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Can We Define "Frivolous"?

by Keith A. Call

During a recent commute, I was thinking about what I could write for this column. Pondering the Utah Rules of Professional Conduct – sick, I know – I thought to myself, "I wonder if there's anything good in the threes?" So when I got to the office, I cracked open the table of contents to the Rules of Professional Conduct and saw Rule 3.1, "Meritorious Claims and Contentions." I immediately thought of an opposing party's recent memorandum that accused my position of being frivolous, an argument that, in turn, I thought was frivolous. I wondered, "What is 'frivolous,' and how can we identify it?" Here is a summary of my survey of how authorities define "frivolous."

Rule 3.1 and Comments

Rule of Professional Conduct 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The second comment to Rule 3.1 adds the following to help define "frivolous":

- "The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery."
- Lawyers are required to "inform themselves about the facts of their clients' cases and the applicable law."
- A legal position "is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."
- A legal position is frivolous "if the lawyer is unable to make a good-faith argument on the merits of the action taken" or is unable to support the action "by a good-faith argument for an extension, modification, or reversal of existing law."

Utah R. Prof'l Conduct 3.1 cmt. 2.

An Objective Standard

Most authorities agree that the test for defining "frivolous" is an objective one. Courts have generally applied one of two objective tests. The "reasonable lawyer" test asks whether a reasonable lawyer would have made such an argument in good faith. And the "rational basis" asks whether the outcome is beyond doubt under any conceivable argument. See James W. MacFarlane, *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. Legal Prof. 231 (1996); Ellen J. Bennett & Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct, 347–48 (9th ed. 2018).

There Are Few Rule 3.1 Prosecutions

The 2018 Annual Report of the Office of Professional Conduct identifies specific rule violations as a percentage of total violations found in all discipline orders. The report reflects that out of 191 discipline orders issued in the 2017–18 reporting year, 2.1% of those orders were based, at least in part, on violations of Rule 3.1. *See* Utah State Bar Office of Professional Conduct, *Annual Report* (Aug. 2018), *available at* https://www.utahbar.org/wp-content/uploads/2018/10/Final-ANNUAL-REPORT-2017-2018.pdf.

In my research, I did not find any reported appellate decisions

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where the OPC had prosecuted a violation of Rule 3.1. There is one case in which an attorney brought an original proceeding to challenge orders of the Utah Supreme Court's Ethics and Discipline Committee. *See Long v. Ethics & Discipline Comm.*, 2011 UT 32, 256 P.3d 206. In another case, the Utah Federal District Court disciplined a lawyer for violating Rule 3.1. *Committee on the Conduct of Attorneys v. Oliver*, 510 F.3d 1219, 1224–25 (10th Cir. 2007); *see also* Utah DUCiv 83-1.5.1 (establishing disciplinary procedures for Utah Federal District Court).

This relative paucity in reported decisions indicates that "frivolous" is difficult to define, identify, and enforce. As stated by one authority:

> [D]isciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. b (2000).

What the Cases Say

In *Long v. Ethics & Discipline Comm.*, 2011 UT 32, 256 P.3d 206, the Utah Supreme Court upheld a Rule 3.1 sanction where a lawyer authorized a $7,775 collection lawsuit against a former client based on six hours' work. *Id.* ¶¶ 55–58. The lawyer represented the client at an initial appearance in a DUI proceeding. *Id.* ¶ 4. After the appearance, the client signed a flat fee agreement for $6,600, but two days later informed the lawyer's office that he decided to retain someone else. *Id.* ¶¶ 5–6. After being sued for the full fee plus interest, the client filed a complaint with the OPC. *Id.* ¶¶ 7–8. In defending himself against the ethics complaint, the lawyer "admitted that it was 'absolutely not' reasonable to charge $6,600 for six hours of work. *Id.* ¶ 9. The supreme court held that "[b]ecause [the lawyer] knew that he was not entitled to the $7,775.34 he demanded in his debt collection action, his claim was frivolous." *Id.* ¶ 57.

In the *Committee on the Conduct of Attorneys v. Oliver*, 510 F.3d 1219 case, the Tenth Circuit did little to enlighten us on how to identify "frivolous" arguments. While affirming violations of Rule 3.1, the court did not explain what frivolous claims the lawyer had made. *Oliver* does tell us, however, that egregiously

frivolous arguments may keep company with other bad behavior. In that case, the lawyer had a history of failing to comply with deadlines and court orders in twenty-seven cases, had offered testimony that "was often incredible and at times outrageous…, antagonistic, defensive, arrogant, and combative," and demonstrated an "inability to exercise fundamental skills of honest and timely analysis and communication." *Id*. at 1221–23.

In *L.C. v. State*, 963 P.2d 761 (Utah Ct. App. 1998), the court of appeals discussed Rule 3.1 in the context of a terminated parent's right to counsel on appeal, *see* Utah Code Ann. § 78A-6-1111. The court addressed the potentially conflicting responsibilities that appointed counsel for indigent parents may face when the lawyer concludes that the only possible grounds for appeal would be frivolous. *L.C.*, 963 P.2d at 766. The court did not directly adjudicate a Rule 3.1 issue, but it reaffirmed that a *meritless* argument is not necessarily *frivolous*. *Id*. at 765. It further described "frivolous" arguments as "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law," and "in which no justiciable question has been presented and…[which are] devoid of merit in that there is little prospect that it can ever succeed." *Id*. at 765 n. 5 (citation and quotation marks omitted).

We can also look to cases interpreting Rule 3.1's cousin, Utah Rule of Civil Procedure 11. Rule 11(b)(2) requires a lawyer to certify that "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." But these cases further demonstrate that clearly defining "frivolous" is difficult.

For example, in *Gillmor v. Family Link, LLC*, 2010 UT App 2, 224 P.3d 741, the court of appeals upheld a sanction for violating the Rule 11(b)(2) prohibition against frivolous arguments, *even though a dissenting opinion adopted the offending lawyer's position. See id*. ¶¶ 16–18 (affirming the district court's Rule 11 sanction); *id*. ¶ 28 (Greenwood, J., dissenting and adopting the argument rejected as frivolous by the majority opinion). This had to be frustrating for that lawyer! Fortunately for him, the Utah Supreme Court reversed. *Gillmor v. Family Link, LLC*, 2012 UT 38, ¶ 17, 284 P.3d 622.

In *Archuleta v. Galetka*, 2008 UT 76, 197 P.3d 650, the Utah Supreme Court grappled with sticky issues surrounding defense lawyers' zealous efforts to defend their client in a capital murder case. The lawyers filed an amended petition for writ of *habeas corpus* that raised 120 claims, many of which repeated claims that had already been rejected. *See id*. ¶ 3. Apparently fed up with this tactic, the Attorney General's Office sought sanctions under Rule 11. *See id*. ¶¶ 3–5. The supreme court declined to impose a sanction under Rule 11 but seemed vexed in attempting to demarcate the line between what is zealous and what is frivolous:

> While we accept the trial court's conclusion that the attorney conduct at issue in this case did not rise to the level demanding a rule 11 sanction, we also agree with the trial court that much of what took place in regard to Archuleta's second amended petition was unwarranted and unjustifiable under our rules and applicable law.

Id. ¶ 17.

The Restatement of the Law Governing Lawyers

While far from perspicuous, the best guidance I have seen comes from the Restatement of the Law Governing Lawyers. It explains that contentions must rise above a "minimally plausible position." Restatement (Third) of the Law Governing Lawyers § 110 cmt. c (2000). It describes three elements for compliance with Rule 11 standards: (1) an inquiry about the facts and law that is reasonable under the circumstances; (2) the lawyer's conclusions about the facts and law must meet an "objective, minimal standard of supportability"; and (3) litigation measures may not be taken for an improper purpose, even if otherwise minimally supportable. *Id*. Finally, it defines a "frivolous position" as "one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." *Id*. § 110 cmt. d.

Conclusion

Based on my review, a clear definition of "frivolous" remains elusive. It is no wonder there is tension in the day-to-day rigors of zealously representing clients, avoiding frivolous arguments, and avoiding frivolously arguing that an argument is frivolous. We lawyers will simply have to learn to live with this ambiguity. *See L.C. v. State*, 963 P.2d 761, 766 (Utah Ct. App. 1998) (recognizing that the process for ensuring counsel fulfills potentially conflicting duties to his or her client and the court is not flawless).

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.