# Timeliness of Motion for Attorney Fees in the Federal Courts of Appeal: The Benefits of a Uniform Rule

By Phineas E. Leahey

The time limit to request attorney fees for successful litigation in a federal district court is 14 days from the entry of a final judgment, unless otherwise provided by statute or court order.[1] There is no parallel federal rule of appellate procedure, which has engendered uncertainty, and occasional waiver, for the practitioner who succeeds on appeal and qualifies for a fee award. This practice note briefly surveys differing approaches to this problem by the federal circuits and proposes the adoption of a uniform rule of appellate procedure—or at least additional local rules—as the preferred solution.

## Differing Approaches

Absent a statute or rule to the contrary, there appears to be no reason why a motion for attorney fees for appellate work may not be filed in either the court of appeals or the district court.[2] Not all circuit courts of appeal have addressed the issue of when a fee application for appellate work is timely. Those that have either adopt a local rule to set a time certain to move for attorney fees or use an equitable approach to determine timeliness on a case-by-case basis. In one case, a court of appeals has applied the federal rule on taxable costs to determine timeliness of attorney fees, but that approach is disfavored and unsupported, if not contradicted, by congressional intent and the rule on taxable costs.

### *Local Rule*

Pursuant to Fed. R. App. P. 39, "taxable costs" are awarded to the appellee if the appeal is dismissed or the judgment is affirmed, to the appellant if the judgment is reversed, or as decided by the court if the judgment is affirmed in part, reversed in part, vacated, or modified.[3] The party entitled to such costs has 14 days from the court's judgment to file an "itemized and verified bill of costs" with the court of appeals.[4]

Taxable costs, however, are generally limited to such enumerated items as the filing fee to docket the appeal and the expense for necessary copies of the briefs and appendixes.[5] Taxable costs therefore should not include costs awarded to a prevailing plaintiff as part of attorney fees under fee shifting statutes, such as 42 U.S.C. § 1988 (the Civil Rights Fee Award Act).

Yet, the Seventh Circuit once suggested that "it is no longer clear" whether Rule 39's taxable cost provision includes attorney fees in light of the Supreme Court holding that, for purposes of settlement offers under Fed. R. Civ. P. 68, "costs" are part of attorney fees under 42 U.S.C. § 1988.[6] Because taxable costs in Rule 39, which are based on 28 U.S.C. § 1920, are specifically limited to docket fees and the costs of copying briefs and appendixes, *Marek* would not appear to extend to Rule 39.[7]

The Second, Sixth, Seventh, and Tenth Circuits do not have local rules governing attorney fee motions for appellate work. The Fourth Circuit adopted a local rule permitting the court of appeal to "award attorneys fees and expenses whenever authorized by statute."[8] The Fifth Circuit imposes the substantive requirement that fee motions "always be supported by contemporaneous time records" and, in their absence, "time expended will not be considered in setting the fee beyond the minimum necessary in the court's judgment for any lawyer to produce the work," unless an exception is warranted "to avoid an unconscionable result."[9] But neither sets a time period for filing appellate fee applications. The First, Third, Ninth, Eleventh, and D.C. Circuits, on the other hand, have adopted local rules requiring applications for attorney fees to be filed within varying periods of time.[10]

### *Rule of Diligence*

As noted, many circuits, including the Seventh, do not have a local rule governing the time for filing fee applications for appellate work. Recently, a panel of the Seventh Circuit was asked to dismiss a motion for taxable costs pursuant to Fed. R. App. P. 39 and for attorney fees pursuant to the Copyright and Lanham Acts (neither of which sets a deadline for attorney fee motions), where they were filed together 30 days after the judgment.[11] The opposing party argued that: (1) because the 14-day period for requesting taxable costs had expired, the motion for attorney fees was untimely; and (2) the court of appeals should apply the 14-day period in Fed. R. Civ. P. 54(d) "by analogy."[12]

The court rejected both arguments, which were "unsupported" by any authority: "Neither [Appellate] Rule 39 nor [District Court] Rule 54 speaks directly to the situation before us. . . ."[13] Absent a statutory or rule-based deadline, the court continued, "we think a general rule of diligence should govern."[14] On the facts before it, the court summarily concluded that the moving party was diligent in preparing its application within 30 days.[15] That ruling is consistent with the test used for determining timeliness of fee motions in a district court prior to enactment of the 14-day period in Fed. R. Civ. P. 54.[16]

While 30 days was an easier case, courts using various formulations of the "diligence" principle have approved fee applications filed significantly longer after the judgment on appeal.[17]

The unwary practitioner may reasonably conclude that awaiting a decision on a petition for certiorari is both diligent and efficient, but absent a rule he or she does not have guarantees of timeliness. In *Montgomery & Assoc's, Inc. v. Commodity Futures Trading Commission*,[18] for example, the court reaffirmed its prior holding that "if an attorneys' fee application . . . is not subject to Rule 39(d)'s 14-day period, it appears that only laches would limit the time for the application's filing."[19] The moving party sought fees with three weeks of the judgment in this commodities case, but the court denied its

application because the "likely purpose" of the fee shifting statute at issue—which appeared to be "the speedy disposition of fee requests"—would be more effectively served by imposing the 14-day time limit set forth for costs in Rule 39.[20]

### Preferred Solution

The more flexible "diligence" approach results in a lack of certainty and, in any event, forces the prudent practitioner to seek attorney fees for appellate work within the 14-day time frame of Fed. R. Civ. P 54(d) or Fed. R. App. P. 39. In circuits where the applicable time period has not been set by local rule, such practitioner would, and should, file his or her motion for attorney fees at the same time as his or her itemized bill of taxable costs in an excess of caution. Nor does the party opposing fees achieve a sense of finality in the absence of a time period set by rule. This uncertainty and lack of finality does not seem justifiable given that virtually all other motions in both the district and appellate courts have specific deadlines. Indeed, Rule 54 was amended in 1993 to "establish a uniform time for fee motions" which, at the time, varied from "10 days to several months."[21]

Admittedly, the local and unique nature of rules relating to the timeliness of fee motions in appellate courts may pose a risk of waiver. The Ninth Circuit rule, for instance, provides that "[a] party eligible for attorneys fees on appeal to this Court may, within the time permitted in 9th Cir. R. 39-1.6, file a motion to transfer consideration of attorneys fees on appeal to the district court . . . from which the appeal was taken."[22] Based on this language, a panel of that court reversed an award for attorney fees on remand, despite counsel's success on the prior appeal, because he filed his motion with the district court.[23]

This type of harsh result should follow only from an unambiguous rule that the courts of appeal demand to consider all appellate fee applications in the first instance. As noted, fee applications in either the district court or court of appeals would otherwise appear to be permissible,[24] and, although appellate courts may rule on appellate fee applications if there are no genuine disputes of fact,[25] arguably "[d]etermining the amount of a reasonable attorney's fee, ultimately a decision that may combine extensive fact finding with a large amount of discretion, is a process well suited to the usual functions and operations of the trial court."[26] Whichever approach is adopted on the appropriate forum (or forums) in which to file, having a rule setting a time certain for fee applications removes doubts about their timeliness and provides a more fair and predictable outcome.[27]

Nor does the rule need to limit the time period to 14 days, as in district courts in light of the Rule Committee's desire "to assure that the opposing party is informed of the claim before the time for appeal has elapsed" (30 days from entry of judgment).[28] The First Circuit, for example, adopted local rule 39.1 pertaining, in large part, to requests for attorney fees and expenses pursuant to 28 U.S.C. § 2412 (the Equal Access to Justice Act), which itself provides a 30-day time period for a prevailing party against the United States in certain types of cases where the government's position was not "substantially justified" and the award would not otherwise be "unjust."[29] The rule also covers requests "under any statute, rule or custom other than 28 U.S.C. § 2412" and also allows the filing of a motion for fees within "30 days of the date of entry of the final circuit court judgment."[30]

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For purposes of the rule "a final judgment must not be considered final until the time for filing an appeal or a petition for writ of certiorari has expired or judgment is entered by a court of last resort."[31] Thus, a party may, but need not, file an application for attorney fees for appellate work until the Supreme Court denies certiorari or, if the case is accepted for review, rules on the merits. The First Circuit's generous approach provides more time than the corresponding rule in other circuits and eliminates the need to withdraw or supplement a pending fee application in the court of appeals to account for the work entailed by an opposition to a petition for certiorari, defending the circuit court judgment on the merits before the Supreme Court, or both. As such, the rule promotes equity and efficiency.[32]

### Conclusion

The adoption of a uniform time period of reasonable length in a rule of appellate procedure—or alternatively the adoption of an appropriate local rule by circuit courts that do not currently have one—would eliminate uncertainty, promote fairness and finality, and prevent disputes and inconsistent results on whether a particular filing should be deemed timely under the more flexible principles of equity. ■

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### Endnotes

1. *See* Fed. R. Civ. P. 54(a),(d). A local rule extending the time to file a motion for attorney fees is considered a valid standing "court order" within the meaning of Fed. R. Civ. P. 54(d). *See* Planned Parenthood of Cent. N.J. v. Attorney General, 297 F.3d 253, 260 (3d Cir. 2002) (collecting cases).

2. *See* Jannotta v. Subway Sandwich Shops, Inc., 225 F.3d 815, 820 (7th Cir. 2000).

3. *See* Fed. R. App. P. 39(a).

4. *See* Fed. R. App. P. 39(d).

5. *See* Fed. R. App. P. 39(c),(e). The counterpart to Fed. R. App. P. 39 in the district court is Fed. R. Civ. P. 54(d), which provides for shifting of "Costs Other than Attorneys' Fees." Congress authorized "any court of the United States" to "tax as costs": (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees

and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under 28 U.S.C. § 1923 (which relates largely to docket fees and the costs of briefs in admiralty cases); (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828. *See* 28 U.S.C. § 1920.

6. *See* Ekanem v. Health And Hosp. Corp., 778 F.2d 1254, 1257 n.3 (7th Cir. 1985) (citing Marek v. Chesney, 473 U.S. 1 (1985)).

7. *See, e.g.*, McDonald v. McCarthy, 966 F.2d 112, 117 (3d Cir. 1992) ("although under [the civil rights fee award statute] attorneys' fees may be included as part of costs, 'that does not mean that [the statute's] definition of 'costs' should be superimposed on the definition of 'costs' in [Rule 39]'") (internal citation omitted); *accord* Pedraza v. United Guar. Corp., 313 F.3d 1323, 1330 (11th Cir. 2002) ("in *McDonald*, the Third Circuit simply joined a long list of courts in reaching the uncontroversial conclusion that attorneys' fees are not included among the 'costs' contemplated by Rule 39"); *but see* Cal. Pro-Life Council, Inc. v. Randolph, 2008 U.S. Dist. LEXIS 80256, at *26–*27 (E.D. Cal. Sept. 30, 2008) (disagreeing with *McDonald* and applying the reasoning of *Marek* to hold that costs under Rule 39 includes a "reasonable attorney's fee" that may be awarded "as part of the costs" under section 1988), *appeal pend'g*, 08-17473 (9th Cir.).

Separately, Fed. R. App. P. 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion . . . and reasonable opportunity to respond, award just damages and single or double costs to the appellee." *See* FED. R. APP. P. 38. The term "costs," as used in Rule 38 may include attorney fees as a penalty. *See, e.g.*, Dubay v. Wells, 506 F.3d 422, 433 (6th Cir. 2007) ("the sole purpose of awarding attorney fees under Rule 38 is to discourage litigants from wasting this Court's time and the opposing party's resources with frivolous appeals"). To recover under Rule 38, however, the appeal must not merely present a non-cognizable claim, but also be "'the result is obvious or the arguments of error are wholly without merit.'" St. Germain v. Howard, 2009 U.S. App. LEXIS 1055, at *6 (5th Cir. Jan. 20, 2009); *see, e.g.*, Maxwell v. KPMG LLP, 2008 U.S. App. LEXIS 23708, at *5 (7th Cir. Aug. 19, 2008) (comparing failure of appellant to distinguish controlling cases to the "ostrich-like" and "unprofessional" tactics held sanctionable in prior cases) (internal citation and quotation marks omitted). Fed. R. App. P. 7 provides that "the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." *See* FED. R. APP. P. 7. There is a circuit split on whether the term "costs" in Rule 7 may include attorney fees where the appellee is expected to recover either under a fee shifting statute or Rule 38. *See* Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 955 (9th Cir. 2007) (collecting conflicting authorities).

8. *See* 4th Cir. R. 46(e).

9. *See* 5th Cir. R. 47.8.1.

10. *See* 1st Cir. R. 39-1.6 (b) (30 days from entry of final circuit court judgment, which runs from the date that time expires to file petition for certiorari or the Supreme Court issues judgment); 3d Cir. R. 108.1 (30 days after entry of circuit court judgment or within 14 days of decision on a timely petition for panel rehearing or rehearing en banc); 8th Cir. R. 47C(a) (within 14 days after entry of circuit court judgment); 9th Cir. R. 39-1.6 (14 days from time to petition for panel hearing or rehearing en banc expires or a decision on such petition); 11th Cir. R. 39-2(a),(e) (same, except that, where the case is remanded, in part, a prevailing party on appeal may move for appellate fees with a timely fee from the final judgment of the district court). In the district court, the time limit to file a motion for attorney fees runs from

"entry" of a final judgment, which means a "separate document" rendering the judgment in accordance with the court's otherwise appealable opinion or order or 150 days, whichever comes first. *See* FED. R. CIV. P. 58(c); United Auto. Workers Local 259 Social Security Dep't, 501 F.3d 283, 287 (3d Cir. 2007) ("W]hen an order does not comply with Rule 58, there is no immediate 'entry of judgment' triggering the time period for Rule 54(d) motions" and "the time period begins 150 days after entry of the order"). In the federal courts of appeal, the time limit to request taxable costs does not run from "issuance of the mandate" restoring jurisdiction to the lower court (which occurs within 21 days of the judgment, Fed. R. App. P. 41), but from "entry of the judgment" itself. *See* FED. R. APP. P. 39(d). Further discussion of the distinction between order, judgment, and mandate are beyond the scope of this practice note.

11. *See* JWC Inv., Inc. v. Novelty, 509 F.3d 339, 341 (7th Cir. 2007).

12. *Id.* at 342.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See* White v. N.H. Dep't of Employment Sec., 455 U.S. 445, 451-454 (1982) (rejecting application of 10-day time limitation in Fed. R. Civ. P. 59(e) for fee applications).

17. *See* Envtl. Defense Fund, Inc. v. EPA, 672 F.2d 42, 61 (D.C. Cir. 1982) (more than nine months after judgment timely under "traditional equitable principles"); *accord* Cush-Crawford v. Adchem Corp., 234 F. Supp.2d 207, 211 (E.D.N.Y. 2002) (two months after time to petition for certiorari lapsed was timely under circumstances); *see also* Seyler v. Seyler, 678 F.2d 29, 31 (5th Cir. 1982) (rejecting application of 14-day time limit in Rule 39 to motions for appellate fees).

18. 816 F.2d 783 (D.C. Cir. 1987).

19. *Id.* at 785 (citing *Envtl. Defense Fund*, 672 F.2d at 61).

20. *Id.* at 785.

21. *See* 10-54 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE—CIVIL ¶ 54.151 & n.4 (2009) (citing Committee Note of 1993 to Amendment to Rule 54).

22. *See* 9th Cir. R. 39-1.8.

23. *See* Cummings v. Connell, 402 F.3d 936, 948 (9th Cir. 2005). The court would have reversed the fee award for appellate work, in any event, on the alternative ground that the motion was not filed with the district court until more than nine months after the time period set by the Ninth Circuit rule expired. *See* 402 F.3d at 948 n.6.

24. *Janotta*, 225 F.3d at 820.

25. *See, e.g.*, ACLU v. Barnes, 168 F.3d 423, 431 (11th Cir. 1999).

26. Dague v. Burlington, 976 F.2d 801, 803 (2d Cir. 1992). It is not unusual for circuit courts to remand cases to the district court to calculate reasonable fees incurred on appeal. *See, e.g.*, LaPeter 1985 Living Trust v. Can. Life Ins. Co. of Am., 2009 U.S. App. LEXIS 151, at *2 (9th Cir. 2009); Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 144 (2d Cir. 2007); First Trust Corp. v. Bryant, 410 F.3d 842, 857 (6th Cir. 2005); Whittington v. Nordam Group Inc., 429 F.3d 986, 1002 (10th Cir. 2005); Powell v. Alexander, 391 F.3d 1, 24 (1st Cir. 2004); Bridgmon v. Array Sys. Corp., 325 F.3d 572, 578 (5th Cir. 2003); Leonard v. Sw. Bell Corp. Disability Income Plan, 2003 U.S. App. LEXIS 19747, at *1 (8th Cir. 2003); Nat'l Ass'n of Mfrs. v. Dep't of Labor, 159 F.3d 597, 607 (D.C. Cir. 1998); Bandura v. Orkin Exterm. Co., 865 F.2d 816, 823 (7th Cir. 1988). In theory, a court of appeals has discretion to appoint a special master to assess an application for attorney fees. *See* FED. R. APP. P. 48(a) ("A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court."). That procedure does not appear to be used for appellate fee applications, even where decided by the court of appeals itself. *But cf.* 9th Cir. R. 39-1.9 (permitting the court to refer disputed attorney fee applications to an "appellate commissioner"). Local rules have occasionally codified precedent allowing remand for calculation by the district court. *See* 1st Cir. R. 39.1 (b) ("The court of appeals, may in its discretion, remit any such application [for appellate fees] to the district court for a determination"); 8th Cir. R. 47C(b) ("On the court's own motion or at the request of a prevailing party, a motion for attorney fees may be remanded to the district court . . . for appropriate hearing and determination").

27. Although beyond the scope of this practice note, courts seem to disagree on whether a local rule of appellate procedure permits a district court to determine an application for fees incurred on appeal. *Compare* Little Rock Sch. Dist. v. Ark., 127 F.3d 693, 696 (8th Cir. 1997) ("despite our local rule, the district courts retain jurisdiction to decide attorneys' fees issues that we have not ourselves undertaken to decide") *with* Common Cause/Ga. v. Billups, 554 F.3d 1340, at *37 (11th Cir. 2009) ("The district court lacked authority to award attorney's fees and costs for work performed before this Court").

28. *See* Committee Note of 1993 to Amendment to Rule 54 (Comment on subparagraph B). The other purposes for establishing the 14-day period are: (1) the court can determine fees "while the services performed are freshly in mind"; and (2) the court can rule "in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case." *Id.*

29. *See* 1st Cir. R. 39.1(a)(1); 28 U.S.C. § 2412(d)(1)(A).

30. *See* 1st Cir. R. 39.1(b).

31. *Id.*

32. *See* Consolo v. George, 1996 U.S. App. LEXIS 10196, at *5 (1st Cir. 1996) (*per curiam*) ("[Local] Rule 39.2 serves three purposes: (1) it promotes fairness by requiring parties to apply for fees within a reasonable time after a case's resolution; (2) it advances judicial efficiency by reducing of the number of fee applications filed; and (3) it prevents this Court from issuing awards under § 1988(b) inconsistent with subsequent decisions on the case.").