SILLY LAWYER TRICKS XII

By Tom Donlon – April 2018

The latest column in our continuing series on real mistakes and misdeeds by real lawyers on appeal.

Clark v. Allen & Overy, 2018 N.Y. App. Div. LEXIS 1488 (N.Y. 1st Dept. March 8, 2018)

Fulfilling the old adage about a lawyer who represents himself (or herself), the attorney-plaintiff in this case failed at trial and compounded her problems on appeal. The lawyer sued her former firm, claiming that she had been fired in retaliation for complaining about harassment arising out of a sexual relationship. As the lawyer alleged extreme mental anguish, the trial court ordered her to submit to an Independent Medical Examination. The lawyer appealed that order and lost. *Id.* at *1.

Yet, the lawyer refused to schedule the examination. At a compliance conference, the court issued another order requiring the lawyer to be examined. Although the plaintiff-lawyer showed up for the examination, she refused to participate. As a sanction, the trial court dismissed the case. *Id.* at *2.

In the present appeal, where she again represented herself, the attorney attempted to draw a distinction between not consenting to the examination and not participating in it. When the lawyer sought to rely on that distinction at oral

argument, the court pointed out that she did more than simply not consent; she "informed the examiner that she would go to the police and charge him with false imprisonment and assault if he proceeded with the examination.…" *Id.* The attorney also claimed the trial court had not warned her that refusal could lead to dismissal. From the bench, the panel pointed to the trial judge's compliance conference order, but the attorney claimed that the order came from the judge's law secretary, not the judge, and that she could not understand the order because it was 'scrawled.' One panel member replied that the document wasn't a scrawled note; it was a court order.

The panel's ultimate decision did not go any better for the lawyer than oral argument had. The court affirmed dismissal for non-compliance with the trial court's order. *Id.* at *2. It also affirmed the separate financial sanctions imposed because the attorney initially – and falsely – claimed that she had not refused to participate in the examination, and had violated a separate order sealing the record by posting the information "to her social media networks in an effort to harass or maliciously injure defendant." *Id.* In all, the attorney was ordered to pay over $110,000 in sanctions. Hiring an attorney to represent and advise her might have been less expensive.

Ellis v. Fidelity Management Trust Co., 883 F.3d 1 (1st Cir. 2018)

It is not a good sign when the court calls your primary argument a "puzzler." *Id.* at 6. Plaintiffs in an ERISA class action appealed from a grant of summary judgment. They asserted that the district court applied the wrong standard by following a recent decision by its own circuit, instead of a thirty-five-year-old case from a different circuit. The court expressed puzzlement because, among other reasons, plaintiffs had never mentioned the other circuit's case to the district court. *Id.* Moreover, in their appeal reply brief, plaintiffs conceded that the two decisions did not conflict. *Id.* The court rhetorically inquired, "[h]ow did the district court apply the wrong standard by expressly relying on a recent opinion of this court that does not conflict with plaintiffs' preferred earlier decision of another court?" *Id.* Accepting the concession in plaintiffs' reply brief, the court held that the district court did not err in following the non-conflicting precedent of its own circuit. *Id.* Agreeing in a reply brief that the case you rely on for error below really 'does not conflict' is indeed a puzzling – and not very persuasive – approach.

Bd. of Overseers of the Bar v. Burbank, Dkt. No. BAR-17-12, *slip op*., (Me. Sup. Ct. January 29, 2018)

Sometimes filing the brief itself gets an attorney off on the wrong foot with the court. Here, it ultimately led to the attorney's disbarment. The case began as a dispute over a piece of property in Maine. The attorney, who regularly resides and practices in Connecticut (but was admitted in Maine), represented not only himself,

but also his father, brother, and sister. After losing, only the attorney appealed. *Id.* at 2-3.

The problems continued when the attorney delivered his brief on appeal "bound with twine." *Id.* at 3. The court next ordered him to show cause why he should not be sanctioned for representing his family members, who were now appellees, when he was the appellant. *Id.*

Following the attorney's withdrawal as counsel for the appellees, the appellate court ruled against the attorney on the merits. The court also sanctioned him for his conduct on appeal (other than submitting a brief bound by twine). The court noted that the attorney (i) stated facts not in the record, (ii) raised issues without argument, (iii) listed "meritless" and "frivolous" issues, and (iv) made arguments "devoid of legal authority to support them." *Id.* at 4. The court concluded:

> [Counsel] has consistently disregarded standards of law and practice that govern appellate review … [Counsel]'s efforts have been disrespectful to the proper role of the trial court, unfair to and expensive for the other parties and contrary to Maine appellate law. [Counsel]'s frivolous and baseless actions are egregious conduct that has confused the issues on appeal, delayed final resolution of this matter, and significantly driven up the costs to other parties.

Id. The court imposed sanctions of $10,000.

The attorney's problems did not end there – nor did he seem to have learned his lesson. The state bar initiated a disciplinary action that led to the present

decision. The opinion points out that, beyond the conduct previously sanctioned by the appellate court, "Burbank's actions continue to be problematic." *Id.* He admitted to making errors in the prior appeal, but claimed some court rules were unpublished and others were ambiguous. He also failed to pay either the sanction against him, or the original judgment. His post-hearing brief in the bar disciplinary proceeding relied on exhibits never offered at the hearing. The Supreme Court concluded, "[i]n short, he does not appear to have a good grasp of the procedural rules of litigation." *Id.* at 5. The court ordered the attorney suspended from practice for a year. Perhaps he should have paid more attention to the rules, starting with how to properly bind his brief. (*See* Me. R. App. P. 7A(g)(3) ("Briefs shall be bound on the left-hand margin with comb or spiral binding that permits the pages to lie flat when the document is open.").)

Jaworski v. Master Hand Contrs., 882 F.3d 686 (7th Cir. 2018)

The Seventh Circuit can be counted on for straight talk about parties and attorneys who appear before it. Here, a contractor appealed from summary judgment. The Seventh Circuit refused to review the contractor's claims because it never submitted the trial court's opinions, as required by the circuit rules. *Id.* at 688. As the court noted, "[t]hese are not hard rules to follow." *Id.* at 690. On top of that, the contractor had "certified that it had given us all lower court opinions

necessary to adjudicate this appeal. That is false. Misrepresentations to this court are unacceptable…." *Id.*

Even if the court had considered the contractor's "porous argument," the opinion pointed out it was "destined to lose right out of the gate." *Id.* at *691. "Perhaps this argument would have borne fruit with more competent representation" but here the contractor "has absolutely nothing else to say beyond stating its bald conclusion …. Calling such an argument 'cursory' might give it too much credit." *Id.*

Finding the appellant's arguments both procedurally barred and substantively invalid, the court ruled that the contractor's "appeal is patently frivolous. Its arguments, once deciphered, are nothing more than naked assertions. And they fail on their face." *Id.* at 689. As a result, the court ordered the contractor to pay appellees' attorney's fees and costs.

Winn-Dixie Stores v. Dolgencorp, 881 F.3d 835 (11th Cir. 2018)

Counsel in this case may have thought they could put one over on the court of appeals, but they were too clever by half. This is a rare case, as the opinion notes, since attorneys do not often try to have the district court defy the appellate court's mandate: "And even if they do try, a district court is seldom misled into that kind of error…." *Id.* at 839. Although counsel's attempt initially succeeded at the district court, the court of appeals had the last word.

Winn-Dixie sued, claiming certain stores owned by Dollar General violated lease exclusivity provisions. The district court granted relief for only 17 of 54 stores. On the initial appeal, the Eleventh Circuit reversed as to stores in Florida, holding that a prior Florida state court decision had defined specific terms, which the district court incorrectly found ambiguous. The Eleventh Circuit directed that, on remand, those state court definitions be applied.

Back at the district court, Dollar General's counsel argued that, since the Florida case was decided in 2002, it should not apply to any leases signed before that date. Although the district court at first questioned this argument as conflicting with the Eleventh Circuit's decision, eventually the district court agreed and limited the state court's definitions to stores leased after 2002.

On the second appeal, the Eleventh Circuit was not impressed or amused. The court observed "[n]eedless to say (or maybe not), a district court cannot amend, alter or refuse to apply an appellate court's mandate simply because an attorney persuades the court that the decision giving rise to the mandate is wrong, misguided or unjust." *Id.* at 844. The decision stated its prior mandate to apply the Florida state case was clear: "We don't know what else we could have said other than perhaps, 'and we really mean it.' Well we really did mean it. And we still do." *Id.*

The decision noted that the "district court did not do what we instructed it to do because it was led astray by the defendants' attorneys," *id*. who were "blunt in urging the district court to disregard our directive.…" *Id.* at 845. (In a footnote, the opinion identifies by name a specific counsel for making misstatements to the district court.) *Id.* at 845 n.6.

Defendants' counsel tried to defend their, and the district court's actions, arguing that applying the prior Eleventh Circuit mandate would violate fundamental fairness, and that the Florida case was wrongly decided. The Eleventh Circuit rejected these claims, noting defendants made neither of them in the prior appeal:

> Apparently their idea of a good strategy is not to fire all of one's shots in the court of appeals but to save a couple of rounds to shoot down the appellate decision after we send the case back to the district court for our decision to be carried out. That is not a strategy that will or should work.

Id. at 847. The Eleventh Circuit remanded the case again, directing the district court to finally follow its mandate. Defendants' counsel's cleverness cost their client not only a second lost appeal, but also another trial.

United States v. Imo, Dkt. No. 4:09-CR-00426, *slip op*., (S.D. Tex. January 25, 2018)

A district court opinion is not where one usually sees criticism of appellate counsel's performance, but that happened here. Here, after defendant's conviction for a multi-million dollar health care fraud, the government sought to increase the

maximum sentence two levels based on obstruction of justice by defendant. The government's argument prevailed and the defendant was sentenced to the new maximum under the sentencing guidelines. However, the guidelines excluded the very conduct the government relied upon – failure to provide financial information to the probation office – from the obstruction of justice enhancement. During the resulting habeas challenge, the district court pointed out, "[o]n appeal, however, Imo's appellate counsel failed to raise this issue." *Id.* at 1-2. After a hearing, the district court found that appellate counsel had been ineffective and ordered a reduction in sentence based on the maximum without any enhancement for obstruction, reducing a 27-year-sentence by half.

Appellate practitioners should remember that their work can be scrutinized, not only by the court they appear before, but also by other courts over the life of the case.

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