Required Materials:

Secondary Sources:
Robert L. Stern, Appellate Practice in the United States (2d ed. 1989);
David G. Knibb, Federal Court of Appeals Manual (5th ed. 2007 & 2008 Pocket Part);
Friedenthal, Kane & Miller, Civil Procedure, Ch. 13 (4th ed. 2005);
James, Hazard & Leubsdorf, Civil Procedure, Ch. 12 (5th ed. (2001);
Teply & Whitten, Civil Procedure, Ch. 12 (3d ed. 2004).

Class Schedule: Monday, Tuesday, Thursday, 10:40 - 11:35 a.m.

Class Participation and Grades:
Those students who, in my judgment, make particularly valuable contributions to the class may have their grades raised above their final examination grade by a half-grade (for example, B to B+). By the same token, chronic lack of preparation or chronic absence may be penalized by deduction of a half-grade from your final exam grade to arrive at your course grade. If you attend fewer than 70% of the classes (fewer than 29 of 42) you may not be permitted to take the final exam and may be dropped from the course.
APPELLATE COURTS and PROCEDURE

Prologue, Preface, Chapter 1. Appeals and Appellate Courts: Background and General Considerations

Read Preface and Chapter 1 (omitting pp. 6-9, 11-14 (Shapiro)).

The emphasis will be on the reasons we have appellate courts; their disadvantages; a bit about structure; whether due process entails a right to appeal; appeal as of right vs. discretionary review; "imperatives."


Distinguishing Other Forms of Post-Trial Attacks on Judgments (Post-Trial Motions and Extraordinary Relief from Judgment)

Read FRCP 50; 59; 60; recall collateral attack.

I. Constitutional and Statutory Bases of Federal Appellate Jurisdiction
   Read Article III of the Constitution; 28 U.S.C. §§ 1291, 1292(a),(b); Chapter 2 at 33-36.

II. Mootness as a Limit on Appealability

III. Timing and Methods of Seeking Review
   A. The Finality Doctrine and its Permutations
      1. Traditional Finality Requirements
         Read 28 U.S.C. §§ 1291, 1292(e), 2072(c); Chap. 2 at 47-56 (Swarthout v. Gentry; Hoberman v. Lake of Isles; Quackenbush v. Allstate Ins. Co.).

      2. Partial Final Judgment under Rule 54(b) and State Law Counterparts
         Read FRCP 54(b); Chap. 2 at 56-68 (Sears, Roebuck & Co. v. Mackey; Curtiss-Wright Corp v. General Electric Co.).

      3. The Collateral Order Doctrine
         a. Generally
            Read Chap. 2. at 68-76 (Rosenberg article; Cohen v. Beneficial Industrial Loan Corp.; Digital Equipment Corp. v. Desktop Direct, Inc.).
         b. Monitoring Trial Court Jurisdiction
c. Discovery Orders
Read Chap. 2 at 89-100 (U.S. v. Columbia Broadcasting Sys., Inc.; Int'l Business Machines Corp. v. U.S.).
d. Immunities from Suit
Read Chap. 2 at 101-05 (Mitchell v. Forsyth); Will v. Hallock (handout).
e. Rooker-Feldman Cases
Read Chap. 2 at 105-09 (Bryant v. Sylvester).

B. Exceptions to the Rule: Interlocutory Review
1. Statutory Exceptions to Finality
   a. Categories Specified by Statute or Rule
   b. Case-by-Case Discretionary Review
      Read 28 U.S.C. § 1292(b); Chap. 2 at 125-142 (West Tenn Chapter of Associated Builders & Contractors, Inc. v. City of Memphis; ABA Standards; Prado-Steiman v. Bush).

2. Extraordinary Writs
   Read Chap. 2 at 142-58 (Thermtron Prods, Inc. v. Hermansdorfer; Schlagenhauf v. Holder; Dairy Queen v. Wood; Stern excerpt).

C. Timing Issues under Governing Rules
   Read Rules 3 & 4, FRCP; Chap. 2 at 158-61 (Stone v. Immigration & Naturalization Service). Think about how F.R.A.P. 4 should apply in consolidated cases.
   Outside the casebook: A Taste of the Nitty Gritty in Federal Court: Read the following Rules for an overview of the process. We will spend just a little time on them in class.
   Miscellaneous – FRAP 1, 5, 8, 12, 46; motion practice – FRAP 27; voluntary dismissal – FRAP 42; briefs, the record, oral argument – FRAP 10, 11, 12, 28, 30-34; decision, rehearing and rehearing en banc – FRAP 36-39, 41; 40, 35.

IV. Scope of Interlocutory Review: Pendent Appellate Jurisdiction
   Read Chap. 2 at 161-67 (Swint v. Chambers County Commission).

V. Standing to Appeal and the Right to Defend Judgments
   A. Would-be Appellants
      Read Chap. 2 at 167-77 (Bender v. Williamsport Area School Dist.; U.S. v.
B. Would-be Cross-Appellants
   Read Chap. 2 at 177-79.

VI. Hypothetical Appellate Jurisdiction
   Read Chap. 2 at 179-83.

VII. Where to Appeal
   Read Chap. 2 at 183-88 (FMC Corp. v. Glouster Eng’g).

Chapter 3. Appellate Review: Breadth and Depth of Review

   Our discussion will include attention to grounds for review (errors of fact, errors of law,
   and procedural errors), positioning cases for appeal, making the decision whether to
   appeal, and the standard of review applicable to various rulings.

I. Scope of Review
   A. Introduction

   B. Controlling Force of the Record

   C. Facts Outside the Record

   D. Resisting and Deciding "New" Questions and Theories on Appeal

   E. Plain Error
      2. Civil Appeals – Read FRCP 46, 51


   Read Chap. 3 at 189-221.

II. Standards of Review:
   A. Distinguishing Questions of Law from Questions of Fact

   B. Trial Judge's Fact-Findings – Read FRCP 52

   C. Jury's Fact-Findings

   D. Administrative Agency’s Fact-Findings
Chapter 4. Judicial Lawmaking

I. Lawmaking by Intermediate Appellate Courts
   A. Overruling
   B. Recognizing New Causes of Action

II. Judicial Lawmaking by Supreme Courts
   A. Overruling
   B. Recognizing New Causes of Action
   C. Lawmaking Functions in Cases Involving the Application of Statutory and Constitutional Provisions

III. Legislative Facts
   A. Appellate Courts’ Use of Legislative Facts Generally
   B. Appellate Courts’ Use of Research and Empirical Data

IV. Making Rules of Procedure for Inferior Courts
   A. Formal Rulemaking
   B. Supervisory Authority
Chapter 5. The Crisis of Volume: Perceived Threats from Docket Growth

[To reduce the reading burden, I want to assign certain chapters on the responses to the crisis of volume to sub-groups of the class, and designate lesser portions to the rest of the class. As we reach each chapter I may identify additional pages for everyone to read. I ask those who have been assigned to read a particular chapter or part thereof to outline the chapter for the benefit of the rest of the class and to be the primarily responsible students in class discussion.

Some students have chosen to read all the chapters and have told me that they didn’t find that too onerous – so feel free, if you would like!]

Chapter 6. Structural Responses to the Crisis of Volume: The Creation of Intermediate Appellate Courts

I. Vertical Expansion of the Judicial Pyramid

II. Varieties of Intermediate Court Structures

III. Allocation of Jurisdiction between Intermediate Courts and the Court of Last Resort

IV. Doctrinal Consistency within the Intermediate Tier

Group 1: Read entire chapter (pp. 421-58);

Chapter 7. Personnel Responses to the Crisis of Volume

I. Judges

II. Law Clerks

III. Central Staff Attorneys

Group 2 -- Read entire chapter (pp. 459-506).

Chapter 8. Procedural Responses to the Crisis of Volume

I. Differentiated Appellate Processes

II. Screening
III. Oral Argument

IV. Court Conferences

V. Opinions – Published and Unpublished

VI. Appellate ADR

Group 3 -- Read I-III (pp. 507-41).

Group 4 -- Read IV- VI (pp. 541-69).

Chapter 9. Collegiality, Delegation, and the Docket Dilemma Redux

I. Collegiality

II. Delegation

III. The Docket Dilemma Redux

Group 5 -- Read entire chapter (pp.571-620).

Chapter 10. The Contemporary Role of Appellate Counsel

I. Introduction

   A. The Decision Whether to Appeal

   B. Effects on Appellate Advocacy of Changes in Appellate Personnel and Process

II. Techniques for a New Setting

   A. Views from the Bench

   B. Views from the Bar

   C. What the Future Holds

   D. Timeless Considerations: Ethics for the Appellate Lawyer

III. Supreme Court Perspectives

IV. Frivolous Appeals and Counsel's Screening Role – Read 18 U.S.C. § 3731, 3742,
relevant to criminal appeals

V. Court-Appointed Counsel in Criminal Appeals: The Frivolous-Meritless Distinction

   Everyone: Read Chap. 10 at 621-27, 645-55, 666-82. Of course, you are welcome to read sections that I didn’t assign.

Chapter 11. Appellate Judges

I. Qualifications for Appellate Judgeships

II. Selection of Appellate Judges
   A. State Appellate Judges
   B. Federal Appellate Judges

III. Judicial Education for Appellate Judges

IV. Evaluation and Regulation of Appellate Judges While in Office
   Everyone: Read Chap. 11 at 715-83 [if time permits].

Chapter 12. The Supreme Court of the United States

I. Jurisdiction

II. Practices and Procedures

III. Case Selection
   A. The Influence of the Solicitor General
   B. The 1980's: Too Many Cases?
   C. The 2000's: Too Few Cases?
   Everyone: Read Chap. 12 at 785-858.

Chapter 13. A Comparative Look Abroad
   [focusing on the English and German systems – omit]

Chapter 14. The Future of Appellate Courts
I. Court Futurism

II. Reorganizing the Middle Tier

III. Creating a New Appellate Tier

   A. Identifying and Categorizing Intercircuit Conflicts

Group 6 – Read above sections (I-IIIA) (pp. 951-1001).

   B. Proposals for a New Court
      1. National Court of Appeals (Freund Committee Proposal)
      2. Nation Court of Appeals (Hruska Commission Proposal)
      3. Intercircuit Panel (Ch. Justice Burger Proposal)

IV. Appellate Subject-Matter Organization

V. Discretionary Jurisdiction

VI. District Court Review

VII. A Reformer’s Manifesto

Group 7 – Read above sections (IIIB-VII) (pp.1001-57).