

From: Sisk, Gregory C. [<mailto:GCSISK@stthomas.edu>]
Sent: Monday, April 13, 2015 6:24 PM
To: Catherine T Struve
Subject: Reimbursement of appellate docketing fee after reversal

Catherine:

Having just returned from supervising the student arguments before the Ninth Circuit in Seattle as part of our school's Appellate Clinic, and being cautiously optimistic about a reversal in favor of our client, I was reminded again of an issue that has arisen more than once in our work. I wanted to run this by you in your capacity as Reporter for the Advisory Committee on Appellate Rules. The matter would seem to be simple – recovering the appeal filing fee after winning an appeal for an appellant. But it has proven to be anything but simple.

In my pro bono appellate work, mainly on behalf of prisoners who were pro se in the District Court, we have repeatedly run into a procedural quagmire in getting reimbursement of the appellate docketing/filing fee for our clients when they succeed on appeal, typically by reversal of a dismissal on the pleadings or at summary judgment. While the amount of money involved – around \$450 – may not seem like a lot to many of us, the plaintiff proceeding pro se who filed the notice of appeal and paid the docketing fee out of his or her own pocket often is genuinely concerned about getting that cost refunded. And for a prisoner who has no earning capacity, the financial impact can be surprisingly severe. And yet we have encountered confusion and a lack of a clear process for having that appellate docketing fee taxed against the other side and then actually recovered.

As you know, under Federal Rule of Appellate Procedure 39(a)(3), “if a judgment is reversed, costs are taxed against the appellee.” Among those costs to be taxed in favor of the successful appellant is “the fee for filing the notice of appeal.” Fed. R. App. P. 39(e)(4).

Some circuits provide directly for recovery of the docket fee as part of the bill of costs on appeal:

<http://www.ca4.uscourts.gov/docs/pdfs/bill-of-costs.pdf>

www.ca5.uscourts.gov/docs/default-source/forms/bill-of-costs.pdf

This strikes me as the most straightforward and sensible approach.

But other circuits, like the Ninth Circuit, read Rule 39(e) as mandating recovery of the filing fee only in the District Court. Thus, in the Ninth Circuit, the bill of costs covers only such things as the costs of printing the briefs. The Ninth Circuit directs appellants to seek recovery of the appellate docketing fee through the process set out by the District Court.

But the District Courts frequently are surprised when our pro se clients ask for recovery of the filing fee for the appeal. And the District Courts don't really have a process for so taxing the appellate filing fee – other than general provisions for a bill of costs at final judgment that may come months or years after the appellate reversal. When our clients inquire of the District Court how to request reimbursement of the filing fee, they usually are told by the District Court clerk's office that they should have asked for that to be taxed in the Court of Appeals before the mandate issued and that the District Court has no authority to do so. Indeed, the District of Nevada says as much in its local rules: “LR 54-15. APPELLATE COSTS. The District Court does not tax or retax appellate costs. The certified copy of the judgment or the mandate of the Court of Appeals, without further action by the District Court, is sufficient basis to request the Clerk of the District Court to issue a writ of execution to recover costs taxed by the appellate court.”

Thus far, we've been able to help our clients get the filing fee back in the District Court. But we've often had to go back and forth between courts and try multiple methods before it finally happens. While it was not one of our cases, the attached unpublished decision from the District of Oregon reflects one court that came to the correct conclusion, but without any clear procedure that led to that result. Importantly, given how surprisingly confusing this simple matter has proven to be for me as an experienced appellate attorney who has practiced in ten of the thirteen circuits, I can only imagine how difficult it would be for the typical pro se appellant who wins on appeal to navigate the process to get the filing fee recovered.

Again, I know it should be a simple thing and the amount involved seems so small, so I should apologize for such a long message to set out the problem. And yet the complexity that occasions the length description is the problem. I wonder why the FRAP couldn't simply direct routine recovery of the docketing fee by the successful appellate as part of the ordinary bill of costs in the Court of Appeals?

Greg

Gregory Sisk
Laghi Distinguished Chair in Law
University of St. Thomas School of Law (Minnesota)
MSL 400, 1000 LaSalle Avenue
Minneapolis, MN 55403-2005
651-962-4923
gcsisk@stthomas.edu
<http://personal.stthomas.edu/GCSISK/sisk.html>
Publications: <http://ssrn.com/author=44545>