Always Appealing-- The Pro Se Appellant

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The saying goes, “he who represents himself has a fool for a client.”1 So often, clients (and sometimes their trial attorneys) are under the misconception that if the opposing party chooses to represent themselves in an appeal, it will be easy sailing. In my experience, nothing can be further from the truth, especially if the opposing party chooses to represent themselves as the appellant.

This is not true of all pro se appellants — some very competently represent themselves and may raise meritorious issues. This article addresses those pro se appellants who are less competent, whose appeals have little merit, and who create an undue burden on both the court and opposing party. As the United States Supreme Court has recognized, “Pro se petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations — filing fees and attorney’s fees — that deter other litigants from filing frivolous petitions.”2

While a party may have a right to appeal a final judgment, that does not mean they should, and a party who is not bound by financial considerations often will. A pro se appellant is also not bound by advice from an attorney who might wisely counsel them not to pursue the appeal because the standard of review for many civil appeals is deferential to the decisions made by the trial court, making the likelihood of prevailing on appeal low.

Even if the pro se appellant recognizes the limited chance of prevailing on appeal, they may appeal anyway simply because they can, especially if the added benefit is that they are forcing the opposing party to incur attorney fees to defend the appeal. This reasoning is not substantially different than that driving “bully appeals,” the topic of the February 2023 “Always Appealing” column. Unfortunately, the tools suggested in that column to ameliorate the consequences of a bully appeal to the respondent, including ordering “suit money” and conditioning further participation in the appeal on payment of an award, may be less effective when an appeal is filed by a pro se.

The court may be reluctant to condition a pro se appellant’s pursuit of an appeal on payment of a suit money award as it may create an access to justice issue if the appellant refuses to or claims they cannot pay. The opposing party may not want to seek dismissal for non-payment because they may incur more attorney fees litigating that issue than if they just responded to the merits of the appeal.

What is an opposing party to do, then? If they simply do not respond, the risk is that the order they obtained in the superior court will be reversed. They could also proceed pro se, but that means the case may now proceed with two “fools.” Or they can hire appellate counsel.

This third option is where I often come in. This is also the point where I have to explain to the client that they should not anticipate “clear sailing” through the appellate process because it will likely take longer than the average appeal and may be more expensive to respond to than if an attorney was representing the appellant.

While pro se appellants are bound by the same rules of procedure and substantive law as attorneys,3 they often miss the mark. And while courts are “under no obligation to grant special favors” to pro se litigants,4 when it comes to procedural rules, the courts are often very accommodating to pro se appellants — more than they might be to a represented party — by allowing the pro se appellant multiple opportunities to come into compliance with the rules.5 The result is often a significant delay in resolution on the merits of the appeal. While it may appear that the opposing party is not harmed by the delay since the order they are defending on appeal remains enforceable unless stayed, they are forced to live with the specter of continued litigation and are deprived of the finality of the trial court’s decision.

And that a pro se appeal may take longer is usually not the reason it may be more expensive to respond to compared to other appeals. The bigger problem is that often their opening brief tends to be a diatribe of the reasons they disagree with the trial

court's decision, without citation to the record or relevant legal authority and with complete disregard for the standard of review. While the rules require that briefs include citations to the record and relevant legal authority,6 this is often where the courts will, at least initially, show the greatest lenience. Rather than reject the brief and order the pro se appellant to submit a brief that complies with the rules, the court will accept the brief, leaving the opposing party, the respondent, to sift through the chaff to find the wheat, if any.

Because courts are not obliged to review arguments that are not supported by authority,7 a respondent could potentially rely on the inadequacies of the opening brief to argue for affirmance. However, courts may address an issue that is inadequately briefed8 — and often do since there is a preference, if not a policy, to decide a case on the merits.9 As a result, this is where the heavy lifting for the respondent comes in.

Ideally the respondent will present a response brief that can serve as a template for the court to use in writing a decision. However, that often requires some "reverse engineering" on the part of the respondent, who must first identify the gravamen of the appellant's complaint before responding to it with proper citation to the record and relevant authority. This increases respondent's attorney fees. A competently drafted opening brief is far easier and cheaper to respond to than one which is not.10

When faced with an opening brief which is merely a diatribe, as counsel for respondent I must determine what issues the pro se appellant is raising and determine if there is legal authority to support their position. Therefore, in drafting a response brief, I first have to — at least in my head — make the arguments the appellant failed to make in their opening brief and then respond to those arguments in the response brief. I have to go through this process because I have to assume there is an industrious law clerk at the appellate court doing the exact same exercise, and the response brief will likely be the only opportunity the respondent has to address the court. This conundrum is like the one described in "The Respondent Who Knows Too Much," the September 2022 "Always Appealing" column.

The difficulty of having to deal with a pro se appellant is not limited to delays and added expense in responding to a less than competent brief, it may also include having to respond to an array of meritless motions, as happened in one case where even though the pro se appellant raised a meritorious issue on appeal, the court sanctioned her because she filed a "plethora of motions, uniformly devoid of legal grounds for the requested relief" in both the Court of Appeals and Supreme Court, substantially expanding "the scope of litigation in this case beyond that necessary to

permit adequate review of claimed trial error."11 As the court stated, our "rules of appellate procedure are designed to promote the considered adjudication of legal issues raised by the parties. They are not designed to place unjustified burdens, financial and otherwise, upon opposing parties nor are they designed to provide recreational activity for litigants."12

So what can be done about a pro se appellant?13 To begin, the courts could more regularly award attorney fees to respondents for having to respond to frivolous appeals by disgruntled pro se appellants. The courts could also more firmly take pro se appellants to task by being less lenient when they fail to comply with the rules and create undue delays in prosecuting their appeals. The courts should be more willing to dismiss an appeal if the pro se appellant has consistently failed to comply with the rules and has been provided clear warning that failure to comply with the rules will result in dismissal.14

What can respondents and their counsel do? My recommendation is to save your efforts by taking little to no action while the pro se appellant is sorting out compliance with the rules.15 If the pro se appellant is prone to filing multiple non-meritorious motions, let the court know that respondent will not answer the motions unless the court requests an answer. Oftentimes the court can summarily deal with the motion without input from respondent. A respondent's efforts are best reserved for addressing the merits of the pro se appellant's challenge to the trial court's decision.

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1 I was unable to locate the origin of this quote, but its sentiment has been acknowledged by our courts. See, e.g., State v. Hoff, 31 Wn. App. 809, 811, 644 P.2d 763 (1982) ("But unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has the personal right to be a fool.").

2 In re Sindram, 498 U.S. 177, 180, 111 S. Ct. 596, 597, 112 L. Ed. 2d 599, reh'g denied, 498 U.S. 1116 (1991).

3 Holder v. City of Vancouver, 136 Wn. App. 104, 106, ¶2, 147 P.3d 641 (2006).

4 Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

5 This type of accommodation is to some extent is built into the rules. Under RAP 1.2(c), the "appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice."

6 RAP 10.3(a)(5), (6).

7 State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 310, 57 P.3d 300, 306 (2002).

8 State Farm, 114 Wn. App. at 310.

9 See RAP 1.2(a).

10 As our courts have recognized, when a brief contains "numerous misrepresentations and inappropriate quotations taken out of context," it causes both the court and opposing party "to waste considerable time checking for their accuracy." Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 313, 151 P.3d 201 (2006). Further, when an "appeal is not based on legal authority or even arguable facts or law," it "absorb[s] the time and effort of both the appellate court" and opposing counsel. Guardianship of Cobb, 172 Wn. App. 393, 406–07, ¶22, 292 P.3d 772 (2012). As these two cases show, an incompetently drafted brief can also be the product of an attorney, not just a pro se appellant.

11 Rich v. Starczewski, 29 Wn. App. 244, 247–48, 628 P.2d 831, 834 (1981).

12 Rich, 29 Wn. App. at 250.

13 Again, this is not addressed to pro se appellants who competently address their challenge to the trial court's decision and raise meritorious issues on appeal.

14 See e.g. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992), as amended (May 22, 1992), cert. denied, 506 U.S. 915 (1992) (affirming order dismissing pro se complaint when court granted plaintiff two opportunities to amend his complaint and each time expressly warned him that "if he did not comply with the order the clerk would enter a dismissal without further notice to him").

15 That is unless their lack of compliance is egregious or obviously intentional and they are using the appeal for purposes of delay. See RAP 18.9.