

RESOLUTION 02-02-2007

DIGEST

Appeals: Determining Frivolous Appeal Sanctions

Amends California Rules of Court, rule 8.276 to provide procedural safeguards for determining sanctions for frivolous appeals.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends California Rules of Court, rule 8.276 to provide procedural safeguards for determining sanctions for frivolous appeals. This resolution should be approved in principle because existing law provides little protection against sanctions being improperly imposed against counsel.

The California Supreme Court has expressed serious concerns over imposing fees for appeals that are characterized as meritless. (*In re Marriage of Flaherty* (1980) 31 Cal.3d 637.) An order for sanctions on appeal requires objectivity, evidentiary proof, and a meaningful opportunity for counsel to address the sanctions issue independently of the issues on appeal. The effect of monetary sanctions being imposed can cause a chilling effect on counsel's ability to challenge conventional thinking and urge changes in the law, and can also serve to suppress unpopular clients or causes.

This resolution would provide better safeguards against overbearing monetary sanctions. The resolution defines a frivolous appeal and requires a court to give notice, at the earliest practical time, that it is considering whether to deem an appeal frivolous. The court would be required to address the issue of sanctions as soon as practical after it is first timely raised. Most importantly, the court would have to determine the suitability of sanctions according to the observations and guidelines in the *Flaherty* case. These changes would provide for more uniform consideration of monetary sanctions for frivolous appeals, and would protect counsel from dealing with the allegation that the appeal is frivolous at the same time counsel is addressing the substance of the appeal.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 8.276, to read as follows:

- 1 8.276
- 2 (a) Right to costs
- 3 (1) Except as provided in this rule, the party prevailing in the Court of Appeal in a
- 4 civil case is entitled to costs on appeal.
- 5 (2) The prevailing party is the respondent if the Court of Appeal affirms the

6 judgment without modification or dismisses the appeal. The prevailing party is the appellant
7 if the court reverses the judgment in its entirety.

8 (3) If the court reverses the judgment in part or modifies it, or if there is more than
9 one notice of appeal, the opinion must specify the award or denial of costs.

10 (4) If the interests of justice require it, the court may award or deny costs as it deems
11 proper.

12 (5) In probate cases, the prevailing party must be awarded costs unless the Court of
13 Appeal orders otherwise, but the superior court must decide who will pay the award.

14 (b) Judgment for costs

15 (1) The Court of Appeal clerk must enter on the record, and insert in the remittitur, a
16 judgment awarding costs to the prevailing party under (a)(2) or as directed by the court
17 under (a)(3) or (a)(4).

18 (2) If the clerk fails to enter judgment for costs, the court may recall the remittitur for
19 correction on its own motion, or on a party's motion made no later than 30 days after the
20 remittitur issues.

21 (c) Recoverable costs

22 (1) A party may recover only the following costs, if reasonable:

23 (A) The amount the party paid for any portion of the record, whether an original or a
24 copy or both. The cost to copy parts of a prior record under rule 8.147(b)(2) is not
25 recoverable unless the Court of Appeal ordered the copying;

26 (B) The cost to produce additional evidence on appeal;

27 (C) The costs to notarize, serve, mail, and file the record, briefs, and other papers;

28 (D) The cost to print and reproduce any brief, including any petition for rehearing or
29 review, answer, or reply; and

30 (E) The cost to produce a surety bond, including the premium and the cost to obtain
31 a letter of credit as collateral, unless the trial court determines the bond was unnecessary.

32 (2) Unless the court orders otherwise, an award of costs neither includes attorney
33 fees on appeal nor precludes a party from seeking them under rule 3.1702.

34 (d) Procedure for claiming or opposing costs

35 (1) Within 40 days after the clerk sends notice of issuance of the remittitur, a party
36 claiming costs awarded by the reviewing court must serve and file in the superior court a
37 verified memorandum of costs under rule 3.1700.

38 (2) A party may serve and file a motion in the superior court to strike or tax costs
39 claimed under (1) in the manner required by rule 3.1700.

40 (3) An award of costs is enforceable as a money judgment.

41 (e) Sanctions

42 (1) On a party's or its own motion, a Court of Appeal may impose sanctions,
43 including the award or denial of costs, on a party or an attorney for:

44 (A) Taking a frivolous appeal or appealing solely to cause delay;

45 (B) Including in the record any matter not reasonably material to the appeal's
46 determination; or

47 (C) Committing any other unreasonable violation of these rules.

48 (2) "Frivolous appeal," as intended in this provision, means an appeal which not only
49 lacks merit, but contemplates an appeal which a) all reasonable attorneys would agree is

50 totally and completely devoid of merit (objective standard), and b) was presented by the
51 party or counsel for a bad faith motive, that is, either brought for purposes of harassment or
52 delay, or advanced without an honest good faith belief in the arguability of the appellate
53 issues (subjective standard).

54 (2 3) A party's motion under (1) must include a declaration supporting the amount of
55 any monetary sanction sought and must be served and filed before any order dismissing the
56 appeal but no later than 10 days after the appellant's reply brief is due. The notice shall state
57 whether the motion is made against the party, the party's counsel, or both. The notice shall
58 set forth the factual and legal analysis and foundation for any sanctions under (1) with
59 sufficient specificity to permit a focused response. If a party moves to dismiss the appeal,
60 with or without a sanctions motion, and the motion to dismiss is not granted, the party may
61 move for sanctions within 10 days after the appellant's reply brief is due. The failure of a
62 party to bring a motion under subdivision (e)(1), or move to dismiss the appeal based on
63 lack of merit or on grounds of frivolousness at the earliest practicable time, shall be
64 considered a waiver of the party's right to seek sanctions on this ground.

65 (3 4) The court must give notice in writing at the earliest practicable time if it is
66 considering imposing sanctions. The notice shall state whether the motion is made against
67 the party, the party's counsel, or both. The notice shall set forth the factual and legal
68 analysis and foundation for any sanctions under (1) with sufficient specificity to permit a
69 focused response. Within 10 15 days after the court sends such notice, or such longer period
70 as the court may grant on application seasonably made and a showing of good cause, a party
71 or attorney may serve and file an opposition, but failure to do so will not be deemed consent.
72 An opposition may not be filed unless the court sends such notice.

73 ~~(4) Unless otherwise ordered, oral argument on the issue of sanctions must be~~
74 ~~combined with oral argument on the merits of the appeal.~~

75 (5) The opposition to a motion or notice under (1) may include argument, points and
76 authorities and declarations of California lawyers demonstrating any factual and legal
77 analysis and foundation for the appeal, along with any good faith belief of appellate counsel
78 and lawyer-like reasoning supporting the purported merits of the appeal.

79 (6) The Court of Appeal shall give timely notice of hearing on the issue of sanctions.
80 The court may set the hearing on the motion for any date prior to oral argument on the
81 merits of the appeal, to be heard in combination with or separate from oral argument on the
82 merits of the appeal, or for a date after oral argument on the merits. The issue should be
83 addressed by the court as soon as practicable after it is first timely raised.

84 (7) In determining the question of frivolousness of an appeal and the appropriateness
85 of monetary sanction against appellate counsel, the Court of Appeal shall attend all relevant
86 factors and evidence, including those considerations and guidelines discussed in the case of
87 *In re Marriage of Flaherty* (1980) 31 Cal.3d 637, 646-55 [646 P.2d 79, 183 Cal.Rptr. 508].

88 (8) It is the intent of these principles and procedures to give effect to the
89 considerations, observations and guidelines articulated in the case of *In re Marriage of*
90 *Flaherty* (1980) 31 Cal.3d 637, 646-55 [646 P.2d 79, 183 Cal.Rptr. 508].

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

PROPOSERS: Joel Bruce Douglas; James W. Gilliam, Jr.; Dennis D. Resh; Laurence F. Liebenbaum; Carmen Vigil; Clayton Lee; Keith M. Rozanski; Sara Hersh; Peter Osinoff; Tamar Karaguezian

STATEMENT OF REASONS

Existing Law: Appellate court imposition of attorney fees on finding the appeal “frivolous” is often arbitrary and capricious, with the guidelines outlined by the Supreme Court practiced in the breach by ambush and with virtual impunity. Existing law provides little protection against monetary sanctions being improperly imposed against counsel, advancing innovative arguments and/or unpopular clients or causes, on the summary finding the appeal is meritless. This creates a chilling effect on appellate advocacy and legal representation for unpopular clients and causes. It stifles questioning and change, perpetuates rigid, stagnant or unfair rules, and promotes personal wimpishness of counsel if not mediocrity in the law.

This Resolution: Assures allegations of frivolousness will be addressed as soon as practicable in the appellate process. Procedural remedies check the posturing and distracting threats of opposing counsel, promoting focus on the issues presented. It provides procedural safeguards for determining frivolousness, emphasizing the rigorous guidelines and standards articulated in *In re Marriage of Flaherty* (1980) 31 Cal.3d 637, 646-55, not always heeded. The finding requires objectivity and evidentiary proof, and a meaningful opportunity for the question to be vetted independently from the resolution of issues in the appeal. It minimizes against the Supreme Court’s concern of sanctions being arbitrarily and summarily imposed by an intolerant panel on a conclusory characterization that the position lacks merit—with the resultant chilling effect on thoughtful advocacy which may challenge conventional thinking, urge change or entail representation of unpopular clients or causes.

The Problem: In its decision, *In re Marriage of Flaherty*, the Supreme Court presented cogent concerns over imposing fees for appeals characterized as meritless. These fees can be imposing. The threat alone tends to create a chilling effect on a citizen’s access to the courts and legal representation, zealous and heady lawyering, and advocacy for indicated changes in the law. Some courts intolerantly confuse what they conclude to be “meritless” for frivolousness, and justify sanctions with conclusory analysis and no consideration that counsel was acting in a good faith belief in the arguments and in an absence of evidence of bad faith tactics. Often sanctions occur by ambush at the same time counsel is attempting to defend the arguments on the merits against a hostile court, assuming the court is not altogether cryptic about it. Certain appellate panels are quicker to apply Rule 8.276 sanctions for “frivolous” appeals than others, seemingly reflective of their personal and often unempathic reaction to the side they reject. Sometime this is a function of the justices’ undue reliance on the research attorney’s summarization of the briefs and casting of the issues for the bench memorandum, rather than personal review of the briefs and transcript. The attorney fee award can be substantial, and the impact a finding of “frivolousness” has on the reputation of counsel— even if acting in good faith, being careful, competent and thoughtful—irreparable. Worse, once imposed, such decisions rarely receive meaningful oversight, especially when rendered in unpublished decisions. When counsel faces

personal jeopardy for advocacy, the legal system is undermined.

IMPACT STATEMENT

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

AUTHOR AND/OR PERMANENT CONTACT: Joel Bruce Douglas, Bonne, Bridges, Mueller, O'Keefe & Nichols, Professional Corporation, 3699 Wilshire Boulevard, Tenth Floor, Los Angeles, CA 90010, voice 213-738-5834; fax 213-738-5888; jdouglas@bonnebridges.com

RESPONSIBLE FLOOR DELEGATE: Joel Bruce Douglas