the adviser

Waiting Game

APPELLATE LAW: Attorneys sanctioned in federal court cannot file an immediate appeal. The law in California is less well-settled. By James C. Martin and Benjamin G. Shatz

An attorney has just been sanctioned by a federal district court judge for discovery abuse. Adding insult to injury, the judge also disqualifies the attorney from representing his client in the case. Naturally he wants the record set straight, so what does he do? What any self-respecting victim of trial-court injustice does — he files an appeal. So the circuit court will straighten things out, right?

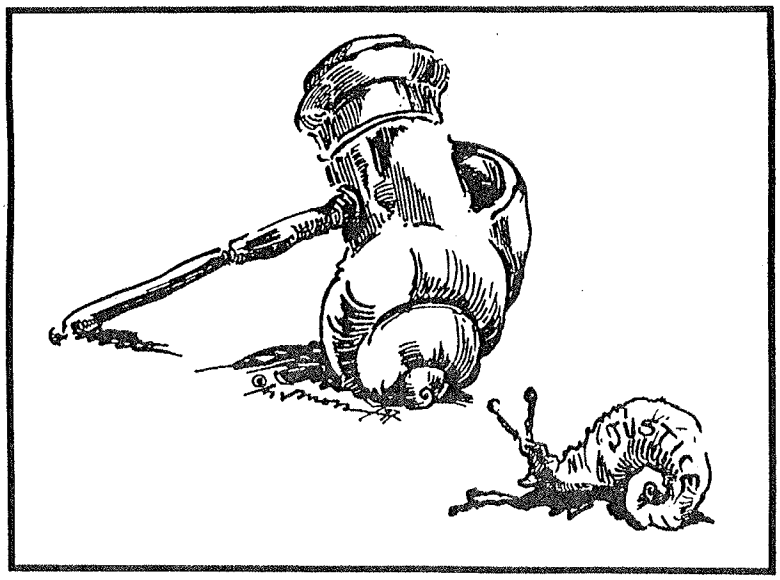
Up until a few weeks ago, the attorney might have had a shot at redemption by filing an appeal. But not now. In *Cunningham v. Hamilton County, Ohio*, 1999 Daily Journal D.A.R. 5896 (June 14, 1999), the U.S. Supreme Court resolved a split of authority in the federal courts and held that sanctions orders *are not* immediately appealable. That result has direct and immediate consequences for practitioners in federal courts throughout California. For those practitioners in state court, however, the route of appeal may not be foreclosed.

Before *Cunningham*, the circuits were divided on the immediate appealability of sanction orders. Five circuits, including the 9th U.S. Circuit Court of Appeals, held that an attorney could immediately appeal a sanctions order. *Transamerica Commercial Financial Corp. v. Banton Inc.*, 970 F.2d 810 (11th Cir. 1992); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Services Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985). These courts viewed sanctions as sufficiently distinct from the merits of the underlying case so as to warrant immediate review, rather than forcing a sanctioned attorney to wait — possibly years — for a final judgment (which might never come if, for example, the case settles).

But five other circuits reached the opposite conclusion. *Sanders Assocs. Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993); *GJB & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Click v. Abilene Nat'l Bank*, 822 F.2d 544 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrick*, 658 F.2d 944 (3d Cir. 1981). These courts viewed sanctions orders as intimately connected with the merits of the underlying case and saw no harm in postponing review, as a matter of judicial efficiency, until after a final judgment.

Momentum seemed to favor nonappealability. Indeed, some of the circuits originally siding with appealability appeared inclined to back away from that position. See *Ted Lapidus S.A. v. Vann*, 112 F.3d 91 (2d Cir. 1997) ("Were we writing on a clean slate, we would be tempted to ... characterize the sanctions order here as nonappealable."); *Cleveland Hair Clinic Inc. v. Puig*, 104 F.3d 123 (7th Cir. 1997).

Although there was much activity in other circuits, the 6th Circuit had not come down on one side or the other when sole practitioner Teresa Cunningham brought her appeal. She represented the plaintiff in a federal civil-rights suit in U.S. District Court for the Southern District of Ohio and had been sanctioned under Federal Rules of Civil Procedure 26(c) and 37(a)(4) for failing to comply with a magistrate judge's discovery order. The district court affirmed the sanctions and also disqualified her as plaintiff's counsel for unrelated reasons (she was a material witness in the case).



Drawing by Geoffrey Moss

Cunningham immediately appealed to the 6th Circuit and drew a panel of two 6th Circuit judges and one visiting 9th Circuit judge. Over a dissent, the majority dismissed Cunningham's appeal, holding that the sanctions order did not satisfy the collateral-order doctrine otherwise limiting appeals to final judgments. The majority concluded that the sanctions order was not sufficiently separate from the merits of the case to qualify as collateral and that Cunningham could always appeal from the final judgment in the case. *Starcher v. Correctional Med. Sys. Inc.*, 144 F.3d 418 (6th Cir. 1998).

The dissenting voice came not from the visiting judge — hailing from a circuit that had adopted a different rule — but from a 6th Circuit judge. The dissenting judge argued that some sanctions orders would not implicate reviewing the merits of the case and that Cunningham's disqualification sufficiently separated her sanctions appeal from the issues in the case.

The dissent pointed out that of the five circuits disallowing immediate appeal, two would allow an appeal from an attorney no longer in the case, while only one reached the opposite conclusion. *Markwell v. Bexar County*, 878 F.2d 899 (5th Cir. 1989); *Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); cf. *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433 (10th Cir. 1996). Thus, with the added factor of Cunningham's disqualification, the dissent

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reasoned that the majority had rejected the weight of authority.

Cunningham pressed her case to the Potomac and Justice Clarence Thomas authored a unanimous U.S. Supreme Court opinion affirming the 6th Circuit majority's ruling foreclosing immediate appealability. The court started its analysis by noting the general rule that only final judgments are appealable. 28 U.S.C. Section 1291. The court also acknowledged the exception to this rule — the collateral-order doctrine — allowing immediate appeals of orders that conclusively determine a disputed question; resolve an important issue completely separate from the merits of the action; and are effectively unreviewable by appeal.

The court went on to explain, however, that sanctions orders are often "inextricably intertwined with the merits of the action," thus failing the second requirement. Moreover, even if a sanctions question remains completely divorced from the merits of the case, the third requirement fails because sanctions can be reviewed by appeal from the final judgment in the case. The sanctioned attorney "suffers no inordinate injury from a deferral of appellate consideration of the sanction," and such an approach prevents piecemeal appeals that delay case resolution.

Further, the court concluded that whether the sanctioned attorney continues to participate in the case does not affect the analysis. If it did, that factor could be subject to abuse (e.g., counsel could strategically withdraw to trigger appeal rights) and could be difficult to evaluate because questions may arise as to when precisely a representation terminates. In sum, the efficiency gained in eliminating immediate appeals of sanction orders outweighs the burden on the affected attorney to monitor a case to determine when sanctions are properly appealed.

Justice Anthony Kennedy penned a short, three-paragraph concurring opinion, adding that immediate appellate review of sanctions causing exceptional hardship remains possible through a petition for writ of mandamus.

California law differs somewhat from *Cunningham*'s new federal standard. In fact, the appealability of discovery sanctions has an interesting and arguably unresolved history in California. Until 1989, most sanctions orders were immediately appealable under the collateral-order doctrine. The paramount exception concerned discovery sanctions of the type at issue in *Cunningham*. *Slemaker v. Woolley*, 207 Cal.App.3d 1377 (1989).

In 1989, however, the Legislature enacted Code of Civil Procedure Section 904.1(k), which made "judgments" imposing sanctions exceeding $750 appealable. But Section 904.1(k) did not indicate if the Legislature meant to include previously nonappealable discovery sanction orders, opening the door to a split of authority.

One line of cases, starting with *Kohan v. Cohan*, 229 Cal.App.3d 967 (1991), reasoned that Section 904.1(k) applied to all directives to pay sanctions exceeding $750, including discovery sanctions. See, e.g., *Greene v. Amante*, 3 Cal.App.4th 684 (1992) (following *Kohan*). A contrary line of cases, starting with *Rao v. Campo*, 233 Cal.App.3d 1557 (1991), reasoned that the Legislature never intended to make previously nonappealable discovery sanctions appealable. This view became the majority position. See, e.g., *Green v. GTE*, 29 Cal.App.4th 407 (1994); *Ballard v. Taylor*, 20 Cal.App.4th 1736 (1993) (urging Supreme Court or Legislature to resolve split of authority).

The Legislature attempted to address this split of authority in 1993 by replacing Section 904.1(k) with Section 904.1(a)(12), conferring appealability on sanction orders in excess of $5,000. But this cure suffered from the same ailment plaguing former Section 904.1(k): It never expressly clarified whether the rule encompassed *discovery* sanctions. As a result, it is unclear whether the courts in the *Rao* camp will persist in holding that discovery sanction orders are not immediately appealable or will relent to allow immediate appeal from such orders in excess of $5,000. At least one court previously following *Rao* has done so: *Rail-Transport Employees Ass'n v. Union Pacific Motor Freight*, 46 Cal.App.4th 469 (1996).

The *Rail-Transport* court concluded that because Section 904.1(a)(12) specifically mentions "orders" and raised the appealable threshold to $5,000, the Legislature meant to allow appeals from discovery sanctions. The court surmised that this was a compromise solution to the split of authority because the vast majority of discovery sanctions would not reach the $5,000 threshold (and prior precedent made clear that counsel could not add separate sanction awards to satisfy the statutory threshold). *Calhoun v. Vallejo City Unified Sch. Dist.*, 20 Cal.App.4th 39 (1993) (aggregation of sanctions to meet statutory minimum runs counter to fundamental restrictive purpose of statute).

In the three years since *Rail-Transport*, no published opinion has revisited the issue. For now, the reasoning in *Rail-Transport* holds sway: All sanction orders in excess of $5,000, including discovery sanctions, are immediately appealable; and orders awarding $5,000 or less are reviewable only on appeal from the final judgment or by writ. Section 904.1(b).

There is, however, no guarantee that all courts will follow the *Rail-Transport* analysis. A court particularly averse to the notion of interlocutory appeals of any kind could continue to adopt the restrictive view that discovery sanctions — regardless of amount — remain appealable only after final judgment.

And there is yet another wrinkle to the California analysis — one directly related to a concern in *Cunningham*. In *Cunningham*, the Supreme Court discounted the sanctioned attorney's continued participation in the case as a relevant factor. Yet California goes its own way on this issue, too. The rule appears to be that discovery sanctions against an attorney no longer representing a party in the case satisfy the requirements of the collateral-order doctrine and are immediately appealable. *Barton v. Ahmanson Devs. Inc.*, 17 Cal.App.4th 1358 (1993).

Barton held that a discovery sanction against an attorney who had substituted out of the case was appealable because the order was final as to the attorney. The only cases to cite *Barton* have followed or cited it with approval. See *Rail-Transport* (following *Barton*); *Marsh v. Mountain Zephyr Inc.*, 43 Cal.App.4th 289 (1996) (citing *Barton* with approval).

Attorneys sanctioned in federal court now have a bright-line rule: They cannot immediately appeal. Unlike the now clearly established federal rule, California law is less definitively settled. The most recent authority makes it appear that the amount of the sanctions and whether the attorney remains in the case are factors affecting appealability.

Given the uncertainty in how a given California court of appeal might address an immediate appeal from a discovery sanction, the safest course is a "belt and suspenders" approach: File a writ petition as well as an immediate precautionary appeal. This gives the court the option of choosing which approach to follow without jeopardizing the opportunity for immediate review. Filing only an appeal or only a writ petition runs the risk of proceeding incorrectly, which could preclude all appellate review of the order. ■