

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: U.S. v. Kenneth G. Lain, Jr.
Appeal No. (if available) : 10-3201
Court/Agency Appeal From: US District Court for Kansas (Kansas City, KS Division)
Court/Agency Docket No.: 2:10-cr-20029-CM District Judge: Carlos Murguia
Party or Parties filing Notice of Appeal/Petition: Kenneth G. Lain, Jr.

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date notice of appeal filed: 08/09/10
- a. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: No
- b. Is the United States or an officer or an agency of the United States a party to this appeal? Yes

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A) _____ Fed. R. App. 4(a)(6) _____
Fed. R. App. 4 (a)(1)(B) _____ Fed. R. App. 4(b)(1) [X]
Fed. R. App. 4 (a)(2) _____ Fed. R. App. 4(b)(3) _____
Fed. R. App. 4 (a)(3) _____ Fed. R. App. 4(b)(4) _____
Fed. R. App. 4 (a)(4) _____ Fed. R. App. 4(c) _____
Fed. R. App. 4 (a)(5) _____
Other: _____

3. Date final judgment or order to be reviewed was filed and entered

on the district court docket: 08/03/2010

- 4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b). Yes
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(If the order being appealed is not final, please answer the following questions in this section.)

- a. If not, did district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?

- b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)? _____
- c. If none of the above applies, what is the **specific** statutory basis for determining that the judgment or order is appealable? _____

- 5. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).

- a. Give the filing date of any motion under Fed. R. Civ. P. 50(b), 52(b), 59, 60, including any motion for reconsideration, and in a criminal appeal any motion for judgment of acquittal, for arrest of judgment or for new trial, filed in the district court:

- b. Has an order been entered by the district court disposing of that motion, and, if so, when? _____

- 6. Bankruptcy Appeals. (To be completed only in appeals from a judgment, order or decree of a district court in a bankruptcy case or from an order of the Bankruptcy Appellate Panel.)

Are there assets of the debtor subject to administration by a district or bankruptcy court? _____

Please state the approximate amount of such assets, if known.

B. REVIEW OF AGENCY ORDER (To be completed only in connection with petitions for review or applications for enforcement filed directly with the Court of Appeals.)

1. Date petition for review was filed: _____
2. Date of the order to be reviewed: _____
3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order: _____

4. Specify the time limit for filing the petition (cite specific statutory section or other authority): _____

C. APPEAL OF TAX COURT DECISION

1. Date notice of appeal was filed: _____
(If notice was filed by mail, attach proof of postmark.)
2. Time limit for filing notice of appeal: _____
3. Date of entry of decision appealed: _____
4. Was a timely motion to vacate or revise a decision made under the Tax Court's Rules of Practice, and if so, when? *See* Fed. R. App. P. 13(a) _____

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). If none, please so state.

NONE

III. GIVE A BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

Defendant was acquitted on May 12, 2010, after a two day jury trial. Following acquittal, on May 21, 2010, defendant filed a timely petition seeking attorney fees under the Hyde Amendment (18 USC 3006A) and Equal Access to Justice Act of 1948 (18 USC 2412). On August 9, 2010, the district court denied defendant's claim for attorney fees in a final order and this appeal was thereafter timely filed within the 14 day time period allowed for appeals in a criminal proceeding.

IV. ISSUES RAISED ON APPEAL.

Whether the district judge's factual findings were clearly erroneous and the court thereby abused its discretion in disallowing attorney fees when the defendant established by preponderance of the evidence that the government's position was vexatious, frivolous and in bad faith. *United States v. Manchester Farming*, 315 F.3d 1176 (9th Cir. 2003); *United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000).

V. **ADDITIONAL INFORMATION IN CRIMINAL APPEALS.**

- A. Does this appeal involve review under 18. U.S.C. § 3742(a) or (b) of the sentence imposed? _____ NO _____
- B. If the answer to question in A is yes, does the defendant also challenge the judgment of conviction? _____
- C. Describe the sentence imposed. _____

- D. Was the sentence imposed after a plea of guilty? _____
- E. If the answer to question D is yes, did the plea agreement include a waiver of appeal and/or collateral challenges? _____
- F. Is defendant on probation or at liberty pending appeal? _____
- G. If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed? _____

NOTE: In the event expedited review is requested, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered at the time of appeal by completing and delivering the transcript order form to the clerk of the district court when a notice of appeal is filed. Defendant/appellant must refrain from ordering any unnecessary transcript as this will delay the appeal. If the court orders this appeal expedited, it will set a schedule for preparation of necessary transcripts, for designation and preparation of the record on appeal, and for filing briefs. If issues other than sentencing are raised by this appeal, the court will decide whether bifurcation is desirable.

VI. INDICATE WHETHER ORAL ARGUMENT IS DESIRED IN THIS APPEAL. If so, please state why.

Appellant will waive oral argument

VII. ATTORNEY FILING DOCKETING STATEMENT:

Name: JOHN R. OSGOOD Telephone: 816) 525 8200

Firm: OSGOOD LAW OFFICE

Email Address: jrosgood@earthlink.net

Address: 740 NW Blue Parkway, Suite 305


Lee's Summit, MO 64086

PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

- A. Appellant
- Petitioner
- Cross-Appellant

B. PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS

- Retained Attorney
- Court-Appointed
- Employed by a government entity
(please specify _____)
- Employed by the Office of the Federal Public Defender.


9/3/10
 Signature _____ Date _____

- Attorney at Law

NOTE: A copy of the court or agency docket sheet, the final judgment or order appealed from, any pertinent findings and conclusions, opinions, or orders, any motion filed under Fed. R. Civ. P. 50(b), 52(b), 59, or 60, including any motion for reconsideration, for judgment of acquittal, for arrest of judgment, or for new trial, and the dispositive order(s), any motion for extension of time to file notice of appeal and the dispositive order, and the notice of appeal or petition for review **must be submitted with the Docketing Statement**, except as otherwise provided in Section I of the instructions.

The Docketing Statement must be filed with the Clerk via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF may be found on the court's website, www.ca10.uscourts.gov.

This Docketing Statement must be accompanied by proof of service.

The following Certificate of Service may be used.

CERTIFICATE OF SERVICE

I, John R. Osgood hereby certify that on
[appellant/petitioner or attorney therefor]

09/03/2010 I served a copy of the foregoing **Docketing Statement**,
[date]

to:

CHRISTOPHER ALLMAN, at _____

Assistant United States Attorney
500 State Avenue, Suite 360
Kansas City, Kansas 66101

_____, the last known

address/email address, by Email at: Allman@usdoj.gov
[state method of service]



Signature

09/03/2010

Date

JOHN R. OSGOOD
740 NW Blue Parkway, Suite 305
Lee's Summit, MO 64086
(816) 525 8200
Email: jrosgood@earthlink.net

[Full name and address of attorney]