IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3485
(Summary Calendar)

ROBERT KALTENBACH,

Petitioner-Appellee,

versus

BRUCE LYNN, Secretary,
Department of Corrections,
State of Louisiana, ET AL.,

Respondents-Appellants.

Appeal from the United States District Court
For the Middle District of Louisiana

(CA-89-893-A-M2)

(November 24, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Lafayette Parish (Louisiana) Assistant District Attorney Ronald E. Dauterive seeks here to appeal a ruling of the United

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

States District Court for the Middle District of Louisiana, imposing sanctions. Finding on our own motion that in the absence of a valid Rule 58 judgment Dauterive's notice of appeal is premature yet untimely, we dismiss his appeal but also acknowledge that he still may file a motion in the district court for entry of a separate judgment pursuant to Rule 58 and file a new notice of appeal upon entry of such judgment.

I

FACTS AND PROCEEDINGS

Plaintiff Robert Kaltenbach (not a party to this appeal) filed a complaint alleging 42 U.S.C. § 1983 and habeas corpus claims. The magistrate judge in the Middle District of Louisiana ordered the district attorney for Lafayette Parish to furnish to the court a copy of the record in another case filed by Kaltenbach in the Western District of Louisiana, together with any documents issued by this court with respect to that case. When the Lafayette Parish district attorney failed to produce the requested records, the magistrate judge ordered that they be filed by a specified date, and that the district attorney appear and show cause why sanctions should not be imposed if the order were not complied with in a timely fashion. A motion signed by appellant Dauterive stated that the record had not been delivered as originally ordered because the matter was pending in this court and we had retained possession of the record. That motion made reference to several attachments. The magistrate judge then issued an order noting that, although the movant represented in his pleadings that the related case remained

pending in this court, one of the attachments to the motion reflected that we had taken final action in the matter on July 2, 1991, and that the record had been returned to the district court.

Dauterive was ordered to appear, to explain how the discrepancy occurred, and to show cause why sanctions should not be imposed. A hearing was held and the magistrate judge imposed a sanction against Dauterive in the nature of a reprimand. Dauterive appealed this decision to the district judge, arguing that he (Dauterive) signed the pleading at the request of another Lafayette Parish assistant district attorney who was not allowed by the clerk of the federal court for the Middle District of Louisiana to file the pleading because he (the other assistant district attorney) was not admitted to practice in that district. Dauterive stated that he signed the pleading after being assured by his colleague that the information contained in it was correct, and further stated that another assistant district attorney had handled all other aspects of the Kaltenbach case.

The district court nevertheless entered an order on February 24, 1992, affirming the magistrate judge's sanction order. On May 15, 1992, Dauterive filed a "Petition for Appeal and Review" with this court in which he requested an out-of-time appeal, claiming that he did not receive notice of the district court's February 24, 1992, ruling until May 13, 1992.

We treat Dauterive's petition as a notice of appeal. See Stevens v. Heard, 674 F.2d 320, 322 (5th Cir. 1982). He was instructed by this court to brief whether the sanction order was

appealable, and, if so, whether the appeal was subject to dismissal because of the lack of a separate Rule 58 judgment.

II

ANALYSIS

A. Collateral Order Doctrine

Dauterive contends that the sanction order is appealable under the collateral order doctrine established in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949) and Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989).

> For an order to be appealable under the collateral order doctrine (1) it must conclusively determine the disputed question, (2) it must resolve an important or serious and unsettled question, (3) which is completely separable from and collateral to the merits of the parties' litigations, and (4) if not appealed as a collateral matter, the district court's determination must be practically unreviewable.

Markwell, 878 F.2d at 901. (citation omitted).

Generally, an interlocutory order imposing sanctions against a party's attorney is not immediately appealable under the collateral order doctrine. Click v. Abilene National Bank, 822 F.2d 544, 545 (5th Cir. 1987). An exception to the Click rule is warranted, however, "where an order assesses sanctions against an attorney who has withdrawn from representation at the time of the appeal, and immediate appeal of the sanctions order will not impede the progress of the underlying litigation. . . ." Markwell, 878 F.2d at 901.

According to Dauterive, his only involvement in the case was

placing his signature on the pleading that produced both the sanction order and his own efforts to overturn that order. Dauterive has no interest in the merits of Kaltenbach's case; he does, however, have an immediate interest in appealing the sanction order, which interest is not shared by the other parties in the case. The reasoning of Markwell makes the order immediately appealable under the collateral order doctrine.

B. Rule 58 Separate Document Requirement

Dauterive contends that there was a separate order denying relief because the district court's ruling was contained in a separate document.

Fed.R.Civ.P. 58 provides, "[e]very judgment shall be set forth on a separate document." "[T]he separate document requirement of Rule 58 applies equally to final and interlocutory decisions." Theriot v. ASW Well Service, Inc., 951 F.2d 84, 88 (5th Cir. 1992) (citations omitted). "An appeal taken under the collateral order doctrine is subject to all the usual appellate rules and time periods, including Rule 4 of the Federal Rules of Appellate Procedure." United States v. Moats, 961 F.2d 1198, 1203 (5th Cir. 1992). Therefore, an order appealable pursuant to the collateral order doctrine is subject to the Rule 58 requirement. See Fed.R.Civ.P. 54(a) ("`Judgment' . . . includes . . . any order from which an appeal lies.").

An order containing an analysis and reasons for a decision is not a "separate judgment" as required by Rule 58. Whitaker v. City of Houston, Texas, 963 F.2d 831, 833 (5th Cir. 1992). The district

court's order affirming the magistrate judge's sanction order contains a discussion of the law and its application to the facts at issue. Consequently, it does not constitute a Rule 58 judgment "separate document." Nevertheless, the absence of a Rule 58 "separate document" judgment does not prevent us from taking jurisdiction of an appeal from a final decision when, as here, the issue of non-compliance with Rule 58 is not raised by any party. Hanson v. Town of Flower Mound, 679 F.2d 497, 501 (5th Cir. 1982). In this case, however, the absence of the "separate document" judgment is relevant because, as discussed below, the appellant did not file a notice of appeal within 30 days following the entry of the district court's order.

C. Timely Filed Notice of Appeal

Dauterive argues that his notice of appeal was timely because it was filed within one day following his receipt of the district court's order.

Fed.R.App.P. 4(a)(1) provides in part, "[i]n a civil case in which an appeal is permitted . . . the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or the order appealed from; . . ." A party who claims that he did not receive notice of a ruling within 21 days of its entry may, within 7 days of receipt of the order, file a motion in the district court seeking a 14-day extension of the time for appeal. Fed.R.App.Fed.P. 4(a)(6).

Here, the district court's sanction order was entered on

February 24, 1992, and Dauterive's petition (effectively, his notice of appeal) was filed with us on May 15 and in the district court on May 20, 1992. Dauterive did not file a Rule 4(a)(6) motion in the district court to extend the appeal time. The notice of appeal would have been untimely under Rule 4(a)(1) if the February 24 order had been a Rule 58 judgment. However, in the absence of a valid Rule 58 judgment, the notice of appeal, though premature, is considered untimely, so that the appeal must be dismissed for lack of appellate jurisdiction. Townsend v. Lucas, 745 F.2d 933, 934 (5th Cir. 1984). Nonetheless, Dauterive still may file a motion in the district court for entry of a separate Rule 58 judgment from which he may file a new notice of appeal within 30 days.

CONCLUSION

For lack of jurisdiction, this appeal is DISMISSED.