Focus

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The Practitioner Appellate Law

Dilatory or Frivolous

Two Recent Cases Address Appellate-Court Sanctions

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Requests for monetary sanctions are a frequent occurrence in trial courts. Not so at the appellate level, where sanctions are rarely sought and even less frequently awarded. The prevalence of sanctions in trial courts makes sense given the different functions of trial and appellate courts.

Trial courts are well-suited to deciding the factual issues inherent in considering sanctions, like fixing an amount and ensuring compliance. Appellate courts, on the other hand, focus on error-correction of lower-court action, not on new issues, especially when fact-finding is required. Appellate courts also often lack the time to devote to the procedural requirements for awarding sanctions. See California Rule of Court 26(e).

That said, courts of appeal will consider sanction requests, thus raising two basic questions: Precisely what sanctions power does the court have? and When will the court exercise that power? Two recent opinions shed some useful light on these questions: *Dana Commercial Credit Corp. v. Ferns & Ferns*, 90 Cal.App.4th 142 (2001), and *Neal v. Superior Court*, 90 Cal.App.4th 22 (2001).

The message of 'Dana' and 'Neal' is that courts of appeal will exercise the power to impose sanctions when appropriate.

Appellate courts have statutory authority to impose sanctions when a party or attorney "unreasonably" violates the Rules of Court or prosecutes an appeal that is either "dilatory" or "frivolous." Code of Civil Procedure Section 907; Rule of Court 26(a).

The seminal opinion setting forth the relevant standards is *In re Marriage of Flaherty*, 31 Cal.3d 637 (1982), which applied Section 907 and Rule 26 and defined "frivolous" and "dilatory." "Dilatory" means that the appeal is being prosecuted for an improper motive — e.g., to harass the respondent or delay the effect of an adverse judgment. This can be a difficult standard to prove because it is a subjective determination that looks to the motivation of the party or attorney and must be shown by clear and convincing evidence. *San Bernardino Cmty. Hosp. v. Meeks*, 187 Cal.App.3d 457 (1986).

Flaherty alternately provides, however, that an appeal is "frivolous" when, viewed under an objective standard, any reasonable attorney would agree that the appeal is totally and completely without merit. The Supreme Court set this elevated standard to ensure that sanctions would be imposed sparingly and not chill appellate advocacy.

Nevertheless, the "frivolous" standard can be satisfied. For example, in *Kurokawa v. Blum*, 199 Cal.App.3d 976 (1988), the court awarded $15,000 in sanctions in an appeal from a summary judgment where the evidence clearly showed that the appellant had no viable cause of action and that any potential claim was time-barred. The appellant also angered the court by submitting a brief containing inconsistent assertions, little evidence or legal support, poor record citations, strained case authorities and a discussion of legal principles without application to the facts.

Similarly, the court awarded a $32,000 sanction in an appeal from a judgment confirming an arbitration award in *Pierotti v. Torian*, 81 Cal.App.4th 17 (2000). That appeal was frivolous given the extremely limited scope of review of arbitration awards and the fact that the appellant failed to discuss the most relevant legal authority or prepare an adequate record.

Subsequent cases also have expanded *Flaherty* to partially frivolous appeals — allowing imposition of sanctions when at least a "significant and material" portion of an appeal is frivolous. E.g., *Maple Properties v. Harris*, 158 Cal.App.3d 997 (1984).

The appellate sanction power also extends beyond appeals to writ petitions. *Manzetti v. Superior Court*, 21 Cal.App.4th 373 (1993). And an appeal that was meritorious when commenced can become frivolous, and thus sanctionable, based on subsequent events. *Cohen v. General Motors Corp.*, 2 Cal.App.4th 893 (1992). Finally, sanctions may be imposed against the attorney or the client and in favor of the opposing party or the court itself. *Pierotti.*

Dana addresses whether appellate sanctions can be imposed for filing frivolous motions. Dana had successfully sued Ferns & Ferns for legal malpractice. Ferns filed a notice of appeal, followed by an opening brief. However, Ferns failed to procure a clerk's transcript or create an appellant's appendix, and the opening brief naturally failed to cite to the (nonexistent) record.

Dana moved to dismiss the appeal, and the court granted the motion, based on Ferns' "flagrant disregard of the rules relevant to the preparation and timely filing of a record." After Ferns unsuccessfully moved to vacate the dismissal, the remittitur issued. The day after the remittitur issued, Ferns moved to recall the remittitur, vacate the dismissal and reinstate the appeal. The court denied Ferns' motion.

Ferns then filed another motion to recall the remittitur, claiming that Dana had obtained the dismissal through fraud because Dana's dismissal motion was improperly captioned. Dana opposed the motion, arguing that this caption issue already had been addressed and requesting $13,812 in sanctions to punish Ferns for filing a frivolous motion. The court denied Ferns' motion to recall the remittitur and scheduled a hearing on Dana's sanctions request.

Ferns and Dana then reached a settlement under which Dana withdrew its sanctions request. The Court of Appeal, however, decided to address the sanctions issue anyway, because it raised an unresolved question of law that was likely to recur, namely whether the Court of Appeal has inherent authority to impose sanctions for the making of a frivolous motion on appeal, as opposed to prosecuting a frivolous appeal.

Looking to Code of Civil Procedure Section 907, Rule 26(a)(2) and *Flaherty*, the court recognized its authority to impose sanctions for frivolous appeals but found no express authority to allow sanctions for frivolous appellate motions.

Similarly, the court observed that Code of Civil Procedure Section 128.5(a), allowing sanctions for frivolous motions, applies to trial courts but does not mention appellate courts. The court reasoned, however, that the rationale of Section 128.5 — to compensate prevailing parties and to control burdensome and unnecessary legal tactics — applies equally at the appellate level.

Consequently, the court concluded that its inherent powers to control its own proceedings allow imposition of sanctions for frivolous motions. In a footnote, the court suggested that the Judicial Council amend the Rules of Court to make explicit that appellate courts may impose sanctions for frivolous motions.

The court also made clear that it would not shirk from "exercis[ing] its discretion to [impose sanctions] upon an appropriate showing." The court explained that but for Dana's withdrawal of its request, the court "would not have hesitated to impose sanctions."

Neal involved directions to a lower court to impose sanctions on remand. After Herman and Judith Neal divorced, disputes arose regarding their respective rights and duties under the divorce judgment. Herman Neal eventually filed a separate complaint in civil court — not family court — against Judith Neal, alleging fraud, breach of contract and abuse of process.

Judith Neal demurred, arguing that the family-law court had jurisdiction because their disputes already were pending in that court. Nonetheless, the trial judge overruled the demurrer as procedurally defective. Judith Neal then filed a writ petition, asking the Court of Appeal to reverse the overruling of her demurrer.

The Court of Appeal agreed that the substance of Herman Neal's claims all stemmed directly from the family-law case and granted writ relief, ordering the trial court to sustain the demurrer without leave to amend.

The appellate court went further, however, noting that because Herman's action was "merely family law waged by other means," sanctions would be appropriate. It therefore directed the family-law court to make an appropriate attorney-fee award for Judith Neal to compensate her for "having been dragged through this unnecessary excursion in the civil court."

Dana and *Neal* both illustrate that appellate counsel need to be wary about the positions that they take and the arguments that they advance. In *Dana*, the sanctioned party failed to realize that repeated requests for relief are just as annoying to appellate courts as they are to trial courts. Practitioners should heed the handwriting on the wall and not pester the court with multiple writs, appeals or motions when it is plain that relief will not be forthcoming.

Neal underscores that courts are willing to award sanctions sua sponte when they encounter misconduct. Judith Neal apparently did not request sanctions, but the court identified Herman Neal's attempt to transform a family-law case into a civil action as an abuse of the judicial system. This approach is in line with cases awarding appellate fees and costs when a party frustrates policies designed to promote settlement and reduce litigation costs in family-law matters. Family Code Section 271(a); e.g., *Marriage of Joseph*, 217 Cal.App.3d 1277 (1990); *Marriage of Green*, 213 Cal.App.3d 14 (1989).

The combined message of *Dana* and *Neal* is that courts of appeal will embrace and exercise the power to impose sanctions when appropriate. Practitioners thus should recognize when the strength of the evidence or controlling legal authority clearly renders a position meritless. Proceeding anyway may invite a result that substantially changes the risks and costs for having taken an appeal.

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