

RESOLUTION 4-10-2002

DIGEST

Sanctions: Not Applicable to Advocacy before the Court.

Amends Code of Civil Procedure section 177.5 to define “advocacy before the court,” under which monetary sanctions for violations of a court order shall not be imposed.

RESOLUTION COMMITTEE RECOMMENDATION DISAPPROVE

Reasons:

This resolution amends Code of Civil Procedure section 177.5 to define “advocacy before the court,” under which monetary sanctions for violations of a court order shall not be imposed. This resolution should be disapproved because the proposed definition is vague and overbroad.

Code of Civil Procedure section 177.5 authorizes a trial court to sanction an attorney or other person who violates a lawful court order. The section expressly provides that the authority does not extend to “advocacy of counsel before the court,” but it does not define that term. This resolution would define “advocacy before the court” to include any act that is “associated with arguing or pleading a client’s cause” and that occurs within the presence or earshot of the judge.

That definition confuses rather than clarifies the meaning of “advocacy” as used in section 177.5. For instance, in the example offered by the proponent, the offensive conduct was cross-examination. But because cross-examination does not clearly fall with the scope of either argument or pleading a cause, it is not clear whether cross-examination that violates a court order would or would not be sanctionable under this definition.

Moreover, this definition excludes too much from the range of sanctionable conduct. In particular, the reference to “any act” is overly broad. The phrase “any act” could very well mean non-communicative conduct, such as throwing away the adverse party’s documents during a hotly contested hearing or even a physical altercation between counsel and a witness. If conduct of that sort is not sanctionable, then the judge’s discretion and power to control the courtroom will be impaired.

Finally, the term defined by the resolution is not the same term used in the statute. The resolution purports to define “advocacy before the court,” but the statute refers to “advocacy *of counsel* before the court.”

SECTION/COMMITTEE REPORT

THE STATE BAR OF CALIFORNIA (Chief Trial Counsel)

Recommendation: DISAPPROVE

Reasons:

The amendment to Code of Civil Procedure section 177.5 would unduly restrict the authority of the judges to address misconduct occurring in the courtroom.

Whether or not a statement made in the presence of the court is considered to be “associated with arguing or pleading a client’s case” will itself engender much debate and argument. The phrase is both vague and potentially very broad in its scope. The amendment will likely result in additional litigation over what is or is not associated with arguing or pleading a client’s case. On the other hand, if the court thinks the statements or actions of counsel are improper, it will likely find that they are not associated with arguing or pleading a client’s case. In such cases, the amendment purports to make a change in the law, but does not. It simply changes the issue to be determined.

This amendment could prevent a judge from sanctioning an attorney for statements made in the presence of the court no matter how improper the statements may be and no matter what admonitions,

instructions or prior rulings of the court have been given to counsel.

From a disciplinary standpoint, the Office of the Chief Trial Counsel receives complaints from time to time about statements or actions made by counsel in the presence of the court. Absent a finding of contempt by the court and the imposition of sanctions, such statements are difficult to address from a disciplinary point of view. This proposed amendment will make addressing such conduct as a disciplinary issue extremely difficult, if not impossible.

The amendment potentially takes away the power of the court to properly control the conduct of attorneys in the courtroom. Judges are already reluctant to sanction attorneys for conduct occurring in the court. Judges often refer matters involving statements or conduct in the court room to the State Bar for investigation and disciplinary action, but have otherwise not dealt with the problem themselves. The Office of the Chief Trial Counsel believes that a judge must have the discretion to act in an appropriate case and to actually take action. Judges are on the front line when it comes to attorney misconduct in the courtroom and need to be able to address misconduct when it arises.

This amendment could make it much more difficult for judges to act and for the State Bar to act in an appropriate case to insure that attorneys adhere to the highest professional standards in the courtroom.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 177.5 as follows:

1 §177.5
2 A judicial officer shall have the power to impose reasonable money sanctions, not to
3 exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, payable to
4 the county in which the judicial officer is located, for any violation of a lawful court order by a
5 person, done without good cause or substantial justification. This power shall not apply to
6 advocacy of counsel before the court. For the purposes of this section, the term "person"
7 includes a witness, a party, a party's attorney, or both. For the purposes of this section,
8 "advocacy before the court" includes any act that (a) is associated with arguing or pleading a
9 client's cause and (b) occurs within the physical or aural presence of the court. Sanctions
10 pursuant to this section shall not be imposed except on notice contained in a party's moving or
11 responding papers; or on the court's own motion, after notice and opportunity to be heard. An
12 order imposing sanctions shall be in writing and shall recite in detail the conduct or
13 circumstances justifying the order.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: The term "Advocacy before the court" in Code of Civil Procedure section 177.5 is not clearly defined therein, or by case law.

The Problem: Confusion exists as to the meaning of "advocacy before the court" as used in section 177.5. In *People v. Jones* (SDSC No. CA151465, an unpublished case), the Appellate Division reversed an order by a trial court sanctioning an attorney under this statute for improper cross-examination of a witness, based on a question to a witness on a topic the court had previously excluded from examination. The Appellate Division, in a split decision, found that the attorney's conduct fell within the statute's exclusion of "advocacy before the court." The dissent would have found the sanction proper on the theory violation of a court order is *per se* not advocacy.

Howitt v. Superior Court (1992) 3 Cal.App.4th 1575, 1585, states that “[b]y definition, an advocate is a partisan for a particular client or point of view.” Witkin describes advocacy as “The representation of clients before courts and administrative agencies” (Witkin Cal Proc. 4th ed 1996 (Attys, §3, p.39)). In *Gitlow v. People of the State of New York* (1925) 45 S.Ct. 625, 629, 268 U.S. 652, 665, 69 L.Ed. 1138, the U.S. Supreme Court relied on a dictionary definition of advocacy: “The act of pleading for, supporting, or recommending; active espousal.” (citing Century Dictionary).

Opening statements, closing arguments, direct and cross-examination of witnesses, and argument of motions are surely “advocacy before the court”. (*Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 732, [permissible advocacy includes challenging the reasonableness of an opponent’s arguments during summation.]; *People v. Gonzalez* (1990) 51 Cal.App.3d 1179, 1224, fn. 21, [counsel’s assertions to jury in court are “statements of advocates”]; *Love v. Wolf* (1964) 226 Cal.App.2d 278, 389, [discussing permissible advocacy during closing argument]; *People v. Mayfield* (1993) 5 Cal.App.4th 142, 182, [prosecutor’s argument is an advocate’s attempt to persuade.]

This Resolution: Would restrict the “advocacy before the court” exclusion in section 177.5 to (a) acts associated with arguing or pleading a client’s cause and (b) within the physical or aural presence of the court. This would include all the acts set forth above, so as to exclude conduct reasonably definable as advocacy during a trial or hearing, and focus the judicial officer’s power to sanction under section 177.5 on violations of court orders not involving advocacy while court is in session.

The trial court’s ability to sanction other conduct, such as failure to appear or departure from the courtroom without permission (*Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075) would remain intact. Also, the trial court’s inherent contempt power also would remain. (*Trans-Action v. Jelinek* (1997) 60 Cal.App.4th 352, 371; *DeGeorge v. Superior Court* (1974) 40 Cal.App.2d 1008, 1013.)

IMPACT STATEMENT: This proposed resolution does not affect any other law, statute or rule.

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