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Briefly: Seeking fees and costs while on appeal

By: Eric J. Magnuson and Gregory S. Voshell May 24, 2022

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Appellate practice takes time and money. Consider this issue from a client's perspective. After a long (and likely expensive) trial, your client prevails, obtains a judgment, and justifiably believes that the matter is resolved. Then, your opposition elects to appeal. This is a process that can take well over a year depending on the appellate court in question. The delay in obtaining finality, and the costs associated with it, can also be used as leverage by your client's opposition to resolve a case on terms less advantageous to your client than the hard-fought trial victory, even if the opposition's appeal is unlikely to prevail. So, your client asks some version of "why do I have to pay for this, we already won, and how long will this take?"

This is an understandable question. After spending time and money just getting to trial, which has become an even more difficult task given court availability during the ongoing pandemic, a client faces the reality of not "winning" for many months and the prospect, even if remote, of having victory reversed. While this is never an enjoyable question to answer, there are options for your client in terms of collecting some of the costs and fees associated with an appeal.

In federal court, the easy issue is the recovery of costs at both the district court and the appellate court level. If your client prevails on an appeal, the federal rules (Rule of Civil Procedure 54 and Rule of Appellate Procedure 39) require the opposition to pay the costs associated with the case. This typically applies to copying costs associated with filing briefs, deposition transcripts, and similar costs. To obtain costs, litigants file a "Bill of Cost" form attesting to the costs sought in connection with the appeal. Federal courts generally publish forms on their respective websites that counsel can use to obtain a judgment on costs.

Merely recovering these costs, however, will not offset the significant financial burden that attorneys' fees may impose on many litigants. By default under our current system, parties are subject to the so-called "American Rule," which provides that each party must pay its own attorneys' fees. In order for a client to recover attorneys' fees, either an applicable statute or contract between the parties must shift the burden of paying the legal fees from what is commonly referred to as a "prevailing" party to the opposition. Both federal and state laws are expanding the use of provisions that shift attorneys' fees, which prompt three primary questions for practitioners: (1) does there exist in the case at hand a statute or contract that shifts fees from a prevailing party, (2) did your client "prevail," and (3) how, from a practical standpoint, do you seek fees on behalf of your client?

As to the first question, there are numerous federal statutes that allow for "fee-shifting." Fee shifting is most often seen in the Civil Rights and Employment spaces. For example, under the Civil Rights Act of 1964, a court in its discretion may permit a prevailing party to recover expended legal fees from its opposing party. Likewise, the Fair Labor Standards Act, the Fair Housing Amendments Act, the Individuals with Disabilities Act, and the Age Discrimination Act also permit a prevailing party to recover reasonable attorneys' fees. And, in limited situations, attorneys' fees are recoverable under the Employee Retirement Income Security Act. There are many additional federal and state statutes that permit the recovery of fees as well, including state insurance fraud statutes.

In addition, under Federal Appellate Rule 38, "[i]f 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." It is a high burden to show that an appeal is frivolous, but this is an option available to clients if an appeal is plainly taken in bad faith.

Likewise, many private litigants employ fee-shifting provisions in contracts. These provisions often state that, in the event of litigation, the "prevailing party" is able to recover its attorneys' fees and costs. These provisions are designed in part to prevent frivolous litigation, but also to incentivize parties to resolve disputes when they arise. It is important, when reviewing these provisions, to consider the scope of the provision, whether the provision covers both attorneys' fees and expert costs, and whether it was drafted in unambiguous fashion, as courts will construe these provisions as they would any other contractual language.

The next question is likely to be whether your client "prevailed," either under the statute or contract at issue. The standards for determining whether a party prevailed in a particular case will depend on the statute or contract at issue. For example, it is fairly easy to determine when the client prevailed if it won at trial or summary judgment on all counts and as to all issues. However, many cases are not nearly as straightforward. It is often the case that a party prevails as to only a handful of the counts contained in the complaint, perhaps after some counts were dismissed at the threshold, motion to dismiss stage. Additionally, the complaint may have included numerous alternative bases for relief, and your client may have prevailed on the primary basis for relief, while the court may have determined that one or more alternative bases did not apply. The question of the extent to which a party has "prevailed" may in turn cast doubt upon the extent to which that party is entitled to recover some or all of the attorneys' fees spent litigating the numerous issues of the case. The answer to the question will depend on the statute or contract at issue (*e.g.*, whether a parent successfully prevailed in vindicating a child's rights under the IDEA).

After determining whether a party prevailed, it is also important to consider recovery of attorney's fees incurred when securing the judgment, including in cases where a party refuses to pay a judgment or claims the inability to do so. These cases can prompt subsequent, related collection actions or fraudulent transfer matters. In these rare cases, where a litigant seeks to conceal funds that would otherwise be available to satisfy a judgment, there is law in some jurisdictions that would permit the recovery of legal fees incurred not only in securing the judgment, but also in pursuing satisfaction of a judgment through collection efforts and a fraudulent transfer action.

Finally, presuming you have determined the extent to which your client is entitled to have fees shifted to the opposition, you must then obtain recovery of those fees. Federal Rule of Civil Procedure 54(d) governs claims for attorneys' fees and the methods by which a party can recover attorneys' fees in a civil action. Under Rule 54(d), a party must file a motion to recover attorneys' fees. There are tight time limits to do so, however. Unless the court orders otherwise, Rule 54(d)(2) provides that after the entry of judgment, a litigant has 14 days to file for attorneys' fees. These applications can be time consuming, so there is a reasonable basis to seek an order or stipulation that stays this issue pending the appeal.

Regardless of timing, a party must generally establish both the entitlement to the fee recovery and the reasonableness of the fees. The latter question may require—or be significantly advanced by—affidavits from other attorneys in the geographic location attesting to the reasonableness of the attorney's rate and the reasonableness of the legal work involved. And this entire proceeding—a dispute over the legal fee award—can occur while the appeal is pending.

In summary, while litigants are still subject to the general rule that they must pay their own legal fees, there are several avenues to recover costs and some fees depending on the claims contained in the complaint they file.

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