COMMON DISORDERS OF THE APPENDIX AND THEIR TREATMENT

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"Appendix" is a Latin word meaning appendage or addition.[2] To the medical profession, it is "a general term used in anatomical nomenclature to designate a supplementary, accessory, or dependent part attached to a main structure."[3] The term often is used specifically to designate the vermiform appendix of the colon.[4] Inflammation of the vermiform appendix may require surgical intervention.[5] For the legal profession, appendix is defined as "[s]upplementary materials added to [an] appellate brief."[6] Like its anatomical counterpart, the appendix to a brief receives little attention until the onset of an acute disorder. Such a disorder may give rise to judicial intervention. Careful attention to the preparation of a proper appendix will avoid this consequence.

A disordered appendix evidences a breach of a lawyer's professional duty of competence in appellate practice. It is just as important for a member of the appellate bar to be knowledgeable about the rules and techniques pertaining to appendices as it is to be knowledgeable about the rules and techniques pertaining to briefs and oral arguments.[7] The three elements of appellate advocacy—preparation of the brief,

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2. *Webster's Third New International Dictionary* 104 (Philip Babcock Gove, ed., G. & C. Merriam Co. 1981).

3. *Dorland's Illustrated Medical Dictionary* 109 (28th ed., W.B. Saunders Co. 1994).

4. *See id.*

5. *See Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing, & Allied Health* 109 (5th ed., W.B. Saunders Co. 1992).

6. *Black's Law Dictionary* 90 (5th ed., West Publg. Co. 1979).

7. *See e.g.* Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 Pace L. Rev. 323, 334 (1999).

compilation of the appendix, and presentation of oral argument—are co-equal in importance. Indeed, it is excellence in all three elements of a case on appeal that is the hallmark of successful appellate advocacy. My purpose here is to discuss the function of an appendix, to review the rules that govern its preparation, to identify some deficiencies and disorders commonly associated with it, to examine the consequences of an improper appendix, and in doing so, to focus attention on the importance of this neglected element of appellate practice.

I. THE FUNCTION OF AN APPENDIX

Before an appellate court can consider an appeal, a record of the proceedings in the trial court generally must be filed with the appellate court. In federal appellate practice, the record on appeal consists of the original exhibits and papers filed in the district court, all transcripts of proceedings, and a certified copy of the district court clerk's docket entries.[8] The documents constituting the record must be numbered and forwarded to the circuit clerk by the district clerk along "with a list of the documents correspondingly numbered and reasonably identified."[9] By stipulation or court order, some or all of the documents, especially the exhibits, may be retained by the attorneys or by the district court clerk.[10] However, the retained documents must remain available to the appellate court if needed. The purpose of an appendix is to facilitate appellate review by placing before the appellate court only those portions of the record that are pertinent to the specific issues raised in the briefs submitted by the parties. This abbreviated record serves to focus the attention of the judges on the arguments of counsel in much the same way as the briefs. By efficient preparation of the appendix, the attorneys show the judges what parts of the proceedings that transpired in the trial court are important to their points on appeal. A proper appendix is especially important where the entire record is not in the custody of the circuit court clerk.

8. *See* Fed. R. App. P. 10(a) (West Group 2000).
9. Fed. R. App. P. 11(b)(2) (West Group 2000).
10. *See id.* 11(e).

II. THE CONTENTS OF AN APPENDIX

The Federal Rules of Appellate Procedure impose upon the appellant the obligation to prepare and file an appendix to the briefs.[11] The contents of the appendix are itemized as follows:

> (A) the relevant docket entries in the proceeding below;
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> (B) the relevant portions of the pleadings, charge, findings, or opinion;
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> (C) the judgment, order, or decision in question; and
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> (D) other parts of the record to which the parties wish to direct the court's attention.[12]

This provision of the rules is simple enough, and it obviously provides for a great deal of discretion on the part of the attorneys who are to prepare the appendix. Unfortunately, that discretion is often abused, to the great detriment of the attorney who attempts to make a point in his brief or in his oral argument that finds no support in the appendix. Such an omission causes the judge to scurry back to the full record to look for the material omitted from the appendix. Sometimes, the judge discovers the material quickly and sometimes not. In neither case is the judge satisfied with the conduct of counsel.

On a number of occasions, I have found such basic items as pleadings and intermediate orders missing from the appendix. I have found appendices in which summary judgment motion papers, or some of them, were missing. I have seen materials that apparently were randomly inserted in the appendix as well as items that were unidentified. In one case presented for review, I found the partial transcripts of two trials in the appendix but no indication where one began and the other left off. On occasion, I have been constrained to track down an indictment or other charging instrument that has been omitted from the appendix in a criminal appeal.

Solving the problem of missing materials is time-consuming, as well as annoying. In the circuit in which I serve, the original record remains with the clerk of the district court, and it is transmitted to a judge of the court of appeals only on

11. *See* Fed. R. App. P. 30(a)(1) (West Group 2000).

12. *Id.*

request through our own circuit court clerk. The delay does not sit well with the judge assigned to draft the opinion or with the other judges on the panel, for that matter. And what item is most often included that should not be included? It is the Memorandum of Law that is filed in the district court, and that the rules specifically exclude from inclusion in the appendix.[13]

Many federal courts of appeals have established rules requiring additional materials to be included in an appendix. Our local rule in the Second Circuit Court of Appeals requires that the Notice of Appeal be included.[14] The Notice of Appeal is an important item in any appeal. The Notice of Appeal needs to specify whether part or all of the judgment is being appealed from[15] and must also specify the parties taking the appeal.[16] Without a proper and timely Notice of Appeal, the appellate court has no jurisdiction. We are very particular about verifying our jurisdiction, and it is not unusual for us to find a lack of jurisdiction that counsel has failed (purposely or not) to bring to our attention.[17] So, what is often missing from the appendix in our court? The Notice of Appeal, of course.

Reported cases detailing the difficulties posed by underinclusive appendices abound. In a case before my court, *United States v. Urena*,[18] the issue presented was whether the attorneys representing the defendants should be permitted to withdraw from representation of their clients pursuant to *Anders v. California*.[19] The panel, in preliminarily denying permission to withdraw, noted that both attorneys had "not even included the sentencing transcripts in the appendices" and that one of the attorneys had "not included his client's plea agreement."[20] These materials were obviously necessary for the determination of the application. In *United States v. Tom*,[21] the court noted the

13. *See id.* 30(a)(2); *see also Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 213 n. 6 (2d Cir. 1970) (denying costs, in part because of inclusion of memoranda of law and other unnecessary matter).

14. *See* 2d Cir. R. 30(d) (West Group 2000).

15. *See* Fed. R. App. P. 3(c)(1)(B) (West Group 2000).

16. *See id.* 3(c)(1)(A).

17. *See e.g. Kahn v. Chase Manhattan Bank, N.A.*, 91 F.3d 385, 387 (2d Cir. 1996).

18. 23 F.3d 707 (2d Cir. 1994).

19. 386 U.S. 738 (1967).

20. *Urena*, 23 F.3d at 708.

21. 787 F.2d 65 (2d Cir. 1986).

omission of the relevant docket entries as well as the indictment.[22] In a Fourth Circuit case, *United States v. Banks*,[23] the appendix was characterized as "skimpy" and "wholly inadequate to permit the evidentiary assessment required by the critical sufficiency issues raised by appellants."[24]

In *United States v. Friedman*,[25] the court, faced with the issue of whether the prosecutor's summation warranted reversal of conviction, "fault[ed] both sides for neglecting to include in the joint appendix the pages of the trial transcript containing the summations."[26] The following plea for an understanding of the importance of a joint appendix preceded a detailed review of the rules governing the preparation and filing of appendices:

> We take this opportunity to remind the bar of the vital function of the joint appendix in the consideration of appeals heard by this Court. Most of the judges of this Court maintain their permanent chambers outside of New York City. For them, the single copy of the trial transcript filed with the Clerk's office at Foley Square is not readily available for inspection before or after their attendance in New York City to hear argument. The bar has come to expect that the judges of this Court will attend argument fully informed about the appeal. The joint appendix, available to all members of the panel at their resident chambers, provides the basis for thorough pre-argument preparation and for further study of the issues as an opinion is being written and considered by the panel.[27]

Rule 30(e) of the Federal Rules of Appellate Procedure, entitled "Reproduction of Exhibits," provides that "[e]xhibits designated for inclusion in the appendix may be reproduced in a volume, or volumes, suitably indexed."[28] Our local rules require that the index for such a separate volume "shall include a description of the exhibit sufficient to inform the court of its nature; designation merely by exhibit number or letter is not a

22. *See id.* at 67 n. 2.
23. 10 F.3d 1044 (4th Cir. 1993).
24. *Id.* at 1050 n. 1.
25. 909 F.2d 705 (2d Cir. 1990).
26. *Id.* at 708.
27. *Id.*
28. Fed. R. App. P. 30(e) (West Group 2000).

suitable index."[29] This direction is simple enough, and it should be followed even in the absence of a local rule. Yet, we continue to receive separate volumes containing multiple exhibits designated only by letter or number. Compliance with local rules is essential, and no competent appellate attorney will ignore them.

There are some circuits that require specific excerpts of the record in lieu of the appendix prescribed by the Federal Rules, and the contents of these excerpts vary widely.[30] In the Second Circuit, the appendix is dispensed with altogether as to appeals in forma pauperis under the Social Security Act and those taken pursuant to the Criminal Justice Act.[31] In those types of cases, appeals are heard on the original record, and the court must be provided with

> five clearly legible copies of the reporter's transcript or of so much thereof as the appellant desires the court to read (or in the case of social security decisions, of the administrative records), and both parties in their briefs shall direct the court's attention to the portions of the transcript or administrative record deemed relevant to each point.[32]

It is always a good idea to consult the local rules for dispensing with the appendix and other matters relating to appropriate presentation of the record.[33]

The foregoing rule of course deals with transcripts in cases where an appendix is not required. It is also germane in cases where the appendix is required, for it points out the necessity of coordinating the brief and the portion of the record included in the appendix. It is, after all, the brief's appendix that must contain the "parts of the record to which the parties wish to direct the court's attention."[34] Actually, the appendix and the brief must work together to "direct the court's attention." Indeed, the brief must include citations to the appropriate pages

29. 2d Cir. R. 30(c) (West Group 2000); *see also Sands v. Runyan*, 28 F.3d 1323, 1332 n. 2 (2d Cir. 1994) (noting the identification of exhibits only by number and consequent non-compliance with Rule 30(c)).

30. *See Federal Procedure, Lawyers Edition* vol. 2A, § 3:600 (Lawyers Coop. Publg. 1994).

31. *See* 2d Cir. R. 30(b) (West Group 2000).

32. *Id.*

33. *See* 5 Am. Jur. 2d *Appellate Review* § 524 (1995).

34. Fed. R. App. P. 30(a)(1)(D) (West Group 2000).

in the appendix when referring "to the parts of the record contained in the appendix."[35] Specific provision is made for reference to evidence whose admissibility is in question. In such cases the pages of the appendix (or transcript) *must* be cited.[36]

An underinclusive appendix is probably worse than an overinclusive appendix, provided of course that the latter is properly formatted.[37] As previously noted, references in briefs to materials not included in the appendix cause no end of problems, the principal one being a waste of time. Often, the omitted materials have a critical bearing upon the issues with which the appellate judges are concerned.[38] Counsel blithely go forward with their written and oral arguments without a clue that the appendix is barren of the material to which they refer. Here is an example: In an argument of a case before a panel of which I was a member, counsel discussed whether certain evidence should have been admitted under the residual exception to the hearsay rule. Under that rule, hearsay not otherwise admissible may be received in evidence, in the interest of justice, if it meets certain criteria *and* if the particulars of the evidence were made known to the opposing party in advance of trial.[39] The problem was that the letter relied upon to provide the requisite notice in advance of trial was missing from the appendix.

An overinclusive appendix also is unacceptable and can bring forth the wrath of an appellate court.[40] Some courts are so concerned about the problems caused by overinclusion that they have adopted specific rules designed to foreclose it. For example, the Fourth Circuit rules specifically allow for the imposition of "sanctions against attorneys who unreasonably and vexatiously . . . inclu[de] unnecessary material in the appendix."[41] Such sanctions may be imposed by the court sua

35. Fed. R. App. P. 28(e) (West Group 2000).

36. *See id.*

37. For the specifics of formatting an appendix, see Part III, *infra.*

38. *See e.g. Teitelbaum v. Curtis Publg. Co.*, 314 F.2d 94, 96 (7th Cir. 1963) (stating that "[i]n the absence of an adequate appendix" the court would "refuse to search the record . . . in order to find whether plaintiff [was] entitled to a reversal").

39. *See* Fed. R. Evid. 807 (West Group 2000).

40. *See* Michael E. Tigar & Jane B. Tigar, *Federal Appeals Jurisdiction and Practice* § 7.02 (3d ed., West Group 1999) (referring to Fed. R. App. P. 30(b)(2)).

41. *See* 4th Cir. R. 30(a) (West Group 2000).

sponte or upon motion of any party.[42] The Fourth Circuit rule makes it clear that the only parts of the record to be included are those that are "vital to the understanding of the basic issues on appeal."[43] Familiarity and compliance with local rules governing the preparation of the appendix will help to avoid the offense of overinclusion. Indeed, familiarity and compliance with local rules will avoid many other disorders of the appendix as well. No competent appellate attorney will undertake the preparation of an appendix without a review of all the court rules governing contents and form of the appendix. My own experience with overinclusive briefs makes me wish that the Second Circuit had a rule similar to the Fourth Circuit rule regarding the inclusion of unnecessary material. There are, however, other ways to deal with that problem.

The court may invoke the procedures allowing the imposition of disciplinary sanctions upon appellate counsel who fail to comply with the rules governing appellate practice.[44] The court may also use the statutory provision for the assessment of excess costs, expenses and fees upon any counsel who "multiplies the proceedings in any case unreasonably and vexatiously" to correct the problem.[45]

The responsibility for the preparation of the appendix lies with the appellant, at least in the first instance. The appellant must compile the appendix and make sure to comply with the contents requirement.[46] However, "[t]he parties are encouraged to agree on the contents of the appendix,"[47] to the end that all necessary portions of the record are before the court. There would seem to be no reason for any disagreement as to what an appendix should contain. Since some "Rambo" litigators (wrongfully) perceive that it is their duty to disagree about everything, the Federal Rules establish a procedure for determining the contents of an appendix in the absence of the preferred agreement of counsel.

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42. *See id.*
43. *Id.* 30(b).
44. *See* Fed. R. App. P. 46(c) (West Group 2000).
45. 28 U.S.C. § 1927 (1994).
46. *See* Fed. R. App. P. 30(a)(1) (West Group 2000).
47. *Id.* 30(b)(1).

First, the appellant is to serve on the appellee, within ten days of the filing of the record, "a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review."[48] The appellee is given ten days after receipt to "serve on the appellant the designation of additional parts [of the record] to which it wishes to direct the court's attention."[49] Although the appellant has no choice but to include the additional parts, the Federal Rules caution the parties not to engage in "unnecessary designation."[50]

Despite the provisions regarding designation, we often see two separate appendices filed in the case—one by appellant and one by appellee. Aside from there being no such thing as a separate appendix for each party provided by the rules, the judges become cross when they have to skip from one appendix to another. They may as well have reference to the original record, for two appendices certainly do not accomplish the purpose of facilitating appellate review. More than thirty years ago, a panel of the court on which I serve condemned the filing of a separate appendix by each party. Noting the requirement for the filing of a single appendix, the court stated:

> The parties chose instead to file an appellants' appendix and an appellee's appendix. Thus, in order to consider a given witness' testimony in this highly technical case, it was necessary for us to jump from one appendix to the other. The rule requiring a single appendix was adopted to facilitate our task of judicial review.[51]

The facilitation of judicial review seems far from the minds of many appellate attorneys as they go about the work of assembling appendices. The rules do provide for the situation where an appellant, who is responsible for the cost of the appendix in the first instance, considers unnecessary the additional record parts designated by the appellee. In that situation, the appellant is authorized to notify the appellee, who then must advance the costs of including the additional parts.[52]

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 455 (2d Cir. 1969).

52. *See* Fed. R. App. P. 30(b)(2) (West Group 2000).

The court's power to allocate the cost of an appendix serves as a brake on the inclusion of unnecessary materials. While the cost of the appendix is taxable to the loser, the court may impose the costs of unnecessary parts of the record included in the appendix upon the party who causes the inclusion of those parts.[53] The real sword of Damocles that discourages the inclusion of unnecessary material is the provision requiring circuits to promulgate rules for "sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix."[54]

III. THE FORMAT AND APPEARANCE OF AN APPENDIX

The format of the appendix is dictated by the applicable rules of appellate procedure, including local rules in the various circuits. In federal practice, "[t]he appendix must begin with a table of contents identifying the page at which each part begins."[55] The relevant docket entries come next, followed by the other parts of the record in chronological order.[56] When an appendix includes any pages from the transcript of proceedings, the brief writer should provide the transcript page numbers, in brackets, immediately before the included pages.[57] Omissions in the transcript or in other included papers are to be noted by asterisks.[58] The appendix should omit formal matters immaterial to the case on appeal, including such items as acknowledgments and captions.[59] The items to be omitted are specified in the vain hope that the appendix will be no larger than necessary to assist the judges in resolving the issues presented on appeal. The hope is a vain one because almost every appendix is cluttered with unnecessary and immaterial formal matters that should be omitted.

Counsel should pay close attention to all the rules governing the physical appearance of the appendix. The Federal

53. *Id.*
54. *Id.*
55. Fed. R. App. P. 30(d) (West Group 2000).
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*

Rules of Appellate Procedure refer to the rules governing the appearance of briefs for such matters as reproduction, binding, paper size, line spacing and margins[60] except that "[t]he cover of a separately bound appendix must be white."[61] Interim local rules recently adopted by the Second Circuit Court of Appeals require "[s]equentially numbered pages beginning with A-1,"[62] "[a] detailed index referring to the sequential page numbers"[63] and one-inch-high type for the docket number printed on the appendix cover.[64] These rules already have been honored in the breach. The Federal Rules allow the inclusion of "legible photocop[ies]" of any documents or decisions[65] and an appendix of a size other than 8-1/2 by 11 inches "to facilitate inclusion of odd-sized document such as technical drawings."[66] The interim local rules allow printing on both sides of an appendix page,[67] the employment of tabs in addition to sequential page numbering to identify documents,[68] and the use of the minuscript form of transcripts.[69] Minuscript allows the printing of as many as four pages of transcript on one page of the appendix. This method greatly reduces the size of the print in the interest of a more compact appendix. For me, it is too hard on the eyes, and fortunately, I have not been subjected to it very frequently.

A frequently encountered problem is the appendix that is so poorly bound that it falls apart. An appendix whose pages become scattered all over the judge's desk as the binding falls apart loses its efficacy. And while the rules require that there be a single appendix, there is nothing that says the appendix cannot be in two volumes. Sometimes there are so many papers that three or more volumes of a joint appendix are required. No matter how many pages there are per volume, a careful lawyer sees that each volume presented to the court is bound properly. In an unpublished opinion dealing with an Age Discrimination

60. *See* Fed. R. App. P. 32(b) (West Group 2000).
61. *See id.* 32 (b)(1).
62. 2d Cir. (Interim) R. 32(b)(1)(A).
63. *Id.* 32 (b)(1)(B).
64. *See id.* 32 (c).
65. Fed. R. App. P. 32(b)(2).
66. *Id.* 32(b)(3).
67. *See* 2d Cir. (Interim) R. 32(b)(2)(A).
68. *See id.* 32(b)(2)(B).
69. *See id.* 32(b)(2)(C).

in Employment claim, the Fourth Circuit described the appendix submitted as "a mess—too many pages were put in a volume so that the volumes fell apart."[70] In addition, the court found the page numbers "unreadable," and the appendix index "useless," and noted that the appendix contained more than 1,000 pages but "failed to contain the complaint and other crucial portions of the record."[71] The court summed up its view in that case as follows: "In short, the joint appendix was a disaster that utterly failed to comply with the letter or spirit of Fed. R. App. P. 30."[72] All too often are appellate judges confronted with unhelpful appendices that can only be characterized as unmitigated disasters!

Aside from disastrous matters, I insert here a point of personal annoyance. Often, the lower court opinion included in the appendix is a photocopy of the opinion received by counsel from the court. When counsel marks up that opinion by underlinings and comments in the margin, the result is very distracting when counsel's copy is included in the record. I am not the only appellate judge to comment upon this distraction. In *Allen v. Seidman*,[73] the court noted its displeasure with the appendix copy of the lower court's opinion in which a lawyer for the Department of Justice "had scribbled critical marginalia, such as the word 'WRONG' beside several findings of [the Judge] with which she took particular issue."[74] Characterizing this conduct, which it had observed in other cases, as "indecorous and unprofessional," the court expressed the hope that it would not recur.[75] In the same vein, my preference is that the photocopy of a published opinion, if available (and clean, of course) should be included in the appendix rather than the typewritten opinion received from the lower court.

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70. *Vitello v. J.C. Penney Co.*, 107 F.3d 869 (4th Cir. 1997) (table), 1997 WL 87248, at *3 n. 1 (Mar. 3, 1977).

71. *Id.*

72. *Id.*

73. 881 F.2d 375 (7th Cir. 1989).

74. *Id.* at 381.

75. *Id.*

IV. THE SUPPLEMENTAL APPENDIX

Although it should be avoided if at all possible, it sometimes becomes necessary to file a supplemental appendix. If the procedure for designation of the record is followed, there should be no need for it. However, as is often the case, the failure of counsel to cooperate in the preparation of an appendix often calls for a supplemental appendix to be filed by an attorney who asks for the inclusion of designated material but is refused. Leave should always be sought before a supplemental appendix is filed.

In one case a motion to strike a supplemental appendix (apparently filed without permission) was denied "because the materials in defendants' supplemental appendix merely correct and clarify factual misstatements in plaintiffs' appellate brief."[76] The court's rationale for allowing the supplemental index was grounded in Rule 10(e) of the Federal Rules of Appellate Practice, which actually has reference to the record on appeal rather than the appendix. It allows the appellate court to direct a "supplemental record" in the event that "anything material to either party is omitted from or misstated in the record."[77]

A supplemental appendix should not be confused with the duplicate appendix problem previously described. As noted, the use of a separate appendix by each party has been roundly condemned. In one case a panel of my court was confronted with a situation where "[s]ix counsel submitted appendices in addition to the appendices submitted by the United States and by the public defender for the District of Connecticut, who represented an eighth defendant."[78] This was excessive duplication and obviously caused considerable confusion. The panel warned the bar "that henceforth costs of reproducing appendices in multi-defendant appeals will not be reimbursed to the extent that the same document or the same pages of transcript are reproduced by more than one lawyer."[79] In my view, duplicative appendices should call for sanctions greater than the mere denial of the costs of reproduction of the

76. *Martinez v. Mafchir*, 35 F.3d 1486, 1487 n. 2 (10th Cir. 1994).

77. Fed. R. App. P. 10(e)(2) (West Group 2000).

78. *U.S. v. Melendez-Carrion*, 804 F.2d 7, 9 (2d Cir. 1986).

79. *Id.*

duplicative material. The problem of course can be entirely avoided by the preparation of a single joint appendix in accordance with the requirements of the Federal Rules.

V. PENALTIES FOR THE IMPROPER APPENDIX

Courts have not hesitated to impose substantial sanctions as a penalty for improper preparation of an appendix. Costs on appeal have been imposed upon a prevailing party that failed to include a copy of the trial court's opinion and omitted thirteen pages of the appendix, "demonstrating extreme carelessness."[80] The cost of preparing a supplemental appendix has been imposed upon a party whose appendix "did not contain all the materials required by court rule and was not properly paginated."[81] An assessment of a sum of money toward the payment of appellees' attorneys' fees was awarded in the case where appellant refused to accommodate a request by appellees to include designated parts of the trial record.[82] In that case, the attorney was directed not to charge any part of the sanctions against his client.[83] Financial sanctions equal to the defendant's attorneys' fees were imposed against plaintiff's counsel in a case where counsel finally "submitted a joint appendix 11 months after he was given extensive and explicit instructions on how to prepare and file a joint appendix."[84]

Where the appellant at first failed to include parts of the record designated by the appellee but later filed a corrected appendix when ordered to do so by the court, attorneys' fees incurred in the preparation of a successful motion to strike the appendix as originally filed were allowed as sanctions.[85] In a case where the court found the first three volumes of appendices "poorly indexed, not in chronological order, and not consecutively paginated," the court invited and granted a motion to allow the filing of a two-volume supplemental appendix.[86]

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80. *Ferrero U.S.A., Inc. v. Ozak Trading, Inc.*, 952 F.2d 44, 50 n. 4 (3d Cir. 1991).

81. *Blue Pearl Music Corp. v. Bradford*, 728 F.2d 603, 607 n. 7 (3d Cir. 1984).

82. *Matthews v. Freedman*, 882 F.2d 83, 85-86 (3d Cir. 1989).

83. *See id.* at 86.

84. *Julien v. Zeringue*, 864 F.2d 1572, 1576 (Fed. Cir. 1989).

85. *See Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 779 (6th Cir. 1996).

86. *Credit Francais Intl., S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 700 (1st Cir. 1996).

The supplementary materials did not contain all the documents desired but did contain "unindexed documents of uncertain relevance."[87] The court noted that "appellants did not seek leave to repaginate and rearrange the first three volumes of their appendices . . . [and did not] revise their record references to the documents cited in their briefs."[88] This all resulted in a chilling conclusion for appellants. The court stated as follows: "[I]n the instant case, wherever material uncertainties result from an incomplete or indecipherable record and impede or affect our decision, we resolve such uncertainties against appellants."[89]

The most severe sanction of all is described in a case decided by the Third Circuit Court of Appeals in 1980. In *Kushner v. Winterthur Swiss Insurance Co.*,[90] the court described its frustration thus:

> Because appellants here failed to provide the court with a list of docket entries or a notice of appeal, much valuable time had to be expended by three judges and personnel of the Clerk's office repairing an incomplete brief and appendix, when this time would have been better spent in considering the merits of cases that are presented to us in proper form.[91]

The court then announced its decision in the following words:

> We now decide not to expend any more valuable judicial time performing the work of errant counsel, a practice that worked a tremendous disservice to the bulk of the litigants who appear before us represented by diligent counsel who do observe our rules. We are deciding this case deliberately, with an awareness of the institutional and precedential value of our decision. *We dismiss this appeal for failure to file an appendix that conforms to our rules.*[92]

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87. *Id.*

88. *Id.*

89. *Id.* at 701.

90. 620 F.2d 404 (3d Cir. 1980).

91. *Id.* at 407.

92. *Id.* (emphasis supplied); *see also Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 15-16 (1st Cir. 1996) (dismissing the appeal for failure to comply with, among other rules, Fed. R. App. P. 30(a)).

VI. CONCLUSION

It is to be hoped that the foregoing will provide some guidance to the bar as its members go about preparing that essential part of a case on appeal—the appendix. Although dismissal as a sanction for an improper appendix is a rare event, it remains as the most severe of the sanctions available. The preparation of a proper appendix is not a difficult task and can avoid the imposition of any sanctions at all. One needs only to follow the rules governing preparation and to see the appendix as an essential part of appellate advocacy.

A well-written brief coordinated with a properly prepared appendix is a joy for an appellate judge to behold. It will earn many points for the client and for the attorney who prepares it on his behalf. A disordered appendix, on the other hand, may have to be removed, with all the unfortunate consequences that may result. Removing (or striking) such an appendix in its entirety is a sanction that will leave the references in the brief without meaning. In such a case, a new joint appendix and new briefs would be required by leave of the court. The case would be delayed, and expenses would proliferate, all chargeable to the offending attorneys, who would then have to explain all to their clients. The attorneys would be subject to severe disciplinary sanctions, but the innocent clients would not suffer the extreme prejudice of dismissal or the resolution of the issues against them. After fifteen years on the appellate bench, and with appendices getting worse all the time, that is *my* view of an appropriate sanction.