Appellate Sanctions: A Review of 2005 Cases

Benjamin G. Shatz

Introduction

Last year, the California courts of appeal imposed appellate sanctions in 20 cases. Although these cases constitute a relatively small sample, they do provide enough material for a few useful observations for lawyers and litigants engaged in appeals. This article offers some insights on such issues as who is sanctioned and why, the primary reasons sanctions are imposed, and the amounts of the sanctions.

Given that the courts of appeal handle roughly 23,000 appeals and writs each year, sanctions appear to be awarded in only one-tenth of 1 percent of all matters. Only five of these 20 cases were published decisions, but, considering that only about 8 percent of appellate decisions are published each year, this means that cases imposing sanctions are roughly twice as likely to be published as cases not imposing sanctions. Moreover, the issue of appellate sanctions arose in about 110 decisions in 2005, meaning that in nearly 20 percent of the cases in which the topic was raised—almost always by a party's motion—sanctions were awarded. (For figures on publication of court of appeal opinions, see Report of the California Supreme Court Advisory Committee on Rules For Publication of Court Of Appeal Opinions—Draft Preliminary Report & Recommendations (Oct. 2005), online at http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf.)

Who Is Sanctioned and Why?

Every case in the group that awarded appellate sanctions did so against either the appellant or the appellant's attorney; there were no awards against respondents or their counsel. In about half of the cases, the courts imposed sanctions jointly against both the appellant and counsel. In the majority of the other half of the cases, sanctions were imposed against pro per appellants. The remaining handful of cases awarded sanctions against only the appellant's attorney. In many instances the sanctioned party (or attorney) was a repeat offender, already having been sanctioned by the trial court or in related litigation. Civil appeals provided the most fodder for appellate sanctions. Indeed, no sanctions were awarded in criminal cases last year.

The most common basis for appellate sanctions—accounting for about a dozen awards—was the failure to abide by basic appellate practice rules: *e.g.*, appealing nonappealable orders, failing to cite the record, providing an inaccurate or incomplete statement of facts, raising improper issues on appeal, misconstruing the facts or law, filing deficient briefs, and failing to serve appellate filings properly. See, *e.g., Evans v Centerstone Dev. Co.* (2005) 134 CA4th 151, 166, 35 CR3d 745 (sanctions for unreasonable violations of the rules of appellate procedure: "[P]laintiffs' briefs are cornucopias of such violations").

The next most common basis for appellate sanctions—accounting for a half dozen awards—was the relitigation of issues already disposed of by prior appeals, especially when the party already had been warned that the prior appeal was frivolous. The third most common basis for appellate sanctions was the use of invective or abusive language against the courts or opposing counsel (*e.g.*, using briefing to vent anger through ad hominem attacks). See, *e.g., Sporn v Home Depot, Inc.* (2005) 126 CA4th 1294, 1303, 24 CR3d 780 ("unnecessary attacks directed at plaintiff and his lawyers"). For example, in *In re Koven* (2005) 134 CA4th 262, 34 CR3d 917, the court found the appellant's counsel's intemperate accusations against the court so outrageous and offensive that it convened separate contempt proceedings against the lawyer—declining to impose jail time only because she later apologized. Finally, sanctions also were imposed in a case in which an appellant derived a significant tactical benefit from the delay caused by a frivolous appeal.

In those cases in which they did *not* impose sanctions, the courts offered three primary reasons. First, in the face of sanctions requests, the courts very often found an appeal to be "meritless" but not "frivolous." Similarly, the courts refused to issue sanctions even if the appeal was "frivolous" if the court was unable to find evidence that the appeal was brought for an "improper motive." Second, the courts often refused to award sanctions where the party seeking sanctions failed to file a proper motion. Third, the courts sometimes refused to impose sanctions when both sides were equally guilty of the same sanctionable conduct.

In some instances, the courts denied sanctions per se, but punished the appellant by awarding statutory fees or making appellant's counsel jointly liable for the ordinary costs awarded to the prevailing party. See, *e.g., County of San Diego v Anderson* (June 30, 2005, D043795; not certified for publication) 2005 Cal App Unpub Lexis 5782. In other cases the courts declined to award sanctions but made clear their displeasure with the offending conduct, often with a stern warning (*e.g.*, "[W]e consider this opinion to be fair warning to appellant as to future sanctions" (*Conservatorship of Hand* (Oct. 5, 2005, B179683; not certified for publication) 2005 Cal App Unpub Lexis 9084); "we again refrain from imposing monetary sanc-

tions with the expectation that these proceedings will now come to an end" (*Lueker v Bues* (Oct. 17, 2005, B178695; not certified for publication) 2005 Cal App Lexis 9384)).

Which Courts Are Imposing Sanctions?

The court of appeal that imposed the most sanctions last year was the Second Appellate District (eight cases), of which five came from Division 2. Four of those five awards were for repeated litigation, and in fact, two matters before Division 2 involved sanctions for a frivolous appeal and a related frivolous writ petition—thus skewing the numbers a bit. Next were the Third District and Fourth District, Division 3—with four cases each—which typically imposed sanctions for procedural violations. The Sixth District imposed no sanctions last year. Overall, there were too few cases to be able to characterize any particular court as more or less likely to award sanctions.

How High Are the Sanctions?

In some cases, the courts awarded "reasonable attorney fees" to be determined by the trial court. In other instances, the court fixed an amount on its own, ranging from a few thousand dollars to a high of $24,045 in *Millennium Corporate Solutions v Peckingpaugh* (2005) 126 CA4th 352, 23 CR3d 500. About half the awards were below $10,000. Only rarely did a motion seeking a specific sum succeed in obtaining that full amount. Instead, the courts generally cut the requested amounts, often significantly (*e.g.*, one request for $22,500 netted only $7500 (*Saber v Leeper* (Feb. 1, 2005, B172570; not certified for publication) 2005 Cal App Unpub Lexis 907); another request for $19,000 was cut to $6000 (*Pelkey v Cavalli* (May 31, 2005, A102207; not certified for publication) 2005 Cal App Unpub Lexis 4779)).

The Third District was the only court to award sanctions to itself (in addition to the aggrieved respondent), doing so in three of its four sanctions matters. The going rate in that district, intended to compensate the court for the time and expense of processing and reviewing the frivolous claim, was $2500 each time. See, *e.g.*, *Olsen v Harbison* (2005) 134 CA4th 278, 35 CR3d 909.

The sting of appellate sanctions often involves more than financial harm to counsel. Apart from causing professional embarrassment, appellate sanctions invariably exceed the reporting threshold for reporting to the State Bar. See Bus & P C §§6068(o)(3), 6086.7(a)(3) (requiring reporting by courts and attorneys of nondiscovery sanctions against attorneys exceeding $1000). The State Bar then may investigate and subject the attorney to additional disciplinary action.

Lessons to Be Learned

Imposition of appellate sanctions remains a rarity. Persuading a court to cross the line and find a meritless appeal to be a frivolous one remains difficult. Moreover, even then, sanctions may not be awarded unless the court also finds evidence of an "improper motive." Those seeking to win an appellate sanctions award should realize that unless the misconduct is extreme and severe, sanctions are unlikely. One helpful tactic may be to demonstrate a pattern and practice of rule violations. For those seeking to avoid appellate sanctions, the signposts are clearer: Follow the rules; do not disparage opposing counsel or the courts; and do not pursue issues that have already been finally determined.

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