always Appealing: “Justice Delayed is Justice Denied.” If That Sounds Good, Check Out the Rules of Appellate Procedure.

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By Howard Goodfriend

“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

My colleagues Catherine Smith and Valerie Villacin have pounded the drum, advocating a more robust use of sanctions, including attorney fees, for frivolous or obstreperous appeals under RAP 18.9(a). While most of the case law under RAP 18.9 deals with frivolous appeals, as last month’s piece notes, the rule also authorizes an award of “terms or compensatory damages” against a party “who uses [the appellate] rules for purpose of delay...“[1] Delay remains the flavor of the month in this installment of “Always Appealing.”

RAP 1.2(a) contains a mandate to liberally interpret the appellate rules “to promote justice and facilitate the decision of cases on the merits.” Unfortunately, the Rules of Appellate Procedure provide fertile ground for misuse by a party hell bent on avoiding a decision on the merits.

In our decades of appellate practice, my colleagues and I have seen the various ways in which the rules have been used for purposes of delay, from the start to the conclusion of the appellate process. RAP 8.1's requirement that a party post a bond or other security to stay enforcement of a judgment, provides some disincentive for an appellant to delay the resolution of an appeal, because interest on a money judgment will continue to accrue.

But some appeals are from final judgments that do not impose a money judgment or order the transfer of valuable property that can be stayed and secured pending a long appeal. Some appellants are well-heeled individuals or companies for whom the monetary consequences of an appeal may be of secondary importance to the message it sends. Irrational or vexatious litigants file appeals solely for the purpose of harassment. And some involve respondents who, having prevailed in the trial court, may be in no hurry for an appellate court to review a favorable decision.

From perfecting an appeal to obtaining the mandate at its conclusion, the appellate rules offer ample opportunity to delay a final and enforceable decision. Cognizant of the hazard that this article will provide a roadmap for obstreperous behavior, I hope instead to prompt appellate decision makers to speed up the appellate process by sanctioning the misuse of the appellate rules for purposes of delay under RAP 18.9(a).

Delay by seeking direct review.

While most appellants seek review of a trial court decision in the Court of Appeals, a party may appeal directly to the Supreme Court.[2] RAP 4.2(a) limits the type of cases that the Supreme Court will consider on direct review, but the criteria are sufficiently broad and flexible to enable a competent lawyer to craft an argument that the case involves "an issue in which there is a conflict among decisions" of the appellate courts,[3] or "a fundamental and urgent issue of broad public import . . ." [4]

The Supreme Court rejects most requests for direct review. However, when the Supreme Court sends the case to the Court of Appeals, there is inevitably attendant delay in processing the case and placing it in the queue for a resolution on the merits, either with or without argument.

Delay in perfecting the appeal.

A notice of appeal is typically filed from a final judgment,[5] after which the appellate court opens a case file and starts the clock for processing the appeal. An appellant has 30 days from filing a notice of appeal to perfect the record by designating clerk's papers[6] and filing a statement of arrangements for transcription of the report of proceedings.[7]

The appellate court will extend these deadlines if the appellant alerts the court to pending post-judgment motions, allowing the parties to brief all the issues in a single appeal. These include unresolved motions for attorney fees,[8] and other post-trial motions in a civil case, such as a motion for new trial or for judgment as a matter of law.[9] The appellate court will hold the appeal in abeyance pending a decision on these post-judgment decisions by the trial court.

After the appellant has filed the statement of arrangements, the court reporter has 60 days to file a report of proceedings.[10] While it is not uncommon for court reporters to seek an extension of this deadline, the parties can also manipulate the timing when a transcript already exists, or is relatively short by asking the court reporter to wait until the last day to file the report of proceedings.

Delay by motions practice.

The appellant's opening brief is due 45 days after the report of proceedings is filed.[11] Parties routinely ask for extensions of time to file briefs. And the appellate courts routinely grant up to 60 days beyond the initial due date for filing a brief, under the threat that further extensions will not be granted or sanctions will be imposed. This is a fairly empty threat, as sanctions are usually limited to several hundred dollars, paid to the court rather than as compensation to the other side for the cost of delay.

But for the truly obstreperous party, motions for extensions of time only scratch the surface. Rulings by the clerk or commissioner may be reviewed by filing a motion to modify, to be considered by a panel of judges.[12] A decision by a motion panel may be challenged in a motion for discretionary review to the Supreme Court.[13] The appellate courts rarely dispose of these challenges summarily. In fact, motions set before the commissioner or clerk will be decided without oral argument unless oral argument is requested by the commissioner or clerk.

Successful challenges to commissioners' rulings on a motion to modify are rare; discretionary review of such interlocutory rulings by the Supreme Court is even rarer. But that hasn't discouraged parties from challenging all sorts of commissioner or clerk's rulings — and not just from decisions on motions for extensions of time, but on everything from orders on appealability, consolidation, substituting parties, allowing joinder, amending a notice of appeal, supplementing the record, allowing or disallowing an overlength brief, and, of course, imposing sanctions.[14]

Parties may also be granted a continuance of oral argument on the merits. While Division One and the Supreme Court alert counsel to possible argument dates to preempt requests to continue consideration of an appeal, the other divisions allow parties to delay oral argument by providing prompt notice of a conflict after the case has been initially set.

Delay when you thought it was over.

The appellate court's decision is rarely the final word. The decision of the appellate court is final only upon issuance of the mandate.[15] If a judgment has been stayed pending appeal, it cannot be enforced until the mandate issues. And the mandate may be a long time coming.

The appellate rules authorize a motion for reconsideration within 20 days of the appellate court's decision.[16] The court may call for an answer.[17] The appellate court has no fixed deadline to rule on the motion, which will delay the appellate court's mandate.[18]

Successful motions for reconsideration are extremely rare. Those that change the outcome of the case even rarer. But appellate lawyers routinely seek reconsideration, if for no other reason that pendency of the motion will delay the start of the 30-day clock for filing a petition for review, as will a timely motion to publish.[19]

Filing a petition for review will delay issuance of the mandate for at least the four to six months that it takes for the Supreme Court to deny review.[20] It may then take the Court of Appeals several weeks, or more, to issue a mandate after it receives the case file back from the Supreme Court.

Post-appeal affidavits for attorney fees and expenses under RAP 18.1(d) can also significantly delay concluding an appeal. RAP 12.5 does not anticipate that a pending request for fees will delay issuance of the mandate, and RAP 18.1(h) contemplates that the clerk can issue the mandate and then provide an award of fees and expenses in a "supplemental judgment."

In practice, however, the appellate court rarely issues its mandate while the issue of attorney fees on appeal is pending. And a motion to modify the commissioner's ruling on an award of attorney fees will further delay issuance of the mandate.

Of course, the mandate is rarely the last word in litigation, as it sends the case back to superior court with directions to do what the appellate court said it should do. When that directive is anything short of an affirmance of a final judgment, the parties may continue litigating their dispute on remand.

That dispute will now include what the appellate court meant, what arguments are barred by the law of the case, and what is fair game on remand.[21] A party unhappy with a trial court's interpretation of the appellate decision can file a motion in the appellate court "to recall a mandate . . . to determine if the trial court has complied with [the] earlier decision of the appellate court given in the same case." RAP 12.9(a).

Again, such motions are rarely successful; the appellate court prefers to let proceedings on remand run their course, but that just guarantees that the appellate court will review whether the trial court has followed its mandate in a subsequent appeal.

What is to be done?

Of course, the first and best solution to combat delay in the appellate process is to support the appellate courts with adequate staffing and necessary funding, for commissioners, clerks, administrative staff, as well as judges. Don't blame the case managers if they have a stack of mandates sitting on their desks, ready to be filed. They have plenty of other tasks to do.

That said, the appellate courts could prioritize issuing mandates as soon as there is a final decision on the merits, rather than await rulings on attorney fees and expenses, which can be disposed of by supplemental judgment as RAP 18.1(h)

contemplates. While the court could not close its file on the case, it would speed up the conclusion of the appellate process for the parties.

Then there is the underused potential for sanctions. A more robust use of RAP 18.9 to impose sanctions for delay could include assessing attorney fees in ruling on motions. The court could make a point to compensate a prevailing party at the conclusion of the case for the myriad ways in which an opponent has used the rules for purposes of delay, even if the appeal is not deemed frivolous. The appellate courts can condition unjustifiable extensions of time for filing briefs on the payment of a significant sum of money that more accurately reflects a party's resources, or that is commensurate with the damage that delay may cause to the opposing party. And the courts can deny untimely requests to continue oral argument where there is another lawyer appearing as counsel for the requesting party.

In the meantime, the appellate process will continue to call to mind the saying we had back in my youthful days at a public defender's office, where gallows humor reigned supreme: "Justice delayed is justice denied . . . and in your case, that's just what we want."

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1 Smith, Catherine, "Activating" RAP 18.9—Conditioning Appeals on Compliance with Valid Orders," Bar Bulletin, King County Bar Association (Aug. 1, 2024); Villacin, Valerie, "Frivolous Appeals: What's Good for the Goose Is Good for the Gander," Bar Bulletin, King County Bar Association (July 1, 2024).
2 RAP 4.2.
3 RAP 4.2(a)(3).
4 RAP 4.2(a)(4).
5 RAP 2.2(a)(1).
6 RAP 9.6(a).
7 RAP 9.2(a).
8 See RAP 2.4(g) ("appeal from a decision on the merits of the case brings up for

review an award of attorney fees . . . “).
9 See RAP 2.4(f) (“appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely” post-trial motion under CR 50(b), CR 52(b) and CR 59).
10 RAP 9.5(a).
11 RAP 10.2(a).
12 RAP 17.7(a).
13 RAP 13.5.
14 See WSBA, Appellate Practice Deskbook, §10.2 (listing types of motions authorized by rules).
15 RAP 12.5(a) (“a ‘mandate’ is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review.”).
16 RAP 12.4.
17 RAP 12.4(d).
18 RAP 12.5(b)(1).
19 RAP 13.4(a).
20 RAP 12.5(b)(3).
21 See Smith, Catherine, “‘Zombie’ Remand: a Peculiarly Appellate Monster,” Bar Bulletin, King County Bar Association (Oct. 1, 2021).