SILLY LAWYER TRICKS III

By Tom Donlon – March 4, 2016

This is the latest in our continuing series reporting on real mistakes made in appeals by real lawyers. Similar examples probably appear in your local jurisdictions. If you are aware of any such cases, please send them in so we can share them with the rest of the Committee.

We Care Transportation v. Branch Banking and Trust Co., 2015 Ga. App. LEXIS 638 (November 5, 2015).

In this case, the appellate court was concerned not only with procedural errors but also with attorney misconduct that merited sanctions. The appeal arose from the grant of summary judgment to a lender in a foreclosure action. The appellate court pointed out that, although the appellant received an extension of time to file its brief, it failed to meet the new deadline and only filed when the appellees moved to dismiss the appeal. Even then, the appellant's brief did not comply with several of the court's rules, including required citations to the record and setting out proper standards of review. *Id*. at 5. Beyond these procedural failings, however, the court was concerned with the "utterly frivolous" nature of the substantive arguments. *Id*. at 10.

Nor was this a one-time misstep. The court observed that appellate counsel "has repeatedly engaged in similar misconduct in his representation of other

clients," asserting "the same meritless arguments and commit[ing]the same procedural defaults." *Id*. at 11. The opinion notes that counsel had filed more than 65 cases that year, of which nearly a third were dismissed, as were most of his petitions for discretionary appeals. *Id*. The court tellingly pointed out that these particular appellants' claims may have had some merit, "just as it may be that other appeals filed by [counsel] on behalf of other clients have some merits," but that counsel failed to convey any such merit within the framework of the court's rules. *Id*. at 13. After awarding sanctions against the lawyer – but not his clients – the court noted that counsel had 17 other appeals pending and he "would be well advised to diligently and expeditiously examine them to determine if they are similarly frivolous." *Id*. at 14.

Raphael v. Rizk, 2015 Cal. App. Unpub. LEXIS 7857 (November 2, 2015).

Sanctions are a recurring theme in this column. This appeal arose out of an everyday discovery dispute, which escalated when appellants refused to obey the trial court's order to provide materials. That conduct led the trial court to impose sanctions on both appellants and their counsel. On appeal of those sanctions, the appellate court affirmed the trial court – and then added further sanctions for a frivolous appeal. The court stated "[w]e have no difficulty in concluding that this appeal is utterly without merit." *Id*. at 14. The court also criticized appellate counsel for misrepresenting the trial court's ruling, making unfounded contentions

and showing "an intolerable display of disrespect for the judicial system and court orders." *Id*. at 16. In addition to awarding the appellee attorney's fees for opposing the appeal and for preparing the motion for appellate sanctions, the court imposed a separate monetary sanction on appellee's counsel payable to the court "to discourage like conduct in the future." *Id.* The court's decision concluded by ordering that a copy of the opinion be forwarded to the State Bar. *Id.* at 17.

Mazzei v. No Respondent, Civil No. 14-911 slip op. (W.D. Pa., 2014).

Some opinions dismissing appeals, like this one, mention the appellate counsel's mistakes, but fail to tell the whole story. Here, an attorney took an appeal of the denial of a motion to recuse a bankruptcy judge from all of the lawyer's pending matters. Although the attorney was representing himself, he still failed to file his appellate brief on time. The opinion presents a simple analysis of the factors regarding dismissal in such circumstance, and concludes that the appeal should be dismissed. The court points out "[a]s an attorney [he] should be more than capable of meeting deadlines and seeking extensions prior to the expiration of said deadlines when necessary. His failure to do so demonstrates a history of dilatoriness before this Court." *Id.* at 2.

Only in a footnote does the opinion hint at the titillating nature of the underlying dispute, when it links to an article entitled "Lawyer Called 'Sociopath' Seeks Judge's Recusal." *Id.* at 3, n.1. The bankruptcy judge had appointed an

expert to investigate the attorney's handling of a large number of bankruptcy matters pending before the judge. At a hearing, the judge apparently referred to the lawyer as a "sociopath" and refused to withdraw the characterization. On the motion to recuse, the judge removed himself from the investigation, but denied the lawyer's request to recuse from all his other pending matters. On appeal, the District Court decided that the judge's extensive explanation supported a determination the judge had not abused his discretion. *Id.* at 4. The attorney's failure to file an appellate brief, and to respond to the judge's explanation, doomed his appeal, regardless of what the judge called him.

Missud v. Armendariz, 2016 Cal. App. Unpub. LEXIS 705 (January 28, 2016).

This case represents the latest chapter in a long history of vexatious lawsuits brought by a former lawyer. Having initially sued a builder over a real estate dispute in Nevada, the lawyer brought numerous cases in various courts against an ever widening circle of defendants, including government officials, the State Bar and ultimately judges. In April 2015, he was disbarred for his conduct in those cases.

In the present action, the now former-lawyer sued the judges who upheld his disbarment. The appellate court held that the particular orders in question were interlocutory and not appealable. Rather than simply dismiss the appeal, however, the court went on to address the deficiencies in the appellant's briefs, noting they

"present an unintelligible compilation of disjointed historical facts, accusations and claims which fail to comply with many fundamental rules of appellate procedure." *Id.* at 1. The court continued, "the incomprehensible nature of appellant's briefs makes it impossible for this court to discern what precise errors he is claiming were made by the trial judge and how such errors were prejudicial." *Id.* at 2.

In granting sanctions for filing a frivolous appeal, the court stated, "any reasonable person reading the invective-filled briefs filed by appellant, including the provocative and hyperbolic prose he uses, would conclude that the purpose of this appeal is simply to harass respondents … by the unrelenting prosecution of plainly meritless litigation…." *Id.* at 4. In a footnote, the court notes "[t]o the extent the vitriol in appellant's briefs is directed at this court or this panel's members, we are not distracted in our obligations to resolve issues and disputes that come before us in an impartial and dignified manner and without embroilment." *Id.*, n.3.

In re Villanueva, 2015 U.S. App. LEXIS 20781 (2d Cir., December 1, 2015).

The final case is a disciplinary action by the Second Circuit. It is unusual because it deals with the attorney's actions in four separate criminal appeals. Like many appellate courts, the Second Circuit requires counsel to file forms with additional information contemporaneously with filing a Notice of Appeal. Counsel here not only failed to file such forms in three different cases, but also failed to

respond to repeated calls from the clerk asking the attorney to submit the forms. Only after notices of default were sent threatening dismissal – or in one of the cases, after a dismissal was entered – did counsel contact the court. In the fourth case, the appeal was dismissed when counsel failed to file a brief and appendix.

The court issued an order for the attorney to show cause why he should not be disciplined. The attorney claimed that his clients had not been prejudiced because all the appeals were ultimately reinstated and the criminal convictions affirmed. The court, however, noted, "the fact that his misconduct occurred in criminal appeals, where important liberty interests were at stake," was a "significant aggravating factor." Taking into account the attorney's mitigating evidence concerning the death of his close friend and colleague, for whose practice he assumed responsibility while he was also caring for his terminally ill parents, the court limited its discipline to a public reprimand. It remains to be seen whether the state and other federal bar disciplinary committees, to whom a copy of the decision was sent, will be as compassionate.

Case Update: Pi-Net International v. J.P. Morgan Chase, 600 Fed. App'x 774 (Fed. Cir. 2015)

We are following up on our earlier report on this case, in which the court of appeals dismissed the appeal because counsel tried to avoid the word limit on briefs by compressing phrases and entire citations into a single word. The losing

party filed a petition for certiorari with the U.S. Supreme Court, claiming that the dismissal was a cruel and unusual punishment that amounted to deprivation of property without due process. On January 11, 2016, the Supreme Court denied the cert. petition without comment.

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