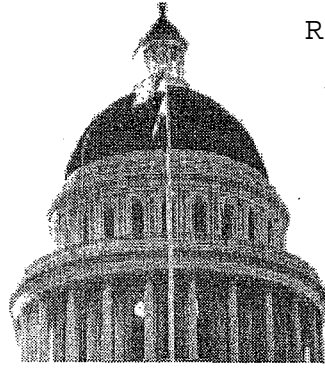


Reprinted with permission from the Daily Recorder



**APPELLATE
INSIGHT**

Peg Carew Toledo



THE DAILY RECORDER

Official Newspaper for the City of Sacramento

901 H St., Suite 312, Sacramento, Calif. 95814 ♦ (916) 444-2355 ♦ Vol. 103, No. 30 ♦ 75¢ ♦ Tuesday, February 16, 2010

Special Considerations In Appeals Involving Attorney's Fee Awards

In any case where the prevailing party may have the right to recover attorney's fees either by contract or statute, the dynamics of the litigation can be impacted. For example, an attorney's fee clause in a contract action or a fee shifting statute will have a significant influence on the analysis of the risks and benefits of filing an appeal. In some cases, the potential fee award to the prevailing party after an appeal may exceed the amount of the controversy on the merits. In other cases, the appellant may prevail on appeal, but have no right to recover its attorney's fees. This article addresses a few of the common issues

See TOLEDO, Page 2

Toledo

Continued from Page 1

that can arise in appeals involving attorney's fee awards.

Should the motion for attorney's fees be deferred until after the appeal?

In most state court cases where one party has a right to recover fees, the litigation over attorney's fees is by post-judgment motion. California Rules of Court, Rule 3.1702(b)(1) provides that a motion for attorney's fees for services up to an including the rendition of judgment in the trial court must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108. This means that in most cases the time to file a motion for attorney's fees is 60 days after a party's notice of entry of judgment or 60 days after the clerk's notice of entry of judgment or 180 days after judgment – whichever is earliest. See Cal. Rules of Court, Rule 8.104(a).

When a party intends to appeal the judgment, an issue arises regarding whether the fee issue should be litigated before or after the resolution of the appeal. Rule 3.1702(b)(2) allows the parties to stipulate to defer litigation of the fee issue until the appeal is resolved. This rule makes sense because the parties can reduce costs and the trial court can avoid the expenditure of judicial resources in cases where the underlying judgment may be reversed.

The following factors should be considered when deciding whether to stipulate to defer the litigation of the fee issue until after the appeal is resolved: (1) the cost of litigating fees, including the need for discovery; (2) the likelihood of reversal on appeal; (3) judgment collection issues; (4) pre-judgment interest; and (5) strategic reasons that the appellate court should decide the merits of the appeal and the fee issues at the same time.

Should a separate notice of appeal be filed to appeal the attorney's fee award?

Because a motion for attorney's fees does not need to be filed in the trial court until the time to file a notice of appeal, the appellant must often file its notice of appeal from the judgment before the fee motion is decided. This creates the practical problem that the appellant has two separately appealable judgments or orders, but the time to appeal the first expires before the second has been rendered.

Generally, a post-judgment order awarding or denying attorney's fees is a separately appealable order. See Cal. Civ. Proc. Code § 904.1(a)(2). A party who intends to appeal such an order must file a notice of appeal from the order awarding or denying fees. Confusion sometimes arises where the appellant challenging the attorney's fee award is also appealing the judgment.

A party who seeks to challenge both the judgment and a post-judgment attorney's fee order should file two separate appeals: one from the final judgment and a second from the fee order. *Torres v. City of San Diego*, 154 Cal. App. 4th 214, 222 (2007).

Some appellants who are seeking to appeal the attorney's fee order and have already appealed the judgment file an "amended" notice of appeal in the same appeal as the judgment. This approach appears to be a creative attempt to avoid paying a second \$655 filing fee for the second appeal. The court rules, however, do not allow such a procedure. Therefore, the \$655 savings in filing fees could cost the forfeiture of the appeal. Thus, the prudent and proper approach is to first file an appeal of the judgment and then file a second notice of appeal from the order awarding attorney's fees.

When there are two appeals in the same case, the appellate court rules only require that there be one record on appeal. See Cal. Rules of Court, Rule 8.147. In addition, some of the logistical issues created by having two appeals can be ameliorated by filing a motion to consolidate the two appeals for purposes of briefing and oral argument.

Do you need to post bond for an appeal of an attorney's fee award?

In general, an appellant must provide an undertaking or bond to stay enforcement of a money judgment during an appeal. However, an exception to that general rule is where the money judgment is solely an award of costs, including attorney's fees under California Code of Civil Procedure section 1021. Thus, the appeal of an order awarding attorney's fees is automatically stayed on appeal if the appellant is only appealing the attorney's fee award. See Cal. Civ. Proc. Code § 917.1(d).

If you win on appeal does that mean you are always the prevailing party for purposes of an attorney's fee award?

Not necessarily. In a recent decision, *Wood v. Santa Monica Escrow Company*, 176 Cal. App. 4th 802 (2009), the Second Appellate District held that "a party who prevails on appeal is not necessarily the prevailing party in an action." In *Wood*, the defendant prevailed in the underlying lawsuit when the plaintiff dismissed the action with prejudice. The defendant moved for attorney's fees pursuant to a fee provision in a contract between the parties. The trial court denied the attorney's fee motion and the defendant appealed. The trial court's order was affirmed. The plaintiff then filed a motion for attorney's fees because he prevailed on the defendant's appeal of the denial of its motion for fees. The trial court denied the plaintiff's fee motion. The appellate court affirmed because the defendant was the prevailing party in the lawsuit considered "as a whole."

The moral of the *Wood* case is that a litigant can win an appeal but still not be a prevailing party for purposes of recovering attorney's fees. This risk must be seriously considered when analyzing the risks and benefits of appealing.

Is the trial court's order awarding attorney's fees always entitled to deference?

A trial court order awarding or denying attorney's fees has at least two components. First, the trial court must determine whether the party is entitled to recover attorney's fees. Second, if the party is entitled to recover attorney's fees, the trial court must determine

the reasonable amount of attorney's fees.

The first issue is a legal issue and thus, the appellate court will review the issue *de novo*. See *Childers v. Edwards*, 48 Cal. App. 4th 1544, 1547 (1996). This means that the appellate court will not defer to the trial court's conclusion or analysis regarding entitlement to fees. In contrast, the issue of reasonableness of the amount of the award is reviewed for an abuse of discretion. The theory is that the trial court, who witnessed the litigation, is in the best position to determine whether the amount of fees is reasonable given the totality of the circumstances.

In considering whether or not to appeal a fee order it is important to determine whether the challenge on appeal is to the entitlement to fees or the reasonableness of the award. Often a challenge to entitlement is worth litigating on appeal while a reasonableness challenge can be a difficult appeal.

In conclusion, the prevailing party's potential right to recover fees can greatly influence the analysis of whether a party should appeal an adverse judgment. The risk of paying for the attorney's fees for both sides for litigation of an appeal can impose a very real barrier to pursuing an appeal. In advising clients regarding whether or not they should appeal it is very important to fully explain any potential for additional attorney's fee liability. Any decision to appeal must be made taking into account this potential significant further liability.

Peg Carew Toledo is Of Counsel at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgslaw.com.

C. Athena Roussos contributed to this article. Roussos is an attorney in Elk Grove, California, and is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. She also teaches at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.