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Ethical Considerations©

Lawrence Hellman

Amidst all the controversy over the recent amendments to Federal Rule 11, a simple little one-page opinion slipped out of the United States Supreme Court this spring that should be of some comfort to those who fear that the courts may be unrealistic in their characterization of positions as "frivolous." *McKnight v. General Motors,* 114 S. Ct. 1826 (1994).

In 1988, Gary McKnight won a substantial money judgment from General Motors Corporation for employment discrimination. The judgment, from the Federal District Court for the Eastern District of Wisconsin, was based on 42 U.S.C. Sec. 1981. On appeal, the Seventh Circuit set aside the money judgment in light of a restrictive interpretation of that civil rights statute in a Supreme Court decision that came down in 1989, while the appeal had been pending. Nevertheless, the case was remanded to consider unresolved issues under Title VII of the Civil Rights Act of 1964. While the case was pending on remand, Congress passed the Civil Rights Act of 1991 which, in effect, reversed the result of the Supreme Court's 1989 decision.

Based on the 1991 legislation, the district court reinstated the damage award, deeming the new law to be applicable retroactively. But before the remanded proceedings were concluded, the Seventh Circuit, in another case, held that the 1991 law did *not* apply retroactively. This led the district court to withdraw its reinstatement of the damage award. 1992 WL 126297 (1992). From this order, McKnight appealed.

Plaintiff's appeal was met with a motion for dismissal of the appeal *and sanctions.* GM contended that the appeal was frivolous because of the Seventh Circuit's prior resolution of the question of retroactivity, which by this time had been reiterated in still another Seventh Circuit opinion. In an unpublished opinion, the Seventh Circuit agreed with GM, dismissed the appeal, and imposed a $500 sanction on McKnight's attorneys. Although it is not clear, it appears that the sanctions were based on Federal Rule of Appellate Procedure 38, which states: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Undaunted, Plaintiff's counsel petitioned the Supreme Court for a writ of certiorari. Counsel undoubtedly was emboldened by an awareness that the question of retroactivity had generated conflicting opinions among various federal district courts, some of which were outside the Seventh Circuit. The lawyers' perseverance was rewarded on May 23, 1994, when, without the benefit of oral argument, the Supreme Court released a one-page per curiam opinion simultaneously granting the writ of certiorari and vacating the sanctions order. There were no dissents.

The Supreme Court observed that the lower courts in this case had been correct on the merits; that is, the 1991 law was not to be applied retroactively. However, this did not determine the question of whether the appeal of that question, filed in 1992, had been "frivolous." Noting that the retroactivity question had not been resolved by the Supreme Court until this term, in two cases decided in 1994, it was held, as a matter of law, that the question of retroactivity was still open in 1992 when the challenged appeal had been filed. The Court stated that, even though there had been no conflict among the circuit courts of appeals on this issue in 1992, the division among the district courts at that time was sufficient to make the question of retroactivity a legitimate one. "[I]f the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper."

While this case required an assessment of frivolousness in the context of appellate practice, it offers interesting implications for the interpretation of amended Federal Rule 11 and its recently amended corollary in 12 O.S. Section 2011. Filings in the trial courts must be "warranted by existing law or by a *nonfrivolous* argument for the extension, modification, or reversal of existing law or the establishment of new law." F.R.C.P. 11(b)(2) (emphasis added). The Advisory Committee's Notes accompanying this provision explain that "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated."

As McKnight's attorneys successfully argued to the Supreme Court, even when there is clearly adverse authority in the controlling circuit, the existence of supporting authority from other courts, even inferior ones, should be sufficient to characterize a position as "nonfrivolous." As long as there are conflicting decisions, one line of authority is bound to be wrong, but a litigant cannot know which line that is until the conflict is resolved by the highest court capable of passing on the issue. On matters of federal law, that is the Supreme Court. In McKnight's case, the Supreme Court noted, "[f]iling an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by [the Supreme Court]."

A few notes of caution should be added here. First, just because a complaint or an appeal can avoid the "frivolous" label in circumstances similar to the *McKnight* case, this does not mean that it is always responsible practice to go forward with it. The affected client should be carefully counseled about the prospects of success and the variety of costs associated with pursuing a cause against which the tide of authority is running. Cf. Oklahoma Rules of Professional Conduct 1.4 and 2.1. Second, as suggested in the Advisory Committee Notes to amended Federal Rule 11, "Although arguments for a change of law [or reversal or disregard of authority] are not required to be specifically so identified, a contention that is so identified should be viewed [by the courts] with greater tolerance under [Rule 11]." Third, lawyers should be mindful of Oklahoma Rule of Professional Conduct 3.3(a)(3): "A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

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