

RESOLUTION 08-05-04

DIGEST

Sanctions: Not Applicable to Advocacy Before the Court

Amends Code of Civil Procedure section 177.5 to exclude from sanctions any act by an attorney arguing in open court.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Same as Resolution 4-10-02 which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure section 177.5 to exclude from sanctions any act by an attorney arguing in open court. This resolution should be approved in principle because sanctions for in-court conduct should be limited to acts for which the court may find the attorney in contempt.

Attorneys are advocates. Their primary responsibility is to their client, and the strength of their advocacy should not be limited by the fear of being sanctioned. There is already sufficient protection from overly disruptive conduct in the law of contempt. Code of Civil Procedure section 1209 defines conduct which is "in contempt of the authority of the court." Such conduct includes, among other things, 1) disorderly or insolent behavior toward the judge; 2) boisterous conduct which tends to interrupt a trial or other judicial proceeding; 3) disobedience of a court order; and 4) any other unlawful interference with the process of the court. This power of contempt is sufficient to ensure that any conduct which goes beyond the bounds of zealous advocacy can be dealt with appropriately by the court. There is no need for additional sanctions under section 177.5 for advocacy of counsel before the court.

The resolution also ensures an attorney will not be sanctioned for speech in court which, as much as a judge may personally dislike it, does not disrupt the proceedings. The Legislature has indicated in other sections that such speech should not be punished. For example, section 1209, subdivision (b), specifies that no speech concerning the court shall be punished as contempt unless made in the presence of the court while in session "and in such a manner as to actually interfere with its proceedings." Exempting an attorney's arguments in court on behalf of his or her client, as this resolution suggests, is in keeping with the policy of allowing a fairly broad range of speech in court.

This resolution provides a definition of advocacy which is broad enough to allow attorneys to advocate as strongly as they feel necessary to put forward their client's claims, without removing the court's ability to sanction conduct which is in contempt of the court, or which is not in furtherance of the client's cause.

TEXT OF RESOLUTION

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

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

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: The term “advocacy of counsel before the court” as used in section 177.5 is not defined therein or in case law.

This Resolution: Would exclude any act by counsel that occurred in the presence of the judge, either in open court or in chambers and anything that occurred during a telephone or other electrical or electronic transmission that the court could hear. It would not include any form of written communication to the court.

The Problem: Confusion exists as to the meaning of “advocacy of counsel before the court” as used in section 177.5. In *People v. Jones* (D037102), an unpublished opinion from the Fourth District, Division One, of the California Court of Appeal, an order by the trial court sanctioning an attorney under this statute for improper cross-examination, based on a question to a witness on a topic the court had previously excluded from examination, was reversed. The Court of Appeal, in a split decision, found that the attorney’s conduct fell within the statute’s exclusion of “advocacy of counsel before the court.” The dissent would have found the sanction proper on the theory that violation of a court order is *per se* not advocacy.

A later case, *People v. Muhammad* (2003) 108 Cal. App.4th 313, considered whether a prosecutor could be sanctioned under the statute because she had peremptorily challenged prospective jurors in violation of *People v. Wheeler*. At the OSC in the trial court, the district

attorney argued that selecting a jury was a protected area under the exclusion. The court of appeal did not reach this point, finding there was no court order upon which to base a 177.5 sanction. However, in passing, the court commented, "Certainly, if a court admonishes counsel that a repetition of specific conduct will result in a monetary sanction, that statement is tantamount to an order not to repeat the conduct, and should suffice under section 177.5." (*Id.* at p. 325.) Thus, if the trial court had admonished the prosecutor earlier and she had continued, the court of appeal would have upheld a section 177.5 sanction.

The purpose of section 177.5 is to compensate public agencies for the cost of unnecessary hearings. (*In re Woodham* (2001) 95 Cal. App.4th 438.) It was intended to apply to violations of court rules (late briefs, excessive page length, failure to serve routine documents, etc.) that do not rise to status of contempt. Any act of counsel that can be described as advocacy before the court is specifically excluded. Unfortunately, "advocacy" is not defined in the statute or succinctly in other statutory or case law. This amendment will accomplish that purpose.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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