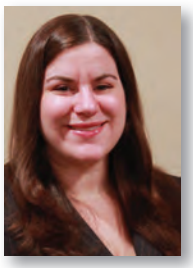
A practical guide to monetary appellate sanctions

By Janet Gusdorff

Appellate courts rarely impose monetary sanctions. Nevertheless, it is crucial for trial lawyers to have a working knowledge of what constitutes sanctionable appellate conduct, how to obtain or defend against sanctions, and the implications and practical consequences of a court's imposition of appellate sanctions. Sanctions can be costly and devastating, especially because courts have State Bar reporting requirements in certain circumstances. This article addresses common questions and synthesizes controlling law to help practitioners understand what constitutes sanctionable appellate conduct, when and how to seek appellate sanctions, and advice for navigating situations in which the client and attorney disagree on strategy.

Sanctionable Conduct

In its seminal case on appellate sanctions, *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651, the Supreme Court warned that sanctions should be used "most sparingly to deter only the most egregious conduct." But what constitutes "the most egregious" conduct? California Rule of Court 8.276 sets forth four categories of sanctionable appellate conduct: (1) taking a frivolous appeal or appealing solely to cause delay; (2) including in the record any matter not reasonably material to the appeal's determination; (3) filing a frivolous motion; or (4) committing any other unreasonable violation of the appellate rules. Code of Civil Procedure section 907 also authorizes sanctions for frivolous appeals or those taken solely for delay.



Janet Gusdorff, certified by the State Bar as an appellate specialist, handles appeals throughout California and the Ninth Circuit, with an emphasis on complex personal injury and employment law issues. www.GusdorffLaw.com

Frivolous Appeals or Motions

A "frivolous appeal" is not synonymous with a meritless appeal. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261.) Attorneys are obliged to vigorously assert their clients' rights, and must have the freedom to file appeals on their clients' behalf without fear of personal liability. (*Flaherty*, *supra*, 31 Cal.3d at 647-8.) Thus, an appeal, though unsuccessful, will not be penalized as frivolous if it "presents a unique issue which is not 'indisputably' without merit"; involves facts that are "not amenable to easy analysis in terms of existing law"; or "makes a reasoned 'argument for the extension, modification, or reversal of existing law.'" (*Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1074-1075, citations omitted.) Conversely, sanctions may deter irresponsible litigants from abusing their right of access to the judicial system. (*Id.* at 648.)

Balancing these concerns, the California Supreme Court concluded an appeal is frivolous "only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Flaherty, supra,* 31 Cal.3d at 650.) These two standards, the subjective state of mind and objective merits of the appeal, are often used together, one providing evidence of the other. An appeal's total lack of merit may constitute evidence that appellant must have intended it solely for delay.

Frivolous *motions* also constitute sanctionable conduct. (*Dana Comm. Credit Corp. v. Ferns & Ferns* (2001) 90 Cal. App.4th 142, 146-147 [extending Civil Procedure Code section 128.5 to appeals].) For instance, an attorney who files a frivolous motion to disqualify opposing counsel, repeated and frivolous applications for extensions of time, or even a motion for sanctions against an opposing party, may face sanctions.

Procedural Violations

Courts may impose monetary sanctions for "any unreasonable infraction of the rules governing appeals … as the circumstances of the case and the discouragement of like conduct in the future may require." (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 886.) Minor infractions concerning the *form* of the brief, such as using the wrong font, exceeding word limitations, or failing to include necessary information on the cover, may result in the brief being stricken or returned for corrections and refilling within a specified time. (Cal.R.Ct. 8.204.) Flouting other procedural rules, though, may warrant costly consequences.

It is axiomatic that an appellant must support all statements of fact in the brief with citations to the record and must confine

© RichLegg / iStockphoto.com

the statement to matters in the record on appeal. (*Pierotti, supra*, 81 Cal.App.4th at 29; Cal.R.Ct. 8.204.) Similarly, appellants have the responsibility to produce a complete and accurate record. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1; Cal.R.Ct. 8.140.) Additionally, the nature of certain appellant claims, such as challenging the sufficiency of the evidence, likewise impose on appellants a duty to set forth all material evidence on the point, including evidence harmful to the party's position. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 34.)

Red flags wave where there are factual statements laced with ad hominem (and unsupported) attacks on opposing parties or counsel, in pages of briefing with minimal or no record citations, in citations to unpublished (or overruled) cases, in failures to present a full and fair portrayal of the facts elicited at trial (i.e., failing to present testimony favorable to respondent), in citing documents or other "facts" that were never presented to the trial court, in presenting disparaging or prejudicial facts about an opposing party that are not significant to the appeal, or in citing to, but misrepresenting, testimony, and the like.

Requesting Sanctions

One of the most common reasons for the denial of appellate sanctions is the party requesting them fails to properly to do so in a separately noticed motion. Courts will reject sanctions requests contained within a brief. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919.) California Rule of Court 8.276 sets forth the procedure for seeking appellate sanctions, including a declaration supporting the amount of any monetary sanction sought, and the deadline for filing the motion. Alternatively, a court may raise the issue of appellate sanctions on its own motion.

To comply with due process, if the appellate court is considering imposing sanctions, it must give *written notice* and offer the parties a chance to brief the issue before it assesses sanctions. If the court fails to issue written notice, an opposition may not be filed. (Cal.R.Ct. 8.276(d).) If the court does issue written notice, an opposition is optional, due within ten days of the court's notice.

The hearing on sanctions (propriety and amount) is typically combined with the oral argument on the appeal's merits. (Cal.R.Ct. 8.276(e).) Keep in mind that although the rules do not require unanimity for the court to impose sanctions, some courts may informally create such a requirement, presumably making them more difficult to obtain. (See e.g., *San Bernardino Comm. Hosp. v. Meeks* (1986) 187 Cal.App.3d 457, 470 [4th App. Dist., Div. 2 uniformly declined to impose sanctions unless the panel were unanimous in favoring them].)

Amount of sanctions

There are no fixed guidelines for measuring an appropriate amount of sanctions. "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (Code Civ. Proc. § 907.) The damages may include the costs and attorney's fees incurred by the respondent in defending against the appeal, as well as the expense incurred by the appellate court in processing, reviewing, and deciding the appeal. (*Summers, supra,* 225 Cal.App.3d at 1079.)

In imposing sanctions, the court is not limited to compensatory considerations; rather, it may also require the payment of sums sufficient to discourage similar conduct in the future. (*Bank of California v. Varakin* (1990) 216 Cal.App.3d 1630, 1639–1640 [imposing sanctions of $25,000, payable to the court, to compensate the taxpayers and "to deter like conduct in the future"].) Thus, various courts imposing sanctions have considered factors such as: Respondent's attorneys fees and costs incurred in defending the appeal; the amount of judgment against appellant; respondent's loss of interest during the appeal's pendency; appellant's gross revenues from unlawful activity during pendency of frivolous appeal; appellant's net worth; the severity or degree of the objective frivolousness or delay; the deterrence of similar conduct; in cases of successive frivolous appeals, the lack of discernable deterrent effect of prior sanctions; and the burden or cost to taxpayers to process the appeal. (California Practice Guide: Civil Appeals and Writes (The Rutter Group) ¶ 11:136.)

Red flags wave where there are factual statements laced with ad hominem (and unsupported) attacks on opposing parties or counsel.

Imposition of sanctions reflects not merely the cost to the aggrieved party, but also those litigants who have "nonfrivolous appeals that are waiting in line while we process the instant appeal." (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1451.) Additionally, frivolous appeals waste judicial and taxpayer resources, since they still must be reviewed and processed. Therefore, when the court determines the amount of sanctions, it may appropriately compensate the government for its expense in processing, reviewing,

and deciding a frivolous appeal, and order the sanctioned party to pay the court clerk, as well as the opposing counsel or party. (*In re Marriage of Schnabel* (1994) 30 Cal.App.4th 747, 755; *Westphal v. Wal Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1083.)

Liability for Sanctions

After a court decides to impose monetary sanctions, it must also determine who is responsible for paying them – the client, attorney, or both. Depending on the circumstances, courts have variously imposed liability for sanctions. Numerous factors influence the decision, but culpability appears to be key. (See e.g., *Summers, supra,* 225 Cal.App.3d at 1080 [no evidence client was personally involved in urging appeal, had any legal training or experience to evaluate merits, or would have benefited from the delay]; *City of Bell Gardens v. County of Los Angeles* (1991) 231 Cal.App.3d 1563, 1572-1573 [sanctions imposed against County whose frivolous appeal was designed to harass respondents and delay the practical effect of the judgment in their favor]; *Moore v. El Camino Hosp. Dist.* (1978) 78 Cal. App.3d 661, 664 ["There is no indication that appellant … is primarily at fault in the taking of the appeal. We therefore deem it appropriate to assess the penalty against her counsel."]; *Hale v. Laden* (1986) 178 Cal.App.3d 668, 676 [sanctions imposed on counsel where there was no evidence that the appellant "was personally involved in continuing the appeal"].)

Additional Consequences

If the court imposes appellate sanctions against an attorney totaling or exceeding $1,000, Business and Professions Code section 6086.7(a)(3) requires the court to notify the State Bar. In *Flaherty*, the California Supreme Court acknowledged the risk of professional harm to those faced with paying sanctions: "A public attack on an attorney's integrity and motives could seriously impair his or her ability to obtain employment and work within the judicial system." (*Flaherty, supra,* 31 Cal.3d at 652.)

Another consideration is the financial consequence of a court-ordered sanctions award. A sanctions debt is *not dischargeable* in bankruptcy because the debt is for "willful and malicious injury." (*In re Zelis* (9th Cir. 1995) 66 F.3d 205, 208-209; 11 U.S.C. § 523(a)(6)).)

Practical Considerations

Attorneys regularly face clients who desire them to take certain action (i.e., filing a frivolous motion or appeal, seeking delay of paying a judgment, harassing an opposing party). Attorneys facing such situations who are unable to convince their clients not to pursue such strategy, must balance not merely the possibility of engaging in sanctionable conduct, but also violating their professional responsibilities. (*Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 521; Cal.R.Prof.Cond. 3-700(B)(1).) On the other hand, attorneys must evaluate their duty to present and urge their clients' claims, even if the issue is debatable. (*Murdock v. Gerth* (1944) 65 Cal.App.2d 170, 179; *Flaherty, supra,* 31 Cal.3d at

647; Bus. & Prof. Code § 6068(c).) If not, and if counseling and advising the client proves ineffective, withdrawal might be necessary. (Cal.R.Prof.Cond. 3-700(B)(1).) It is risky to assume that, merely because a client requests the sanctionable strategy, the court will limit liability for a sanctions award to the client.

Attorneys on the receiving end of a sanctions motion may take comfort in knowing that courts rarely award appellate sanctions. Furthermore, depending on the contents and circumstances underlying the sanctions motion (e.g., if the circumstances show the motion was brought to harass or delay), the recipient attorney may have cause to bring a sanctions motion against the original moving counsel or party.

When evaluating whether to file a sanctions motion against an opposing party, consider whether the circumstances are truly exceptional. For example, did appellant's brief repeatedly misrepresent trial testimony? To answer this question, make sure to note the applicable standard of review. Do not rely on the existence of citations; be sure to cross-reference them with the reporter's transcript. Similarly, be sure to cite check and read the important cases on which the opposing party relies. Occasional mistakes or misinterpretations, or even vigorously arguing unusual interpretations, might not constitute sanctionable conduct, but ignoring controlling authority, citing overruled cases, or misrepresenting holdings, may constitute evidence of foul play. Of course, if opposing counsel's brief has a dearth of citations, or if appellant fails to procure a full and fair appellate record, consider whether it is a mistake or flagrant disregard for the Rules of Court.

Do not let fear of sanctions stifle supported and creative, albeit difficult, arguments for extending, modifying, or reversing existing law.

Where the opening brief contains significant deficiencies, such as misrepresenting the law or the trial testimony, it is often wise to highlight such deficiencies in the respondent's brief. Practically, even if monetary sanctions are unlikely, other sanctions (including forfeiture of legal arguments) may be attainable.

Another reason for highlighting the significant procedural deficiencies of an opening brief is to make an adequate foundation to show appellant's improper intent in pursuing the appeal. For instance, an appellate court facing deficiencies in an opening brief might opt to give the benefit of the doubt to appellant, assuming incompetency rather than strategy. If those deficiencies are discussed and appellant continues to make similar misrepresentations or commits other violations in its reply brief, however, the court will be less likely to dismiss the violations as incompetence.

Such were the circumstances in *Alicia T., supra,* 222 Cal.App.3d 869. Appellant's arguments were not deemed "frivolous," but the opening brief improperly contained references to factual material that was not properly before the court. The brief also failed to contain any citations to the record and relied on an unpublished case. Incredibly, although respondent pointed out the errors and appellant's failure to discuss controlling case law, appellant's reply brief repeated the improper references, discussing the unpublished case over four pages, avoiding the effect of the controlling case, and citing material outside the scope of the record. Unsurprisingly, the appellate court found appellant's errors "compounded and unreasonable" in the reply brief in light of the fact that respondent had pointed them out. It chose to bypass the less severe remedies for defective briefs (e.g., returning to counsel for correction), and imposed monetary sanctions because the violations in issue involved more than the mere form of the brief. Counsel's refusal to desist in the citation of an unpublished opinion and failure to address controlling published authority merited a more severe sanction. (See also *Evans v. CenterStone Devl. Co.* (2005) 134 Cal.App.4th 151.)

Although sanctions may be awarded against a party who files a frivolous motion or appeal, or that engages in egregious violations of procedural rules, argue both violations if it is feasible to do so. It is not always easy to prove a meritless argument was brought for an improper purpose, as opposed to the product of inexperience or incompetence. Sanctions will be denied in all but the clearest cases. (*People v. Sumner* (1968) 262 Cal.App.2d 409, 415.)

Therefore, when drafting sanctions motions, do not hesitate to highlight for the court all indications that opposing counsel brought the appeal for improper reasons. For instance, if counsel's extension request referenced time needed to perform research on a complicated issue of first impression but its filed brief raised only run-of-the-mill issues, the disparity might convince the court of opposing counsel's true dilatory or harassing motivation.

A final word of advice. Do not let fear of sanctions stifle supported and creative, albeit difficult, arguments for extending, modifying, or reversing existing law. Do, however, remain cognizant of stare decisis. For instance, if your appeal challenges a law that has been long-settled by the Supreme Court, but you are before the Court of Appeal (which lacks authority to overrule the Supreme Court), acknowledge that fact and your intent to preserve the issue for later review. (*Summers, supra*, 225 Cal.App.3d at 1074-1075.) Not only will you avoid sanctions, but you will also preserve your credibility. ■