Fighting Words

MARCH 14, 2008 | FOCUS & FORUM

FOCUS COLUMN

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Some judicial opinions and orders are ensconced in legal lore. For example, in *Avista Management Inc. v. Wausau Underwriters Ins. Co.*, 6:2006cv00054 (M.D. Fla. 2006), an apparently exasperated judge ordered counsel to settle their a dispute over the location of a deposition through a game of "rock, paper, scissors." Many infamous judicial utterances have come from Judge Samuel Kent in the Southern District of Texas, who wrote in a published order granting summary judgment in a personal injury case, "[t]ake heed and be suitably awed, oh boys and girls - the Court was able to state the issue and its resolution in one paragraph ... despite dozens of pages of gibberish from the parties to the contrary!" *Bradshaw v. Unity Marine Corp. Inc.*, 147 F. Supp. 2d 668 (S.D.Tex. 2001) (also noting that the lawyers had filed some of the most "amateurish pleadings" the judge had ever seen).

Orders like these might be viewed as funny - and indeed, these were circulated by e-mail and appeared on Web sites as diverse as jumbojoke.com and The National Review Online. But the attorneys involved probably did not find this amusing. After all, their names and the names of their law firms appeared on the order. Moreover, these attorneys came from respected firms and collectively had a century of legal experience under their belts. One reasonably may wonder whether their offenses were egregious enough to warrant such a judicial tongue-lashing. Even more important is the question of whether an attorney who faces such judicial "commentary" has any recourse before courts that publish their opinions, especially appellate courts.

The analysis begins by asking, "What constitutes an actual sanction?" The answer is not as clear as the question. At one end of a district court's power is the statutory authority to hold an attorney in contempt and the statutory and "inherent" power to otherwise punish counsel. Although attorneys generally are strangers to such proceedings, when a court imposes a sanction it is exercising its inherent power to regulate the proceedings. When a court directs its authority at an attorney, the lawyer effectively becomes a party to the case. There is little debate among the circuits that such orders are appealable. The attorney may not prevail in clearing his or her name, but the recourse available to do so is at least clear.

At the other extreme is the situation in which a court, in the course of rendering a decision, criticizes counsel's tactics. The circuits are almost equally unanimous in holding that such language does not amount to an appealable sanction. In these cases, the general rule applies: An attorney, as a nonparty, cannot challenge a district court's rulings by direct appeal merely because the ruling contained unfavorable or unflattering commentary. *Gautreaux v. Chicago Housing Authority*, 475 F.3d 845 (7th Cir. 2007). The good news is that a court's mere criticism of an attorney's tactics rarely amounts to a serious blemish on his or her reputation.

Between the two ends of this spectrum lies a troubling group of cases, in which courts pick out an individual attorney to reprimand for his or her conduct, judgment or ethics but do not formally impose sanctions. Such judicial commentary is not reported to the state bar and thus does not appear on any formal "record." Yet such language can have an impact on an attorneys' reputation, both in one's firm and in the wider legal community. The attorney facing such judicial language must wonder what recourse is available.

The circuits are divided on the question of when unflattering commentary constitutes a sanction. As a result, depending on the jurisdiction, the range of options may be broad or severely limited. At best, an appeal might be available, depending on the wording of the comments. Failing that, counsel may be able to petition a court - formally or perhaps informally - at least to remove a lawyer's name from the body of

an opinion. Small consolation, of course, but it can make the difference between a loss in a single case and the loss of one's reputation although, in the Internet age, any harm likely will be done long before a remedy might take effect.

The 7th Circuit takes a narrow approach, recently reaffirming the position that only a formal reprimand involving monetary sanctions is appealable. *Seymour v. Hug*, 485 F.3d 926 (7th Cir. Feb. 20, 2007). Attorneys otherwise are prohibited from appealing what it called "critical comments." In reaching its conclusion, the 7th Circuit balanced the severity of the harm to an attorney's professional reputation, which it characterized as a "speculative contingency," against the specter of "congested appellate dockets and ... the difficulty of assuring an adversary contest in most such appeals." Under this analysis, judicial commentary damaging an attorney's professional reputation satisfies the case or controversy requirements of Article III but does not constitute a "final decision" for appealability purposes. Seeking relief from critical comments by way of a writ of mandate remains a possibility. *Clark Equipment Co. v. Lift Parts Manufacturing Co. Inc.*, 972 F.2d 817 (7th Cir. 1992).

On the other end of the spectrum is the 5th Circuit. It has held that, in certain circumstances, judicial declarations related to an attorney's conduct amount to appealable sanctions. It has noted that "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct." *Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997).

The 1st, 9th, 10th and Federal circuits noted that this line of cases requires that the judicial statement be accompanied by findings of fact or a formal reprimand (such as an order that the attorney attend ethics classes). See *Butler v. Biocore Med. Technologies Inc.*, 348 F.3d 1163 (10th Cir. 2003); *Precision Specialty Metals Inc. v. U.S.*, 315 F.3d 1346 (Fed. Cir. 2003); *U.S. v. Ensign*, 491 F.3d 1109 (9th Cir. 2000). For example, the 1st Circuit has held that sanctions are not limited to monetary "imposts" and that a court's critical commentary may be appealable when it is "expressly identified as a reprimand." *In re Williams*, 156 F.3d 86 (1st Cir. 1996). In practice, this holding may be closer to the 7th Circuit's narrow view: In *Williams*, the district court vacated monetary sanctions imposed by the bankruptcy court but let the latter's harshly critical published order stand. The court held that the absence of formal sanctions deprived the court of appellate jurisdiction. A strong dissent argued that the majority was making a distinction without a difference because "linguistic sanctions can be far more penetrating and damaging. They can pierce the heart and the reputation of the lawyer at whom they are aimed, and, in the long run, probably will strike the lawyer's bank account as well."

What happens when critical language appears in an appellate decision rather than a trial court order? For example, in 2005, the 9th Circuit published an opinion in an asylum case in which the court described serious misconduct by two attorneys who had represented the petitioner before the immigration judge and the Board of Immigration Appeals, but the court stopped short of a formal rebuke. *Yeghiazaryan v. Gonzalez*, 431 F.3d 678 (9th Cir. 2005). Under the 9th Circuit's approach, this probably did not constitute a sanction. Moreover, the attorneys could not petition for rehearing because neither was counsel for the appellant during the appellate proceedings. What recourse did the attorneys have?

The solution was deceptively simple: According to the 9th Circuit's docket, one of the attorneys simply wrote a letter to the court seeking depublication or asking that her name be removed. Six months later, the court issued an Order Amending Opinion, in which it substituted pronouns for both the attorneys' names. The new opinion also contained a footnote explaining that the court was not making any factual findings regarding the adequacy of representation by earlier counsel but merely was reciting background facts as presented on appeal - that is, new counsel's representations about former counsel's conduct. This corrective victory is slightly diminished, however, because the original opinion remains in the Federal Reporter, so anyone reading the amended opinion may well be inclined to read the original opinion.

The best practice, of course, is not get on the wrong side of a court in the first place. Sometimes, even the best preparation falls short, however, so the diligent practitioner should know that some recourse may be available, depending on the type and severity of the criticism and relevant precedent in the circuit.

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