

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Berger v. City of Seattle

Berger · No. 05-35752 · Decided September 2, 2009

SUMMARY

The Ninth Circuit awarded Michael Berger attorneys’ fees on appeal and held that his fee request was timely. The court referred determination of the appropriate fee amount to the Appellate Commissioner, subject to panel reconsideration.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Alex Kozinski, Chief Judge; Harry Pregerson, Circuit Judge; Stephen Reinhardt, Circuit Judge; Michael Daly Hawkins, Circuit Judge; Kim McLane Wardlaw, Circuit Judge; Ronald M. Gould, Circuit Judge; Richard A. Paez, Circuit Judge; Marsha S. Berzon, Circuit Judge; Richard C. Tallman, Circuit Judge; Milan D. Smith, Jr., Circuit Judge; N. Randy Smith, Circuit Judge
JURISDICTION	Federal
DECIDED	September 2, 2009
DOCKET	05-35752
DISPOSITION	other
PROCEDURAL POSTURE	The court considered the appellee's request for attorneys' fees incurred on appeal and the timeliness of that request.
PRECEDENTIAL VALUE	Published
PARTIES	City of Seattle, Virginia Anderson, Michael B. Anderson, Ten Unknown Employees/Officers of the Seattle Center and the City of Seattle v. Michael James Berger, also known as Magic Mike

TOPICS

[attorney fees](#) [appellate procedure](#) [civil procedure](#)

PRACTICE AREAS

[Appellate procedure](#) [Attorneys' fees](#)

QUESTIONS PRESENTED

1. Whether the appellee's request for attorneys' fees on appeal was timely when filed within fourteen days after expiration of the period for seeking full-court rehearing en banc.
2. Whether the court should award appellate attorneys' fees and refer determination of the amount to the Appellate Commissioner.

HOLDINGS

1. An appellate attorneys' fee request is timely when filed no later than fourteen days after expiration of the period in which a petition for rehearing, including full-court rehearing en banc, could have been filed.
2. The appellee was entitled to attorneys' fees on appeal, with the appropriate amount to be determined by the Appellate Commissioner.

KEY QUOTATIONS

“Appellee Michael Berger is awarded attorneys’ fees on appeal.” (12202)

“A request for attorneys’ fees must be filed no later than fourteen days after the expiration of the period within which a petition for rehearing might have been filed.” (12201)

FACTUAL BACKGROUND

The relevant facts concern only the timing and processing of Berger's appellate fee request. The request was received within fourteen days after expiration of the period during which a petition for rehearing en banc by the full court could have been filed.

PROCEDURAL HISTORY

After an en banc disposition, Berger sought attorneys' fees on appeal. The defendants argued that the fee request was untimely. The Ninth Circuit rejected that argument, awarded fees, and referred determination of the amount to the Appellate Commissioner.

DISPOSITION

other

REMAND INSTRUCTIONS

The determination of the appropriate amount of attorneys' fees on appeal is referred to the Appellate Commissioner, who may conduct whatever proceedings the Commissioner deems appropriate. The Commissioner's order is subject to reconsideration by the panel.

OPINION

PER CURIAM.

FOR PUBLICATION UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
MICHAEL JAMES BERGER, a single man also known as Magic Mike, Plaintiff-Appellee, v.
No. 05-35752 CITY OF SEATTLE; VIRGINIA D.C. No. ANDERSON, Director of Seattle CV-
03-03238-JLR Center; MICHAEL B. ANDERSON, Western District of Emergency Service
Manager for Washington, Seattle Center; TEN UNKNOWN Seattle EMPLOYEES/OFFICERS, of
the Seattle ORDER Center and the City of Seattle, all in both their individual and official
capacities, Defendants-Appellants. Filed September 2, 2009 Before: Alex Kozinski, Chief
Judge, Harry Pregerson, Stephen Reinhardt, Michael Daly Hawkins, Kim McLane Wardlaw,
Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Milan D. Smith, Jr.
and N. Randy Smith, Circuit Judges.

ORDER Appellee Michael Berger is awarded attorneys' fees on appeal. Contrary to the
respondents' suggestion, the fee request was timely. A request for attorneys' fees must be filed no
later than fourteen days after the expiration of the period within 12201 12202 BERGER v. CITY
OF SEATTLE which a petition for rehearing might have been filed. See 9th Cir. R. 39-1.6.

Although the applicable procedural rules, national and local, do not expressly provide for the filing
of a petition for full court rehearing en banc, they apply gener- ally to the procedures governing
rehearing en banc, with no exception for full court en banc. See 9th Cir. R. 35-3; Fed. R. App. P.
35, 40. Indeed, in every circuit but ours, every peti- tion for rehearing en banc is a petition for full
court en banc, so the Federal Rules of Appellate Procedure necessarily apply to such petitions.

Our General Orders so recognize, as they expressly contemplate the filing of a petition for
rehearing en banc before the full court within fourteen days after the filing of an en banc
disposition. See 9th Cir. Gen. Order 5.8.

The court received Appellee's petition within fourteen days after the expiration of the period
within which a petition for a full court rehearing might have been filed. Appellee's peti- tion is
therefore timely. The determination of an appropriate amount of fees on appeal is referred to the
Appellate Commissioner, who shall conduct whatever proceedings he deems appropriate.

The Appellate Commissioner's order is subject to reconsideration by the panel. See 9th Cir. R. 39-
1.9. PRINTED FOR ADMINISTRATIVE OFFICE—U.S. COURTS The summary, which does
not constitute a part of the opinion of the court, is copyrighted