SILLY LAWYER TRICKS

by Tom Donlon

***Pierce v. Visteon Corp.*, 791 F.3d 782 (7th Cir., July 1, 2015)**

This is an example of an attorney who not only let his clients down, but then tried to stab them in the back. The attorney appealed the verdict below, claiming the class plaintiffs should receive a greater award under the statute, and that the attorneys' fees were too low. The court found that the appeal of the plaintiffs' recovery could not be heard because their attorney had filed the notice of appeal too late. However, the separate appeal of his attorneys' fees was timely. The court rejected the attorney's request for increased fees, criticizing him severely in the process. The court noted that the attorney was "in no position to contend his compensation was too low" because he "bungled the appeal, costing the class an opportunity to seek greater compensation." *Id.*, at 787-8. The court called counsel to task for trying "to undermine his clients interest" by arguing that some members of the class would "get *too much* money." *Id.*, at 787 (emphasis in original). The court stated it was "unfathomable that the class's lawyer would try to sabotage the recovery of some of his own clients." *Id.* The court went on to point out that the lawyer had failed to comply with its order regarding supplemental briefing of an issue raised at oral argument (*id.*, at 788) and described his brief writing as "careless" and "ungrammatical." *Id.* The attorney did not receive any additional fees.

***Blixseth v. Yellowstone Mountain Club*, 796 F.3d 1004, 2015 U.S. App. LEXIS 13559 (9th Cir., August 4, 2015)**

In this case at least the lawyer and client were on the same page – they both were sanctioned. The decision arose out of an order to show cause issued by the Court of Appeals for proceeding with a frivolous appeal. *Id.*, at *3. In the original appeal, the lawyer argued that the bankruptcy judge was biased. The court of appeals rejected this claim as "a transparent attempt

to wiggle out of an unfavorable decision by smearing the reputation of the judge who made it." *Id.* Unrepentant, the lawyer continued to attack the bankruptcy judge in responding to the order to show cause. The court ordered sanctions, stating the lawyer "has not retracted his demonstrably inaccurate statement," which he made about the bankruptcy judge in oral argument to the court of appeals. The court pointed to the lawyer's "propensity for distortion," and "improper reliance on facts outside the record" in concluding that his "conduct has been unprofessional throughout the proceedings." *Id.*, at *6.

The opinion also addresses the conduct of four other attorneys who were involved in the appeal to varying extents. Showing better sense, their response to the order to show cause focused on their good faith in appealing and their limited roles in the appeal. *Id.*, at *7. Notably, they did not attack the bankruptcy judge. *Id.* Nevertheless, the court noted, "these lawyers allowed their names to be placed on briefs that presented frivolous and inflammatory arguments." *Id.*, at *8. Although the four lawyers avoided monetary sanctions, being criticized by name in the opinion certainly hurts their professional reputation. Their treatment is a cautionary tale for any attorney serving as a co-counsel or local counsel in an appeal.

***Zappola v. Zappola*, 159 Conn. App. 84 (August 4, 2015)**

The appellant's counsel in this case failed to follow the basic procedural rules in his brief. The court pointed out that the brief "is completely devoid of [ ] required components," namely "argument and analysis regarding the alleged errors of the trial court, with appropriate references to the facts." *Id.*, at 86. This attorney did not miss an obscure requirement, but left out what any competent lawyer should recognize as the major elements of an appellate brief. The court concluded that the attorney "presented this court with an inadequate brief" and "accordingly we decline to review the claims raised." *Id.*, at 87.

***Estate of Mildred MacComb*, 2015 WL 5554659 (Maine, September 22, 2015).**

Our final case presents an example of an attorney who just did not learn from his own mistakes. The appellant's lawyer first filed what the court referred to as "a document that purported to be his brief." *Id.*, at *1. The *pro se* appellee filed a motion to reject the brief because of myriad errors and misleading citations. *Id.* In response, the attorney told the court, "Counsel admits errors of form in his brief largely due to pressure from time constraints…." He continued, "[h]owever inartfully presented, counsel submits the issues presented in this appeal are very important…. Justice demands form should not be elevated over substance…." *Id.* The Maine Supreme Court rejected the brief, but gave the attorney two weeks to file a corrected brief.

When the lawyer filed the amended brief, appellee again moved to reject it, because the brief still contained numerous erroneous citations. *Id.* In response to this second motion, the attorney "concede[d] still there remain formal errors of citation" but he is "a one man office" and he struggled with the brief, "putting too much effort still into substance rather than form." *Id.*, at 2. To address the appellee's particular criticisms he attached an eight page errata sheet. *Id.* The court rejected the second brief as it was "replete with so many errors that no reader is able to evaluate the assertions on appeal." *Id.*

Not having learned his lesson, the attorney then filed a request to reconsider the rejection of his amended brief. However, he still "did not file a corrected brief with his motion for reconsideration." *Id.* The lawyer claimed that he works with "*very limited* resources" (*id.*) (emphasis in original) and that sole practitioners "cannot be expected to comply with the Rules of Procedure." *Id.*, at 3. The court considered this last comment a serious disservice to Maine lawyers and rejected the claim that the court placed form over substance. *Id.*, at *3. The court pointed out that failure to comply with the rules "compromises both the appellee's ability to

defend against the appeal and our ability to decide it." *Id.* Denying reconsideration, the court concluded that the attorney, despite being given an opportunity to correct his mistakes, had submitted "a document that is neither accurate nor helpful." This case gives new meaning to the classic phrase, "three strikes and you're out."

Further in this, and all of these cases, one is left to wonder what the discussion with the client was like when the opinion came out (as well as the discussion with the malpractice insurer). Members of our Committee, who strive to follow the rules to submit a persuasive brief – and often struggle with opposing counsel who cut corners and are not candid with the court – can feel better that some courts are willing to publically call out the bad apples. As lawyers continue to make stupid mistakes in appeals, there will undoubtedly be more examples for our next issue.