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Frivolous Appeals

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The Daily Journal, July 30, 2007 -- Every litigator hopes that opposing counsel will observe the highest degree of professionalism and good judgment. Unfortunately, that hope remains an aspiration, and most litigators are likely to confront adversaries who view litigation more as a game than as a quest for truth and justice. This approach may spill over into the appellate process, with higher review treated merely as an additional forum for litigation shenanigans. In short, someday you likely will face a frivolous appeal.

In federal practice, the primary recourse against frivolous appeals is Rule 38 of the Federal Rules of Appellate Procedure, which provides, "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." "Just damages" include actual damages as well as attorney fees and court costs. Rule 38's straightforward language notwithstanding, the circuits, for a variety of reasons, often are reluctant to apply it. Thus, to take full advantage of Rule 38, one must consider how best to present a case for sanctions to a hesitant court of appeals in order to maximize the recovery of expenses caused by a frivolous appeal.

Courts generally evaluate a Rule 38 sanctions motion in two steps. First, the court must ascertain whether the appeal is frivolous. Far more is required than simply a losing argument on appeal. Under the 9th U.S. Circuit Court of Appeal's formulation, an appeal can be frivolous in two ways: (1) the results are obvious; or (2) the arguments of error are wholly without merit. In re George, 322 F.3d 586 (9th Cir. 2003). Other factors that courts, including the 9th Circuit, have considered include a party's motives for appealing (for example, to cause delay), the number of appeals the same party takes and even the quality of the appellant's advocacy on appeal (a sound issue may be frivolously presented). Harrah's Club v. Van Bletter, 902 F.2d 774 (9th Cir. 1990); Romala Corp. v. U.S., 927 F.2d 1219 (Fed. Cir. 1991) (genuinely appealable issue "frivolous as argued").

For example, when a pro se tax protester comes before the same circuit for the fourth time making precisely the same failed arguments for why she should not be required to pay federal income taxes, the court likely will view the latest appeal as frivolous. Szopa v. U.S., 453 F.3d 455 (7th Cir. 2006). But not all cases are so easily resolved. As the 6th Circuit noted in an oft-quoted paraphrase of Justice Potter Stewart's famous observation about pornography, "frivolity, like obscenity, is hard to define." WSM Inc. v. Tennessee Sales Co., 709 F.2d 1084 (6th Cir. 1983) (also noting "With courts struggling to remain afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity.").

In WSM, the court ruled that, though the appeal clearly was frivolous, the offending appellant avoided sanctions because he was acting pro se. Other courts facing pro se appellants have not been so generous. In Wood v. Santa Barbara Chamber of Commerce Inc. 699 F.2d 484 (9th Cir. 1983), the court imposed $10,000 in sanctions against a pro se appellant who had filed numerous meritless motions in the district court and had prosecuted at least two prior appeals.

A $10,000 sanction against a pro se litigant may appear harsh, particularly in light of other cases in which comparable litigants escaped unscathed. This inconsistency illustrates a central difficulty with Rule 38: Once the court has decided that an appeal warrants sanctions, how should the amount be fixed? An award of attorney fees is the most common answer. Yet the question of how to calculate such fees properly has generated a wide range of (often inconsistent) solutions from the circuits.

The inconsistency has two sources. First, parties seeking Rule 38 sanctions often do not provide the court with sufficiently precise information - detailed time sheets, filing fees and narrative descriptions of the work performed - to justify the award requested. This is not the way to have a motion taken seriously. The courts are wary of employing the rule in the first place, so a weak motion simply makes it easier to deny an award. A diligent practitioner should not have much trouble avoiding this pitfall.

A second problem is thornier, at least from the practitioner's perspective. Even when courts award Rule 38 sanctions, they are loathe to push too hard. Several circuits have limited sanctions even in egregious cases, while others (notably the 7th Circuit) engage in microscopic analysis of fee requests. In Warner Brothers Inc. v. Dae Rim Trading Inc., 877 F.2d 1120 (2nd Cir. 1989), the panel found that an attorney had made "a farce and mockery of the entire briefing and legal memorandum process and place[d] an intolerable and almost insurmountable burden on both opposing counsel and the Court." In spite of that misconduct - for example, citing to 50 unreported decisions -
the court awarded only $1,000 and double costs. The practical deterrent value of such an award, much less the compensatory value to the other party, which had to spend time and resources opposing the offending brief, may be negligible. Note, however, that even a small sanctions award may affect an attorney's reputation. Indeed, in California, sanctions awards of $1,000 or more must be reported to the State Bar. Business and Professions Code Section 6068(o)(3).

Likewise, in Budget Rent-A-Car System Inc. v. Consolidated Equity LLC, 428 F.3d 717 (7th Cir. 2005), after the 7th Circuit ordered Rule 38 sanctions against Consolidated Equity, Budget submitted a statement of fees and costs. The court characterized Budget's numbers as "exorbitant." Budget claimed that it incurred 3.3 partner hours at $425 per hour and 10.4 associate hours at $310 per hour for the preparation of a four-page jurisdictional memorandum. The court declared that "13.7 hours of high-paid professionals' time are too many" for "so modest a product." Budget also (presumably inadvertently) mischaracterized $165 as a filing fee, when in fact it was a pro hac vice application fee. The court rebuked Budget, noting that its "mischaracterization further undermines the credibility of its submissions." As a result, the court refused to award any sanctions, even though the appeal was frivolous. The 7th Circuit subsequently cited Budget Rent-A-Car for the proposition that "a court asked to award sanctions must consider not only the reasonableness of the requested fee but the reasonableness of the time expended on the litigation by the prevailing party." Kathrein v. Monar, 06-2294 (7th Cir. March 6, 2007).

This line of cases reached its apex in Szopa I, the tax-protester case. There, the 7th Circuit delved even more deeply into a fee request. It rejected the government's request for $11,042 for responding to a frivolous appeal as unrealistic. The court went so far as to conduct some back-of-the-napkin arithmetic to estimate that that number represented 10 days of a government attorney's time. The court found that much of the government's brief was "formulaic and doubtless straight from the glossary function of a word-processing program." As a result, the court did not accept that the brief took 10 days to write. Instead, after inviting the government to provide additional briefing, the court concluded that a "necessarily arbitrary" sanction of $4,000 would apply to all frivolous income tax appeals in the circuit. Szopa v. U.S., 460 F.3d 884 (7th Cir. 2006). In the process, the court rejected the government's argument that it takes time to parse often "unintelligible" arguments of tax protesters.

Fortunately, such microanalysis of time sheets seems to be limited so far to tax cases, in which many circuits have adopted a flat sanction. Still, Szopa, Budget Rent-A-Car and Warner Brothers point to a common theme: the unwillingness of appellate panels to invoke the full potential force of Rule 38, and their harsh response to any fee claim that appears inflated.

n light of these cases and the courts' general discomfort with Rule 38, how can one best attempt to recoup fees expended in fighting a frivolous appeal? First, fee motions must be as specific as possible. Check whether the circuit has a specific rule governing fee requests (for example, 9th Circuit Local Rule 39-1.6), and if so, follow it to the letter. Second, be accurate. As Budget Rent-A-Car attests, courts react harshly to even inadvertent mischaracterizations in fee requests. Third, don't be greedy. Be sure to show how each billing entry directly related to opposing the frivolous appeal. Finally, make clear that the award sought was money that a client had to expend. A court is more likely to sympathize with a burdened client than with counsel.

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