OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TERESA L. CUNNINGHAM, Petitioner v. HAMILTON COUNTY, OHIO

CASE NO: 98-727 c.2

PLACE: Washington, D.C.

DATE: Monday, April 19, 1999

PAGES: 1-53

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TERESA L. CUNNINGHAM, :

4 Petitioner :

5 v. : No. 98-727

6 HAMILTON COUNTY, OHIO :

7 - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Monday, April 19, 1999

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:02 a.m.

13 APPEARANCES:

14 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of

15 the Petitioner.

16 JOHN J. ARNOLD, ESQ., Assistant Prosecuting Attorney,

17 Cincinnati, Ohio; on behalf of the Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 THOMAS C. GOLDSTEIN, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF

6 JOHN J. ARNOLD, ESQ.

7 On behalf of the Respondent 25

8 REBUTTAL ARGUMENT OF

9 THOMAS C. GOLDSTEIN, ESQ.

10 On behalf of the Petitioner 49

11

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in Number 98-727, Teresa Cunningham v.

5 Hamilton County, Ohio.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice, and may it

10 please the Court:

11 The district court in this case sanctioned

12 petitioner, who is not a party to the underlying

13 litigation, but instead was the plaintiff's counsel. The

14 question presented to this Court is at what time

15 petitioner should appeal the sanction.

16 The Sixth Circuit recognized that there were

17 three possible answers to that question. The first, and

18 this is the rule the that the Sixth Circuit adopted, is

19 that petitioner should wait until the final judgment in

20 the case. That rule, however, has some serious problems.

21 First and foremost, it conflicts with this Court's

22 repeated holding for more than 100 years that only parties

23 may appeal the final judgment.

24 QUESTION: But there are exceptions to that

25 rule, are there not, Mr. Goldstein?

1 MR. GOLDSTEIN: Mr. Chief Justice. there is an
2 indication in this Court's precedents that there are a
3 class of persons known as quasi-parties who may appeal,
4 but the quasi-party cases do not determine whether or not
5 that appeal should be brought at the end of the case or
6 not. This Court's most recent precedents, particularly
7 Marino v. Ortiz and Karcher v. May, instruct that the test
8 is whether or not the individual who seeks to appeal could
9 intervene in the case under Rule 24(b), and there is no
10 question that petitioner could not intervene under Rule
11 24(b).
12 QUESTION: Mr. Goldstein, you have recognized
13 that, if the client had been sanctioned as well, the
14 client would have to wait till the end of the line and
15 presumably the lawyer, too, and the lawyer, although not a
16 party, could then appeal, so that seems to be inconsistent
17 with your position.
18 MR. GOLDSTEIN: The circuits that have
19 confronted this question uniformly agree, and so do we,
20 that when that sanction merges into the final judgment,
21 practicalities require that the sanction itself come up
22 together, because it would be injudicious --
23 QUESTION: But we have a nonparty, the attorney,
24 who could take an appeal then, so the Chief asked if that
25 rule is without exception. One exception would be this

1 very situation if the client were sanctioned along with
2 the lawyer.
3 MR. GOLDSTEIN: That is correct, but we do
4 believe that that position is consistent with our views of
5 Rules 3 and 4 of the Federal Rules of Appellate Procedure.
6 That sanction merges into the final judgment because it
7 is -- it operates upon the client.
8 QUESTION: If you're wrong about the possibility
9 of the attorney appealing the sanction at the end of the
10 line, if you're wrong about that, then I take it you
11 concede that you could not prevail here.
12 MR. GOLDSTEIN: Respectfully, no. There are
13 very serious practical consequences that make this
14 sanction effectively unreviewable at the end of the case
15 under the third prong of the Cohen doctrine. In
16 particular, we --
17 QUESTION: Before we get to those, I'm sort of
18 perplexed by the inconsistency at the other end. Why is
19 it that an attorney would not be a party for purposes of
20 appealing immediately --
21 MR. GOLDSTEIN: The --
22 QUESTION: -- but -- I mean, would be a party,
23 treated like a party for purposes of appealing
24 immediately, but would not be a party for purposes of
25 appealing at the end of the case? I mean, I don't see

1 why, conceptually, that makes any sense.

2 MR. GOLDSTEIN: It requires this Court to track

3 Rule 3 of the Federal Rules of Appellate Procedure, and

4 that rule instructs that you may appeal from an order or a

5 judgment to which you are a party. No one contests that

6 the petitioner is a party to the sanction order. It is

7 directed at her. She is not, however, a party to the

8 final judgment, with which she has nothing to do.

9 QUESTION: Well, so you're saying she could

10 appeal the -- on the basis of the order, in -- but she

11 couldn't appeal from the final judgment. That seems a

12 very strange result.

13 MR. GOLDSTEIN: Mr. Chief Justice, this Court

14 has been quite clear that the final judgment itself has to

15 be looked at in isolation, and you determine whether or

16 not the appellant is a party to the final judgment.

17 QUESTION: But she's not appealing the final

18 judgment. The final judgment is simply what we refer to

19 to determine when she may appeal. She's still appealing

20 the order, whether she appeals it immediately or later.

21 MR. GOLDSTEIN: That is correct, the difference

22 being that under Rule 4 of the Federal Rules of Appellate

23 Procedure she is precluded from appealing the sanction

24 order more than 30 days after it's entered. She is

25 directed -- the rule directs that you appeal upon the

1 entry of the order or the judgment.

2 Rule 4 further instructs that the entry is to be

3 determined under the entry definition in the Rules of

4 Civil Procedure, and that is when it is placed upon the

5 docket by the clerk of the district court. The sanction

6 order here was entered upon the docket. It was the only

7 thing that she could appeal from as a practical matter

8 under the Federal Rules of Appellate Procedure. She had

9 no other choice.

10 QUESTION: Mr. Goldstein, there are all kinds of

11 orders that are made in the course of a trial proceeding,

12 orders that are not immediately reviewable, and you don't

13 lose out because of the 30-day limit. I think that that

14 applies to a final order, not to an interlocutory order.

15 MR. GOLDSTEIN: That is correct. This Court has

16 instructed that mere discovery rulings, or anything else,

17 really, that goes to a party to the litigation, one of the

18 actual litigants, all of those merge into the final

19 judgment. But the Court has been equally clear that when

20 it is a third party, when it is not a litigant who is in

21 question, and we point the Court particularly to Alexander

22 and its progeny, which are discussed at length in the blue

23 brief, and those cases instruct that when you are dealing

24 with a third party who has been punished by the district

25 court, that order does not merge into the final judgment.

1 The only time that it may be appealed is directly upon its
2 imposition. The Court has drawn a very clear line between
3 the actual litigants before the district court and third
4 parties who might be punished by --
5 QUESTION: Well, if the Court should decide that
6 no such line was ever drawn and that it would make no
7 sense to draw it, that is, the judgment is the occasion,
8 as Justice Scalia said, it answers the when question. You
9 can appeal it then.
10 The attorney isn't seeking to reverse the
11 judgment against the client, but is seeking to review an
12 order that was made along the way. So you were beginning
13 to tell us that even if it's right that this would be
14 appealable at the end of the line, still, you said, it
15 could be appealed earlier because --
16 MR. GOLDSTEIN: Exactly. If I could return to
17 your earlier question, the sanction is effectively
18 unreviewable, notwithstanding a holding by this Court that
19 petitioner technically could file a notice of appeal from
20 the final judgment.
21 There are two classes of reasons. The first is, it
22 is not at all clear that there will be a final judgment.
23 The district court, for whatever reason, might never close
24 the case, the case could settle, the case could simply
25 languish, and the attorney would never have a triggering

1 right, under the Federal Rules of Appellate Procedure ever
2 to bring such an appeal.
3 In addition, along with those practical
4 considerations, the attorney really is injured in the
5 interim. We do not believe that this is an independent
6 ground for appeal, but when you look at all the practical
7 considerations for an attorney, the attorney is forced to
8 pay the money --
9 QUESTION: Well, in this case it was stayed.
10 The order was stayed, was it not?
11 MR. GOLDSTEIN: Respectfully, no. There is a
12 subtle but very important difference for purposes of
13 Rule 4. The order itself was not stayed. Petitioner
14 requested twice that it be stayed. After she filed the
15 notice of appeal, the collection of the sanction was
16 stayed, and our point remains that under Federal Rule of
17 Appellate Procedure 4, she is required to appeal not from
18 the collection of the sanction but from the entry of the
19 order. To give another example --
20 QUESTION: Does that mean that the order could
21 not be stayed, in your view?
22 MR. GOLDSTEIN: No. We respectfully believe
23 that that is a good course for district courts to take.
24 QUESTION: Well then, that takes some of the
25 injury out of it.

1 MR. GOLDSTEIN: If a district court were to do
2 so, if the district court were to announce to an attorney,
3 I believe you have contravened my ruling, I believe you
4 have engaged in irresponsible conduct and at the end of
5 this case I am going to sanction you $1,500, $10,000,
6 what-have-you, that order would not be immediately
7 appealable. That is the balance --
8 QUESTION: Well, that isn't staying the order,
9 that's not entering the order until later. It seems to me
10 you can never stay an order. You stay the consequences of
11 the order. You stay the effect that the order provides,
12 so you're not talking about staying the order. It seems
13 to me this order was stayed as completely as any order is
14 ever stayed. Its effect was suspended until the end of
15 the trial.
16 MR. GOLDSTEIN: I take that distinction. That
17 is fair. If the district court were to not finally enter
18 the order until the conclusion of the case, or were to
19 expressly provide that the sanction will merge into the
20 final judgment, respondent's point would be well-taken,
21 and these sanctions would be appealed at the end of the
22 case.
23 We are attempting to create a situation in which
24 the district court has a balance. If the district court
25 believes that the situation is so serious that the

1 sanction has to be finally entered right now, and that
2 direction to pay has to be entered right now, then the
3 attorney is finally told and the sanction is determined
4 completely as to her. And when we have that third-party
5 situation, where the district court is not going to return
6 to the sanction, when the issue is decided, it is final as
7 to the attorney and she could and should bring the appeal
8 immediately.

9 QUESTION: Is there any reason -- I mean,
10 assuming that the language is open to your interpretation
11 or the other, which I'll assume for the moment, is there
12 any good reason why we should make this so complicated? I
13 mean, shouldn't -- isn't the simple -- courts of appeals
14 have a lot to do, and if we take the other position, we're
15 sure they're not going to get into this business of trying
16 to mix the, is it part of the merits, isn't it part of the
17 merits, et cetera. It's a single rule for everybody, and
18 is any harm done?

19 MR. GOLDSTEIN: There is no harm in a clear,
20 single rule, and that's --

21 QUESTION: Or the clear, single would be, you'd
22 lose, because the clear, single rule would be,
23 everybody -- if you're sanctioned, the time to appeal the
24 sanction order, just like an attorney who is still in the
25 case, the attorney who isn't appeals it at the end of the

1 case, and if you don't like the order in the meantime, ask
2 for a stay, and if he won't give you a stay, go under Rule
3 8, get the court of appeals to do it.
4 MR. GOLDSTEIN: Respectfully, that's -- two --
5 we should make two points. We do think that our rule is
6 perfectly clear. If you are an attorney and you are
7 sanctioned alone, file your notice of appeal. We don't
8 believe that that gives rise to any sort of --
9 QUESTION: Oh, well, why wouldn't it give rise
10 to the problem of, in many sanctions cases, when they get
11 to the court of appeals it would be mixed up with the
12 merits, and all of a sudden you discover that this
13 attorney was sanctioned for bringing a frivolous this or
14 that, and the court of appeals, the parties will think, my
15 God, we'd better be up there arguing about this, because
16 it has to do with the merits of the case.
17 MR. GOLDSTEIN: Respectfully, no. But if I
18 could first deal with the Rule 8 problem, and that is that
19 Rule 8 is triggered once you file a timely notice of
20 appeal. If this Court's holding is that the notice of
21 appeal in the first instance is not proper and not timely,
22 none of the Federal Rules of Appellate Procedure apply,
23 including the ability to get a stay, including the ability
24 to get a supersedeas bond --
25 QUESTION: Well, I suppose on that point, in a

1 serious case, could you get a writ of mandate?

2 MR. GOLDSTEIN: The Court has been very clear

3 that writs of mandamus --

4 QUESTION: I mean, it's a million-dollar fine,

5 and the judge refuses to stay it. Could you go to the

6 court of -- let's assume that you had to wait till the end

7 of the -- could you get a writ of mandate?

8 MR. GOLDSTEIN: Respectfully, we do not believe

9 so. The Court has been very clear that the writs under

10 the All Writs Act, including writs of mandate,

11 prohibition, and the like, are confined to keeping the

12 district court within the lawful exercise of its

13 jurisdiction, and it's very difficult to conceive, no

14 matter how much the financial burden is upon the lawyer,

15 that you can make the argument that it's outside --

16 QUESTION: I'm sorry, why can't -- I would think

17 this would be an odd case that it would ever happen that

18 if a lawyer is sanctioned in the middle of the case, and

19 the lawyer withdraws, so that he's not still representing

20 the party, and you say, judge, I want to appeal, I can't

21 appeal to the end, would you mind staying the payment

22 until the end of the case, and the judge would say no. I

23 can't believe a judge would do that, but if the judge did

24 say no, you would go to the court of appeals and ask them

25 for a stay. Is there any problem with that?

1 MR. GOLDSTEIN: The Federal Rules of Appellate
2 Procedure and its stay provisions, including Rule 8, are
3 not triggered at that point because there is no timely
4 notice of appeal.
5 QUESTION: Where does it say that Rule 8, to get
6 a stay, you have to have filed a notice of appeal? I
7 didn't see --
8 QUESTION: You don't have jurisdiction -- the
9 court of appeals doesn't have jurisdiction if --
10 QUESTION: To protect itself. That's my
11 question, because that's what I wondered.
12 MR. GOLDSTEIN: We do read the rules to not
13 permit it, and in fact we have studied every single
14 interlocutory attorney sanction appeal that has been
15 brought in the last 20 years, and a court of appeal has
16 never, ever allowed a writ of mandamus or Rule 54(b)
17 certification, a 1292 certification. The courts of appeal
18 expect you to file a timely notice of appeal, and those
19 circuits that are on the bottom of the split and do not
20 believe that an interlocutory appeal is permitted simply
21 will have nothing to do with it.
22 QUESTION: Mr. Goldstein, when Justice Breyer
23 asked you, you could read it one way, you could read it
24 the other way, why shouldn't the tie-breaker be 1292(e)?
25 The Congress said, courts, this is the kind of thing you

1 ought to sort out by rule-making. You want to make more
2 things final, court, you can do that through the rule-
3 making process.
4 Given that signal from Congress, why should we
5 do anything by adjudication to add to the list of
6 interlocutory orders that are immediately appealable?
7 MR. GOLDSTEIN: Justice Ginsburg, the Court
8 has -- and you have pointed this out in an earlier opinion
9 for the Court that that option is open to this Court to
10 begin the rule-making process, which respectfully, it has
11 never seen fit to do, and there are no less than a dozen
12 splits in the circuits about when various interlocutory
13 orders may be brought to this Court.
14 We have no objection if the Court were to, in
15 addition, use its rule-making authority to resolve these
16 conflicts, but the Court does have before it this case.
17 QUESTION: What is the -- I mean, you're being
18 very picky about, you know, Rule 4, Rule 8 and so forth.
19 What is the textual authority for any
20 interlocutory appeal?
21 MR. GOLDSTEIN: The textual authority does lie
22 squarely within 28 U.S.C. 1291. This is literally and
23 figuratively a final decision. It is complete as to
24 petitioner. The district court is not going to ever
25 revisit the sanction.

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1 QUESTION: It's a judicial elaboration in Cohen
2 upon the term, final order.
3 MR. GOLDSTEIN: There is no term, final order
4 for --
5 QUESTION: Final decision, excuse me.
6 MR. GOLDSTEIN: Yes. That's exactly right, and
7 the Court has made clear that it is a practical
8 construction of the term, final decision, and in --
9 QUESTION: Well, if it's just a matter of
10 practicality, I mean, we're making it up under Cohen,
11 essentially. We say, some things are final decisions, and
12 other things aren't final decisions, and we feel free to
13 use the Cohen factors, some of which have very little to
14 do with finality. They have to do with practicality. So
15 why not take those same practical considerations into
16 account in the present instance?
17 MR. GOLDSTEIN: We believe that the practical
18 considerations do favor petitioner in this case. In
19 particular, there is the grave concern that she could not
20 appeal from the final judgment, but that cannot be the
21 right result.
22 QUESTION: Why didn't she try? One of the
23 striking things about the facts of this case is that no
24 protective appeal was taken once there was a final
25 judgment. That was just allowed to happen.

1 MR. GOLDSTEIN: That's correct. Petitioner
2 believed that it was inappropriate for her to bring an
3 appeal from the final judgment in the case. It is worth
4 noting that at the time she filed her notice of appeal,
5 every single circuit that had confronted these facts had
6 ruled in her favor.
7 QUESTION: Well, what did she have to lose,
8 because it seems that would put her in the best position?
9 MR. GOLDSTEIN: That is not correct,
10 respectfully. Under Rule 38 -- there were sanctions
11 motions filed upon the filing of this notice of appeal.
12 Under Rule 38, if she files an improper notice of appeal
13 she can get herself in more trouble, but I do want to pick
14 up --
15 QUESTION: Where? What kind of trouble?
16 MR. GOLDSTEIN: For filing an improper notice of
17 appeal from the final --
18 QUESTION: You are envisioning that the court of
19 appeals, when someone is in this bind, says the law is
20 uncertain, so I filed a notice of appeal at the
21 interlocutory stage, I filed one at the end of the line, a
22 court of appeals would sanction a lawyer for doing that?
23 MR. GOLDSTEIN: At the -- it is a concern that
24 the attorney, even if she is not going to be sanctioned,
25 should still appeal when it's appropriate and should not

1 be filing unnecessary protective appeals, but it is worth
2 returning to our argument under Rule 4(a)(2), and that is
3 that the Federal Rules of Appellate Procedure explicitly
4 contemplate that if you file too early your notice of
5 appeal automatically functions to be protective.
6 QUESTION: May I ask in -- picking up on your
7 last colloquy with Justice Scalia, do you acknowledge that
8 this is a Cohen problem at all? Cohen orders usually
9 refer to parties.
10 MR. GOLDSTEIN: That's absolutely correct. We
11 have fitted within the Cohen doctrine because most of the
12 courts of appeal have, but the closest analogue,
13 truthfully, are the cases in which this Court has dealt
14 with third parties who are punished, and they deal with
15 them completely outside of the Cohen doctrine, because
16 it's final as to that person, cases like Alexander and the
17 like.
18 QUESTION: May I ask, when you talk about the
19 closest analogue, is there anything we can learn from the
20 procedure when a lawyer is actually held in contempt, as
21 opposed to just sanctions? When do you appeal then, and
22 so forth?
23 MR. GOLDSTEIN: Respectfully, yes. We believe
24 that, for example, under Rule 16(h) of the Rules of Civil
25 Procedure, petitioner could have been held in civil

1 contempt, and there is no question that -- respectfully,
2 we believe there's no question that she could have
3 appealed at that time, because the Court is very clear
4 that nonparty civil contempts are immediately appealable.
5 There is no practical difference in terms of the effect on
6 district courts, or on the effect on courts of appeals.
7 Why, if the district court says, this is not
8 merely a Rule 37 sanction, I'm going to put next to it the
9 word contempt, why one should be appealable and one should
10 not. In addition --
11 QUESTION: And is it true that the contempt
12 cases we've reviewed have been reviewed on the
13 interlocutory stage, rather than after the final judgment?
14 MR. GOLDSTEIN: Yes. In fact, that's the
15 express direction. The most recent case is United States
16 Catholic Conference in 1988, and that was absolutely
17 interlocutory, and the precedents in the blue brief
18 explain that a -- appeal from the final judgment in fact
19 would not be permitted. They have --
20 QUESTION: But isn't an attorney given
21 considerably more procedural rights in the case of a
22 citation for contempt than for a sanction?
23 MR. GOLDSTEIN: Rule 37 requires that there be a
24 notice and opportunity to be heard, but civil contempt
25 cases do not draw a greater distinction, and in

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1 particular, again, Rule 16(h) allows the district court to
2 simply deem this to be a contempt, and so does Rule 37(b),
3 which also deals with discovery sanctions. If petitioner
4 had continued to refuse to turn over the documents, for
5 example, she could have been money-sanctioned, or the
6 district court could have deemed it to be a civil
7 contempt.
8 In terms of -- there just would be no practical
9 difference on the effect on the district court or a court
10 of appeal that a -- that the district court labels it
11 contempt.
12 But if we could -- if I could mention one other
13 practical difference, and that is, it seems a bad
14 practical and policy judgment to tell the attorney, well,
15 if you go that one step further and get yourself held in
16 civil contempt, then you can appeal, because that has
17 grave collateral consequences on the attorney's client.
18 QUESTION: Well, that would be a pretty risky
19 thing for an attorney. I'm not really worried about an
20 attorney --
21 QUESTION: Yes, that's hardly a motivation, to
22 say that, you know, yes, you're in bad shape now --
23 QUESTION: Right. Right.
24 QUESTION: -- but if you just get yourself held
25 in contempt, you'll be okay.

1 (Laughter.)

2 QUESTION: I mean, I suppose he might commit
3 suicide, too, but I'm not really worried about it.

4 MR. GOLDSTEIN: Respondent has suggested that
5 this rule that we propose would lead to lots of attempts
6 to appeal, that attorneys might get themselves sanctioned
7 in order to have the right to take an appeal, and we hope
8 the Court will take the same practical view of that as
9 well.

10 QUESTION: Mr. Goldstein, can I ask you, if you
11 say that Cohen is really not implicated here, then there
12 really is no way to handle the case where you have an
13 interlocutory appeal and it is intimately bound up with
14 the merits of the case, that really whether there was a
15 sanctionable conduct or not depends entirely upon how you
16 view the merits of the case, which seems to me not at all
17 an unusual situation. What do you do in that case?

18 MR. GOLDSTEIN: Well, Justice Breyer --

19 QUESTION: Since we're not applying Cohen you
20 can't say, well, although most of these things would be
21 interlocutory, this one won't be. We'll have -- you'll
22 have to do this at the end of the whole proceeding.

23 MR. GOLDSTEIN: This is briefed at length in the
24 case. We respectfully do not believe that appeals of Rule
25 37 sanctions and Rule 11 sanctions do bring up the case,

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1 because what is being appealed is not the underlying
2 determination by the district court, but instead whether
3 or not the attorney misbehaved, and that is the line that
4 this Court drew in --
5 QUESTION: Yes, but the ones I've actually seen,
6 where we had appeals, they -- the argument would be that
7 the attorney, for example, asked too many questions or
8 something in a deposition, way out of line, and the
9 defense would be something like, well, if you really
10 understood this case you'd understand that these questions
11 aren't out of line. If you really understood this case,
12 you'd see that my delay was reasonable. And then they'd
13 start arguing about, what's this case really about, and at
14 that point, if I were a client, I'd say -- I'd want to be
15 in there, you know, before the court of appeals takes a
16 view of this.
17 I mean, that's the kind of thing I'm concerned
18 about, and I guess that's the kind of thing that's led the
19 lower courts not to allow appeals in cases where the
20 attorney's in there and hasn't been dismissed, and a lot
21 of other instances. That's what's worrying me.
22 MR. GOLDSTEIN: There are two answers. The
23 first deals with the legal standard, and the second with
24 what actually is brought up on appeal. The Cohen doctrine
25 cases from this Court are very clear that the concern is

1 that you are not bringing up on an interlocutory appeal
2 the merits of one of the claims. We do not want a
3 situation where you're going to appeal now and the
4 client's going to come along 6 months later and bring the
5 same appeal.
6 And when you have the question on appeal, to
7 turn to the practical effect of what's brought up for the
8 appeal, if you take a Rule 37 sanctions, the question is,
9 did the attorney behave unreasonably in believing that a
10 particular question or deposition or interrogatory would
11 lead to the discoverability of admissible evidence, and we
12 proceed further and further away from the actual merits of
13 the legal claims.
14 And in point of fact, this Court let this split
15 in the circuits percolate for two decades, and the
16 majority rule in the circuits by far, based on the
17 experiences of courts of appeal judges like you formerly
18 were, Mr. Justice Breyer, is that this does not intertwine
19 with the merits and disrupt district court proceedings.
20 In particular, the court looks at -- the courts
21 have noted two points. It doesn't result in a stay of the
22 district court proceedings because the district court
23 case, just like it did here, continues apace until it gets
24 to final judgment. And, pointedly, unlike a lot of this
25 Courts interlocutory appeal cases, it's not going to moot

1 out.

2 QUESTION: Are there instances, in your

3 experience, where there are repeated multiple sanctions

4 put on an attorney, an attorney is just really being

5 obstreperous?

6 MR. GOLDSTEIN: It happens --

7 QUESTION: He's fined $50 on 1 January, $500 on

8 the 1 February for something else?

9 MR. GOLDSTEIN: Yes. It is never --

10 QUESTION: And you obviously know where I'm

11 going, if there are multiple appeals.

12 MR. GOLDSTEIN: That's correct. It has -- it

13 does happen in the district court that attorneys can be

14 sanctioned more than one time. Our experience, in

15 reviewing every single example in the courts of appeals,

16 it has never occurred that multiple appeals have been

17 brought from the same case, and there is a reason for

18 that. And that is that while attorneys may get themselves

19 sanctioned, they tend not to be so, for lack of a better

20 term, stupid as to continue to bring their case to the

21 court of appeals only to get shot down again and again in

22 the Federal reports.

23 QUESTION: But each time the court of appeals

24 shoots them down it's another piece of appellate business

25 that really is contrary to the policy against piecemeal

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1 appeals.

2 MR. GOLDSTEIN: As a practical matter in the

3 court of appeal, those appeals will be consolidated by the

4 court of appeals under Rule 3.

5 There -- it is, we respectfully submit, final as

6 to the attorney each time a final sanction order is

7 entered, but again --

8 QUESTION: So is a disqualification order, and

9 why isn't that the closer analogy than a contempt

10 citation?

11 MR. GOLDSTEIN: There are two keys to the

12 disqualification cases. The first is the conclusion in

13 Richardson-Merrell that the attorney doesn't get to appeal

14 the disqualification. That runs against the client, not

15 against the attorney. And the second is that the district

16 court proceedings will be stayed, and it will disrupt

17 them.

18 If I could reserve the remainder of my time.

19 QUESTION: Very well, Mr. Goldstein.

20 Mr. Arnold, we'll hear from you.

21 ORAL ARGUMENT OF JOHN J. ARNOLD

22 ON BEHALF OF THE RESPONDENT

23 MR. ARNOLD: Mr. Chief Justice, and may it

24 please the Court:

25 To respond to the questions raised to

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1 petitioner, there are alternatives which Congress has
2 given which would adequately address the most egregious or
3 most unjust of these cases where sanctions are imposed
4 against attorneys. Those alternatives are available in
5 the appropriate case.
6 Secondly, there's a very practical reason for
7 treating attorneys differently than a pure nonparty to
8 litigation. The attorney comes before the court solely on
9 behalf of the client, as opposed to a third party who is
10 distant from the litigation. The attorney's interests are
11 those of the client, and are entwined with the outcome of
12 the case.
13 So the simple question before this Court today
14 is whether an attorney who is sanctioned for violating a
15 pretrial discovery order may immediately appeal that
16 decision.
17 QUESTION: Well, this attorney was also removed
18 from the case, so is no longer acting as attorney, right?
19 MR. ARNOLD: That's correct, Your Honor.
20 QUESTION: That might make a difference. Do --
21 does Cohen apply? Should we assume that Cohen applies to
22 this --
23 MR. ARNOLD: I believe --
24 QUESTION: -- when it's a nonparty?
25 MR. ARNOLD: I believe the analysis is

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1 different, because the interests of a pure party and the
2 attorney are different. Secondly, I suggest that the --
3 whether the attorney was removed from the case or
4 continues to participate should not affect the
5 jurisdictional question which was before the court of
6 appeals. Coincidentally in this case, district court
7 Judge Sandra Beckwith removed the petitioner on the same
8 date as she imposed the first set of sanctions against
9 Ms. Cunningham. That may have happened at some later
10 time.

11 QUESTION: Oh, no, once the attorney is removed,
12 it makes the person much more of a nonparty than when the
13 attorney is still in there representing the client.

14 MR. ARNOLD: But it does not affect the
15 jurisdiction of the appellate courts, respectfully. That
16 jurisdiction should be determined as of the date the order
17 was issued. Subsequent events should neither confer nor
18 take away jurisdiction, except in extraordinary cases.
19 For example, if the case were mooted for some reason, I
20 would concede that that would in effect destroy or take
21 away appellate jurisdiction if it existed, but we submit
22 that the change in facts after the fact should not confer
23 or destroy jurisdiction.

24 QUESTION: Why would mooting of the case affect
25 it?

1 MR. ARNOLD: I'm sorry.

2 QUESTION: The case might moot out later, but

3 the basis for the attorney sanction would not be

4 eliminated by the mooting of the case on the merits, would

5 it?

6 MR. ARNOLD: When I said that, I was referring

7 to the attorney sanctions may become moot at a later time.

8 Either they might be set aside, merged into the final

9 order, settled --

10 QUESTION: You weren't saying that mooting of

11 the case by some later event necessarily moots the

12 attorney sanction issue that arose before it.

13 MR. ARNOLD: No, Your Honor.

14 QUESTION: Okay.

15 QUESTION: You're saying whatever is the end of

16 the line, if the case is settled, there's an order

17 dismissing the case, is that what you're saying? Because

18 Mr. Goldstein brought up the possibility, well, the case

19 could settle, and then there would be never a time that

20 this could be appealed.

21 MR. ARNOLD: In my experience, at some point in

22 time there is going to be some document filed in the

23 district court which says, this case is dismissed, this

24 case is reversed, whatever. There's going to be a final

25 order filed in the district court, otherwise --

1 QUESTION: But there would be no notice given,
2 presumably, to an attorney who had been removed in the
3 interim. That attorney would not get notice of any final
4 disposition, presumably.
5 MR. ARNOLD: That may be true, and that may
6 impose a slight burden upon the attorney to essentially
7 monitor, if you will, to calendar in a tickler file, to
8 review periodically the status of that case every 30 days
9 or so, and I suggest that that burden is significantly
10 less than the burdens which will be placed on the parties
11 and the appellate courts by repeated or multiple
12 interlocutory appeals.
13 QUESTION: Why isn't the contempt sanction the
14 closest analogy? I mean, the magistrate who imposed the
15 Rule 37 fine could have used this contempt sanction.
16 MR. ARNOLD: The contempt sanction is different,
17 we believe, because contempt sanctions are typically
18 imposed against nonparties who are unrelated to the case.
19 It is a more severe sanction --
20 QUESTION: Well, there's a lot of cases where
21 the lawyers are held in contempt. I've been in court when
22 lawyers have been held in contempt and the case came all
23 the way to this Court. There are a lot of those cases.
24 But why -- regardless of the number, why should they be
25 treated differently? That's the real question.

1 MR. ARNOLD: Because their interests are
2 different from that of a pure nonparty. Their interests
3 are that of the client. The client cannot appeal a
4 contempt -- I'm sorry. The client cannot appeal a
5 discovery order immediately, so neither should the
6 attorney. It's a lesser sanction imposed against the
7 attorney than contempt.
8 QUESTION: Well, my question is, why shouldn't
9 it be treated like contempt, which is sometimes used as a
10 way of getting interlocutory review of a discovery order?
11 I mean, isn't that true of the famous Hickman v. Taylor?
12 A lawyer was held in contempt, and that's how it got up on
13 appeal.
14 MR. ARNOLD: Yes, Your Honor, but to treat the
15 cases differently we suggest supports the underlying
16 reasons behind the rule of finality, and that is, we don't
17 want to have multiple appeals. And, indeed, there have
18 been some cases which have suggested in the lower courts
19 that when an attorney is found, even an attorney is found
20 in contempt, his or her interests are so merged with that
21 of a client, that of the party, that the appeal may only
22 lie at the conclusion of the case, and that, we suggest,
23 gives a very practical interpretation to the final
24 judgment rule.
25 QUESTION: You say a contempt might not be

1 appealable until the end?

2 MR. ARNOLD: Yes, Your Honor.

3 QUESTION: Why -- I'm sorry, I haven't followed

4 you. Why is it that you say a contempt citation is

5 different from just a sanction?

6 MR. ARNOLD: It is a more severe sanction

7 imposed against the --

8 QUESTION: Well, that's true, but --

9 MR. ARNOLD: -- client, and it is treated

10 differently, I think, by the courts, in the case of a

11 party as opposed to the attorney, and the reason --

12 QUESTION: Well, let's say -- I'm talking about

13 contempt citation of an attorney. Now, do you acknowledge

14 that that's appealable immediately?

15 MR. ARNOLD: In not every case, Your Honor.

16 QUESTION: Not in every case?

17 MR. ARNOLD: Not in every case.

18 QUESTION: What cases would it not be?

19 MR. ARNOLD: For example, in the situation where

20 the -- there is a substantial congruence of interests

21 between the nonparty, or the attorney, and the party to

22 the action.

23 QUESTION: What is this case, the case that

24 you're relying on?

25 MR. ARNOLD: I would refer the Court to a

1 decision of the Ninth Circuit, the coordinated pretrial
2 proceedings in Petroleum Products antitrust litigation
3 case, a 1984 decision of the Ninth Circuit, where the
4 Attorney General, I believe of the State of Oregon, was
5 sanctioned, or was found in contempt, and his interests
6 were so congruent, or so substantially similar to that of
7 the State of Oregon, that the court ruled that the appeal
8 was not immediately -- may not be taken immediately.
9 QUESTION: But I thought in all of the -- at
10 least all the contempt cases I know, taking Hickman v.
11 Taylor, the lawyer's interest was -- he was serving his
12 client. He was totally serving his client, and yet we
13 took that case, and it was the great case about the scope
14 of discovery.
15 MR. ARNOLD: To do so, Your Honor, if the Court
16 allows even an appeal of a contempt citation immediately,
17 will cause the appellate courts to become entwined in
18 reviewing more and more the facts of the underlying
19 litigation.
20 QUESTION: Now you're arguing that we should not
21 allow interlocutory appeals of contempt citations.
22 MR. ARNOLD: I am.
23 QUESTION: And I'm inclined to agree with you,
24 that if we agree with you we shouldn't allow interlocutory
25 appeals of contempt citations. Is that your position?

1 MR. ARNOLD: That's an extension of the
2 rationale that applies to this case, yes, Your Honor.
3 QUESTION: Well, frequently, and I think this
4 Court has admonished trial judges that if you're thinking
5 of holding a lawyer in contempt, either tell him that
6 you're thinking about it, but wait awhile. In other
7 words, don't simply cite him from the bench, but hold off
8 for a while, and maybe do what Judge Medina did in the
9 communist case, have a hearing at the end of the trial,
10 and of course that would remove the appealability problem
11 there, since surely a contempt citation with a fine at the
12 end of the trial would be appealable.
13 MR. ARNOLD: Yes, it would, because it would at
14 that point merge with the final judgment of the case.
15 QUESTION: Well, what discretion does a trial
16 judge have to defer the effectiveness of an order of
17 sanction, or to defer -- what discretion would a court of
18 appeals have to defer holding any hearings on it until the
19 end of the case?
20 MR. ARNOLD: Well, the trial court does, of
21 course, have the discretion to decide when they are going
22 to make that decision, when they are going to impose that
23 sanction, or even if they -- and the courts below have
24 seen the situation where the court has found, or ordered,
25 I'm going to sanction you for this conduct, but has not

1 determined the final amount of the sanction.
2 QUESTION: Uh-huh.
3 MR. ARNOLD: Or they may say, I'm going to
4 impose a sanction of $1,500, but stay that until the final
5 resolution of the case.
6 QUESTION: Stay the collection of it?
7 QUESTION: Stay the collection of it?
8 MR. ARNOLD: Stay the -- I'm --
9 QUESTION: They would stay -- would have power
10 to stay the collection of the sanction until the end.
11 MR. ARNOLD: The execution of the order, yes,
12 Your Honor.
13 QUESTION: But would it be, do you think, would
14 the notice of appeal have to be filed in 30 days of the
15 entry of the order that you are sanctioned?
16 MR. ARNOLD: If this Court adopts a rule that
17 says that attorneys may only appeal from the final
18 decision of the Court, no. That notice of appeal, that
19 appeal should be perfected within the appropriate time
20 from the final order of the district court.
21 QUESTION: Well, is the best resolution of this
22 to leave it to the discretion of the court --
23 MR. ARNOLD: In terms of --
24 QUESTION: -- imposing the sanction?
25 MR. ARNOLD: I'm sorry, Your Honor.

1 QUESTION: Should the best resolution of this
2 problem be to leave the effectiveness of it in the
3 discretion of the trial judge?
4 MR. ARNOLD: That is one resolution, but I
5 submit the better resolution is to simply announce a
6 bright line. Either the attorney can appeal or not
7 appeal, and if the interests which support the finality
8 rule suggest that the most practical, the most judicially
9 efficient manner of doing it is to announce the rule that
10 the attorney may perfect that appeal at the conclusion of
11 the case.
12 QUESTION: The problem is, is that these
13 sanction orders are sometimes entered by the court when
14 its patience has run out, the court is angry at the
15 attorney, sometimes for a good cause, sometimes not, and
16 there's a real danger that the district judges can
17 overstep and require an attorney to come forward with a
18 substantial sum of money for a sanction, and that just
19 seems to me to be a very harsh rule, especially in this
20 case, where the attorney is out of the case.
21 MR. ARNOLD: Your Honor, I would suggest that
22 it's a balancing test the Court has to reach, and it's a
23 balancing test that should be answered not just on this
24 particular case, on a $1,500 sanction, but on the broader
25 issue, and that is, there will be, perhaps in the case

1 where sanctions are not stayed, some financial hardship
2 imposed upon the attorney, just as there are financial
3 hardships --
4 QUESTION: Well, it can go beyond financial
5 hardship, it seems to me. Justice Ginsburg's question
6 raises this doubt in my mind. Supposing a conscientious
7 lawyer thinks that material is privileged, and he refuses
8 to disclose it in response to a discovery demand, and the
9 magistrate says, I'm going to sanction you $1,500 unless
10 you pay it over. He says, I just think professionally I
11 can't do it. I'm not going to turn it over. Can they
12 continue to -- and they go ahead with the trial and try
13 the case.
14 The -- but they could continue to impose more
15 and more sanctions for the same refusal, and there would
16 be no way to review it until the case is over, even though
17 the materials might be critical to the outcome of the
18 case.
19 MR. ARNOLD: And that I believe is one of the
20 balancing factors, one of the factors the Court must take
21 into account when it balances these things. Do you want
22 to have the courts of appeal reviewing evidentiary
23 decisions before the trial is over?
24 QUESTION: In other words, have you -- this is
25 the point that I was worried about. I mean, have you ever

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1 found a -- I can't imagine a trial judge, when the lawyer
2 says, judge, I'm going to appeal this at the end of the
3 case, will you please stay it, and he says no. I've never
4 heard of such a thing. Have you come across such a thing?
5 I may just be overly naive.
6 MR. ARNOLD: We have not, Your Honor, but --
7 QUESTION: All right. Now, suppose he did.
8 Suppose we ran against somebody who's having a temper
9 tantrum, and he's going to be unreasonable. Then under
10 the law, are you permitted to go to the court of appeals
11 and say, court of appeals, we'd like a writ under the All
12 Writs Act. All we want is for you to stay this order so
13 we have a chance to appeal. Would you be entitled to it,
14 if the judge is having a temper tantrum and won't be
15 reasonable?
16 MR. ARNOLD: Yes, Your Honor, you would.
17 QUESTION: Would be. Is there any authority for
18 that?
19 MR. ARNOLD: The All Writs Act, and there's also
20 authority in section 1292(b) of title 28, which --
21 QUESTION: I think Justice Breyer was asking, or
22 at least I was thinking, is there any case on it?
23 MR. ARNOLD: I have not seen the specific case,
24 although this Court, in numerous decisions, has suggested
25 that mandamus is an alternative, although one which is

1 reserved for the most important or most appropriate of
2 cases to interlocutory appeals, as it has suggested that
3 1292(b) is an alternative, and the rule-making --
4 QUESTION: I don't understand how 1292(b) would,
5 because how is this order making it appealable,
6 immediately appealable going to be the ultimate
7 determination of the case, and how is it a controlling
8 question as to which there's a substantial disagreement?
9 1292(b) is very limited in terms -- it's a
10 double certificate, and it requires it to be an important
11 question about which there's a substantial disagreement,
12 and that immediate determination of that question will
13 speed the underlying lawsuit. I don't think you can meet
14 the 1292(b) standards.
15 MR. ARNOLD: That may very well be the case in
16 this particular facts, or in any attorney sanctions, that
17 you cannot -- they are not --
18 QUESTION: So that's why I don't think 1292(b)
19 is in the picture. This kind of thing just doesn't fit
20 what that statute contemplates.
21 MR. ARNOLD: Justice Ginsburg, if it's not the
22 type of case that rises to the level of the urgency and
23 the importance anticipated by section 1292(b), I would
24 submit that it's also not the type of case that rises to
25 the level of an important right which must be immediately

1 determined by the court of appeals, as opposed to an
2 interest or a question which may be answered upon the
3 final --
4 QUESTION: Yes, but the distinction is, under
5 1292(b) it must relate to the merits, and under Cohen it
6 may not relate to the merits, or have I got it backwards?
7 MR. ARNOLD: Under Cohen it should be separable
8 from the merits.
9 QUESTION: Separable, whereas under 1292(b) it
10 must control the merits.
11 MR. ARNOLD: And that is certainly a reason, we
12 submit, that had Congress intended to expand that limited
13 right of interlocutory appeals to this type of case, they
14 would have done so in the language of 1292(b).
15 QUESTION: Well, Congress certainly recognized
16 that finality is a problem, because it provided now twice,
17 once in, what is it, 1272(c) and 1292(e) for rule-making
18 to make additional -- put additional things on the list of
19 interlocutory appeals.
20 MR. ARNOLD: That is correct, Your Honor.
21 QUESTION: But why -- but it seems to me that
22 that doesn't foreclose doing it by adjudication.
23 MR. ARNOLD: It does not, but this Court has
24 held that this is a -- that the cases envisioned by Cohen
25 are a narrow class of cases which should be strictly

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1 construed, and the ultimate question is, can the
2 petitioner in this case obtain a fair hearing at the end
3 of the case? Can she file her notice of appeal at the end
4 of the case and have her rights protected?
5 Unlike the cases where this Court has ruled an
6 interlocutory appeal must lie, whether it's a right to
7 bail bond case, or a double jeopardy case, or in immunity
8 cases, those are cases that stop, or prevent the
9 underlying litigation from going forward. This case is
10 more, or similar to that of a speedy trial question, or
11 the question involving the disqualification of counsel.
12 Those are steps toward the end of the case. They are
13 steps toward resolving the case.
14 QUESTION: But you concede that some -- that
15 this is a sooner-or-later question. That is, it's
16 definitely reviewable ultimately.
17 MR. ARNOLD: Yes, Your Honor. And the
18 question --
19 QUESTION: I don't see what harm is done by
20 adopting the petitioner's resolution here. I mean, I am
21 affected by the fact that it's within the total control of
22 the district court to prevent any disruption by simply
23 saying, you know, I'm not going to impose this until the
24 end of the trial, but you're going to get whacked pretty
25 hard, and you do it again, I'm going to whack you harder,

1 but I'll wait till the end of the trial, because I don't
2 want the trial interrupted. What's the problem with, once
3 you announce the rule, the district judge knows exactly
4 how to prevent the interference with the trial?
5 MR. ARNOLD: The problem with that is, I think
6 the district courts have found that that, the threat of a
7 sanction, the threat of punishment has not been effected.
8 QUESTION: It isn't a threat, it's a promise.
9 (Laughter.)
10 QUESTION: At the close of the trial, I am going
11 to impose upon you a sanction of, you know, $20,000.
12 QUESTION: How can you say they found that
13 totally ineffective? I think a lot of lawyers would
14 listen to the judge when the judge said that.
15 (Laughter.)
16 QUESTION: I know I would.
17 MR. ARNOLD: Unfortunately, not all attorneys do
18 listen to the judge, and the rule the petitioner is
19 proposing opens the Pandora's box --
20 QUESTION: The answer is, they wouldn't know.
21 The district judges don't know every rule, nor do we. The
22 lawyer's out of the case. He's going to sanction him.
23 He's not there anymore. He says goodbye, I'm not going to
24 see you anymore, I'm going home. And you say, fine, when
25 you go, pay $10,000. I mean, that's what's going to

1 happen.

2 I don't know how we could prevent that, whatever

3 rule we announce. And then the problem it seems to me is,

4 well, shouldn't he have an appeal at that point. He's

5 gone home, he is hurt, and that's the difficulty for you,

6 I guess.

7 MR. ARNOLD: And the Court has suggested any

8 number of combinations that may come before the district

9 court judge. The practical matter is that interlocutory

10 appeals delay and hinder the district court proceedings.

11 They impose additional burdens on the parties below. They

12 disrupt those proceedings.

13 QUESTION: That's all true, but what if we were

14 writing the opinion, something along the lines Justice

15 Scalia said, the better practice, absent compelling

16 circumstances, enforcement of all these orders shall be

17 postponed until the litigation is over. Wouldn't that

18 avoid the problem for everybody, and just -- we could just

19 follow the practice of waiting till the case is over?

20 MR. ARNOLD: That would avoid the situation

21 where it's a purely monetary sanction that's imposed,

22 other than it would create a similar hardship on the party

23 who's had to seek the sanction. And again --

24 QUESTION: In trying to think of your answer to

25 that question, I was thinking, well, it might not be

1 sufficient, because the judge wants an immediate sanction
2 that works to control this attorney, but then I thought
3 the answer to that was, if the attorney's that bad, then
4 he can hold him in contempt.
5 MR. ARNOLD: Or remove him from the case, and if
6 removed from the case, the attorney would have no right of
7 immediate appeal.
8 QUESTION: So it seems to me that --
9 QUESTION: You wouldn't acknowledge that holding
10 him in contempt would allow an immediate appeal anyway. I
11 mean, your position now is that that also is not
12 appealable until the end of the trial.
13 MR. ARNOLD: Because of the similarity of
14 interests between the parties and the attorney.
15 QUESTION: Then the Court was wrong in Hickman
16 v. Taylor, I suppose, in allowing that to go up as an
17 interlocutory appeal, because of the contempt.
18 MR. ARNOLD: In this particular case, Your
19 Honor, we submit that there is a similarity, or such a
20 close congruence of the relationships and the interests of
21 the parties.
22 QUESTION: It couldn't have been closer than in
23 Hickman. I mean, I can't imagine a closer congruence.
24 MR. ARNOLD: Again, this is a situation where
25 the district court, for whatever reason, chose not to go

1 that further step and impose the sanction order, or the
2 contempt order.
3 QUESTION: There was another sanction here. It
4 was -- and I don't -- there was a $29,000 sanction that
5 was not appealed. What was that for?
6 MR. ARNOLD: It was actually appealed. At the
7 conclusion of the case, after summary judgment had been
8 granted, the district court judge imposed another $29,000
9 in sanctions against the petitioner as a result of
10 failure -- basically, her conduct from September of 1986
11 forward. That was also appealed, as was another discovery
12 order of the district court. That case was settled, and
13 that was in favor of the codefendant below, Correctional
14 Medical Services.
15 QUESTION: But that was -- it was confusing,
16 because I thought the attorney was both sanctioned and
17 disqualified, and that was an under $2,000 sanction, and
18 then there's this mention of another sanction. Was that
19 before or after the larger one, the $29,000?
20 MR. ARNOLD: The $1,500, or the $1,494 sanction
21 was imposed before the $29,000 sanction. The latter --
22 QUESTION: But --
23 MR. ARNOLD: -- sanction was for her continued
24 refusal to cooperate and provide documents which had been
25 ordered produced by the district court.

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1 QUESTION: After she was disqualified.

2 MR. ARNOLD: Yes, Your Honor.

3 This case presents a situation where the review

4 of the attorney sanction order is closely entwined with

5 the merits of the underlying case. As the Sixth Circuit

6 recognized, it is not a case which would turn out to be

7 completely separated from the merits of the underlying

8 case. Indeed, Rule 37 requires the district court in

9 imposing sanctions to determine if the nondisclosure

10 response or objection was substantially justified.

11 It is essentially another opportunity to provide

12 a way to -- for a pretrial appeal of discovery orders,

13 because included in any review by the court of appeals

14 would have had to have been the question of relevancy, was

15 this information that she was sanctioned for, this

16 discovery that was to be produced that was not produced,

17 was it relevant. And the court of appeals would be

18 required to review that for an abuse of discretion, which

19 is an inherently fact-related question, for prejudice to

20 the opposing party as well as the willfulness or

21 culpability of the sanctioned counsel.

22 We also ask this Court to consider the breadth

23 that this Court's rationale or decision will have if it

24 accepts the rationale advanced by the petitioner.

25 Certainly, it will apply to the situation where Rule 11

1 sanctions are imposed, as well as sanctions under 28 U.S.
2 Code section 1927.
3 I would also submit that it applies to the
4 situation where both the party and the attorney are
5 jointly sanctioned, and in that case it would create the
6 situation where the attorney could step forward with the
7 appeal, but the party could not.
8 As to the depth of the sanction, it will
9 certainly apply to any monetary sanction of whatever
10 amount, and I submit that it will apply to sanctions which
11 are less than monetary, sanctions which, in effect, cost
12 attorneys time and money but are steps to getting on with
13 the case, to moving the case along. Judicial efficiency
14 will be impaired, and delay will result. Appellate courts
15 will find themselves effectively reviewing pretrial
16 discovery orders, reviewing partial records where the
17 entire record of the proceedings below would be most
18 helpful to them.
19 QUESTION: Couldn't the appellate court just
20 wait, I mean, just say, you know, we have this appeal
21 here, but we're going to hold it on our calendar until the
22 conclusion of the trial below? Could the appellate court
23 do that?
24 MR. ARNOLD: Yes, Your Honor, they could. They
25 could very well just postpone ruling on the case.

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1 QUESTION: So I mean, if it is a real problem
2 like that, once again there's a solution.
3 QUESTION: Huh --
4 MR. ARNOLD: I'm sorry. May I respond to
5 Justice Scalia?
6 QUESTION: I think Justice Breyer was about to.
7 (Laughter.)
8 MR. ARNOLD: To do so will still increase the
9 burdens on the parties in the courts below. Whether they
10 take the case in and say, well, we're just not going to
11 decide it until the district court err -- or, makes its
12 decision below, and then if an appeal is filed by the
13 attorney we'll consolidate them, we still are in the
14 situation where we have multiple appeals. In this case,
15 the defendant below would be required to fight the battle
16 on multiple fronts, if you will.
17 QUESTION: Under Rule 11, the sanctions can
18 sometimes be paid to the injured party and, under your
19 rule, you'd have to pay to a third party and you might not
20 be able to get your money back. You might be judgment-
21 proof.
22 MR. ARNOLD: That is a consideration. However,
23 we suggest that if -- the rule of repayment is the remedy
24 to that. If, in fact -- and that has not happened in this
25 case -- petitioner had paid the money, and if for some

1 reason the county became insolvent thereafter, and --

2 QUESTION: But under Rule 11, sanctions are

3 frequently paid to the injured party, to the moving party.

4 MR. ARNOLD: Yes, and as the attorney sanctions

5 would have been paid in this case, they would have been

6 paid to the Hamilton County Treasurer.

7 QUESTION: All I meant by my "huh" was that I

8 guess you could postpone it if you're prepared to

9 investigate the merits of the underlying case, investigate

10 the merits of the appeal, and then decide how closely they

11 are to related, while you happen to have 300 other cases

12 on the docket with which the court of appeals is supposed

13 to deal. Now you're going to agree with that "huh."

14 MR. ARNOLD: I think that is an example of the

15 burdens multiple appeals impose upon the parties and the

16 courts below.

17 In summary, we ask this Court to strictly

18 construe the final judgment rule and decline to expand

19 that narrow class of cases to which Cohen applies, to

20 pretrial discovery sanctions imposed by the district

21 court. To do so, to require the appeal to be brought at

22 the conclusion of the case will avoid judicial delays, it

23 will serve the purposes of judicial efficiency, while

24 giving the petitioner the opportunity at the close of the

25 case to raise the issue on appeal.

1 We therefore respectfully ask this Court to
2 affirm the decision of the Sixth Circuit Court of Appeals
3 and rule that 28 United States Code section 1291 bars the
4 interlocutory appeal of attorney sanction orders.
5 QUESTION: Thank you, Mr. Arnold.
6 MR. ARNOLD: Thank you, Your Honor.
7 QUESTION: Mr. Goldstein, you have 4 minutes
8 left.
9 What case do you rely on from this Court that
10 holds a sanction against an attorney, contempt is
11 appealable?
12 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN
13 ON BEHALF OF THE PETITIONER
14 MR. GOLDSTEIN: The Hickman example, Justice --
15 QUESTION: Did the Court discuss appealability
16 at all in Hickman?
17 MR. GOLDSTEIN: No, Mr. Chief Justice, and the
18 Court is very clear that there aren't implicit
19 jurisdictional holdings. We do not claim that this
20 Court's decision in this case is predetermined by Hickman.
21 QUESTION: Because Hickman didn't say a word
22 about jurisdiction.
23 MR. GOLDSTEIN: I believe that that --
24 QUESTION: It was an opinion by Justice Murphy,
25 so --

1 (Laughter.)

2 QUESTION: Did the Third Circuit say something

3 about jurisdiction?

4 MR. GOLDSTEIN: Justice Ginsburg, I believe we

5 are beyond my familiarity with Hickman and Taylor. I

6 don't want to represent to you that I know the Third

7 Circuit's opinion in that case, but I can tell you that

8 the Court's cases dealing with contempt do deal with very

9 analogous situations. Cases like Alexander and its

10 progeny involve agents of the party to the case. It is

11 very, very close. In addition, the rationale is the same.

12 QUESTION: Well, there are a lot of cases that

13 have held that if a lawyer is held in contempt for failure

14 to comply with a court order, it's immediately appealable.

15 MR. GOLDSTEIN: We have not seen contrary

16 authority. I --

17 QUESTION: But I -- that's what I was asking

18 you, Mr. Goldstein. Is there a case from this Court

19 holding what Justice Stevens apparently thinks there is?

20 QUESTION: The answer's yes, but I can't give it

21 to you.

22 (Laughter.)

23 QUESTION: Imagine that as an exam answer.

24 (Laughter.)

25 QUESTION: Mr. Goldstein, could I get your

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1 position clear on one thing? What if the sanction had
2 been imposed upon the party?
3 MR. GOLDSTEIN: Nonappealable. It merges into
4 the final judgment. That's a very clear line, we
5 respectfully submit. There are third parties, and there
6 are parties who --
7 QUESTION: And you already told me in response
8 to the earlier colloquy that that would be true of the
9 lawyer as well if the lawyer and the client were jointly
10 sanctioned.
11 MR. GOLDSTEIN: Yes. As a practical matter,
12 that has to operate to merge into the final judgment.
13 That's the uniform view of the courts of appeals. Just
14 simply the fact that the client can't appeal, it has to --
15 QUESTION: So if everything else is the same,
16 but the magistrate says, you and your client.
17 MR. GOLDSTEIN: Yes, and remember that the
18 magistrate is making a conscious decision. Rules 11 and
19 37 ask the district judge to make a choice. Is this the
20 fault in any way of the party, or is it instead the fault
21 of the lawyer? And if it's the fault of the lawyer, it
22 says, sanction the attorney. Treat them as separate from
23 the party.
24 This is not an agency point, where the attorney
25 is appealing on behalf of her client. It's against her,

1 and when it's done, it's done against her. She has been
2 sanctioned. There is a final decision against her.
3 I want to pick up, however, if I could, on the
4 sort of parade of horribles we got from the respondent.
5 We submit that this has been the rule in a number of
6 circuits for two decades. The contempt rule has been here
7 for more than 100 years, and this as a practical matter
8 has not happened. The Ninth Circuit --
9 QUESTION: Well, if you say the contempt rule
10 has been here for more than 100, you must know some case.
11 (Laughter.)
12 MR. GOLDSTEIN: That is correct. Alexander says
13 nonparties. Alexander says nonparties, that the final
14 judgment would not bring up their appeal, and there has
15 never been a contrary suggestion in a court of appeals
16 that an attorney would not fall within that rule.
17 I also do believe that there is not an answer to
18 the line drawn when the attorney isn't in the case
19 anymore. The respondent's view is that my client's
20 interests are intertwined with those of her client, but
21 she's -- that -- it isn't her client anymore.
22 QUESTION: Well, as a practical matter in this
23 case we were just told that in fact there was continuing
24 activity involving this lawyer, and that's what accounts
25 for the subsequent $29,000 sanction.

1 MR. GOLDSTEIN: The attorney's conduct in -- the
2 petitioner's conduct that was sanctioned at the end of the
3 case involved her activity as counsel. To the extent she
4 was a witness in the case, she would be able to appeal,
5 which is the status she had.
6 Thank you, Mr. Chief Justice.
7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
8 Goldstein. The case is submitted.
9 (Whereupon, at 11:00 a.m., the case in the
10 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

TERESA L. CUNNINGHAM, Petitioner v. HAMILTON COUNTY, OHIO
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BY: Leona M. May
(REPORTER)